

Independent Environmental Protection Assessor for Wales

Welsh Government Offices

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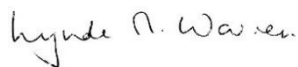
Dear Chair

I am providing you with the following report on the Aarhus Convention (and its importance in Wales) in response to a submission we received in 2023

This letter is for information only and I am not requesting a formal response from you.

I have also provided this report to the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs for his information.

Yours sincerely



Interim Environmental Protection Assessor for Wales

Report on Aarhus Convention

Introduction

In March 2025 the IEPAW received a submission which alleged that the Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill will not be able to deliver its intended objectives without the inclusion of the so-called 'Aarhus Principles'. A redacted version of the full submission is included in Appendix 1. This report describes our response to that submission and also addresses other issues relating to the Convention.

The Aarhus Convention

The Convention¹ grants rights to members of the public under three pillars:

- access to environmental information;
- public participation in environmental decision-making; and
- access to justice in environmental matters.

The UK is a contracting party to the Convention. Because it is an international treaty, responsibility for its implementation rests with the UK Government. The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 enable public access to environmental information. There are numerous pieces of legislation providing for public participation in environmental decision-making and consultations on policy are routinely held by government at all levels. There is no specific legislation, however, enshrining the public right of access to justice on environmental matters. Instead, this right is delivered through judicial review procedures which are governed by the Civil Procedure Rules (CPR).

The Submission

The submission, which was made before the Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill was published, argued that the rights of access

¹ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

to environmental information, public participation in environmental decision-making and access to justice in environmental matters should be introduced into Welsh law by adding them to the Bill alongside the principles of integration, precaution, prevention, rectification at source and polluter pays. The submitter cites several references on the Aarhus Convention included in the summary of responses to the Welsh Government's consultation on its White Paper *Securing a Sustainable Future Environmental Principles, Governance and Biodiversity Targets for a Greener Wales* but notes that neither the White Paper itself nor the Government's response to the consultation refer to the Aarhus Principles.

The submitter is of the opinion that these principles should be embedded in Welsh planning and environmental law and that the ways in which Aarhus rights are secured for Welsh citizens should be clearly identified where this falls within Welsh competence. It is alleged that a failure to embed these principles limits the rights of Welsh citizens and puts them at a disadvantage in comparison with other nations. They go on to say that this would make it challenging for the Bill to deliver its intended objectives and is plainly out of step with the progressive environmental ambitions of Wales.

The Status of the Aarhus Convention in Wales

As a constituent part of the UK, it is indisputable that the UK Government's ratification of the Convention in 2005 was intended to include its application in Wales. The legislation giving effect to the UK's commitments under the Convention included both primary and secondary legislation some of which is specific to Wales. The CPR, under which effect is given to access to justice, come under the remit of the Ministry of Justice (MOJ) and are not devolved so there is no body of legal rules governing access to environmental justice, specific to Wales.

The IEPAW's Views

We agree with the submitter that the three areas of environmental rights covered by the Aarhus Convention are of fundamental importance. We are not convinced,

however, of the need to include specific reference to them as principles as proposed in the submission. In our view, the rights are already implied in Welsh law and policy, for example in provisions relating to sustainable development in the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016.

During the course of discussions about the submission it was drawn to our attention that it has been asserted that the Aarhus Convention is not environmental law. We consider that this statement may have been taken out of context. The meaning of 'environmental law' in clause 29 of the Bill is essentially the same as that included in legislation for the establishment of the Office for Environmental Protection (OEP)² and Environmental Standards Scotland (ESS).³ The term is restricted to legislative provisions that come within the competence of the relevant national administration. It follows that, while the Aarhus Convention is undoubtedly law about the environment it does not come within the definition of environmental law for any of the environmental governance bodies. It is a creature of international law and, as such, is only applicable to the extent that it has been incorporated into domestic legislation. The various provisions relating to public participation in environmental decision-making will therefore come within the definition. The Environmental Information Regulations would also be included but for the fact that they are expressly excluded presumably to avoid conflict with the legal regimes governing access to information.

We do, however, think that there is lacuna in the Bill with respect to the proposed Office of Environmental Governance Wales (OEGW) and the third pillar, access to justice in environmental matters. The option to apply for judicial review under prescribed circumstances is expressly included in the functions of the OEP and ESS.⁴ They may also apply to intervene in judicial review proceedings. These provisions are not included in the Bill in respect to the OEGW. The Welsh Government's view is that there is no need to expressly state this function because the OEGW's supplementary

² Environment Act 2021 s. 46.

³ UK Withdrawal from the EU (Continuity) (Scotland) Act 2021 s. 44.

⁴ Environment Act 2021 s. 39 and UK Withdrawal from the EU (Continuity) (Scotland) Act 2021 s. 38 respectively.

powers would enable it to do anything it considers appropriate for the purposes of, or in connection with, its functions, or incidental to, or conducive to the exercise of those functions.⁵ It was also suggested in evidence to the Climate Change, Environment, and Infrastructure Committee (CCEIC)⁶ that it was better not to follow the OEP/ESS format because the OEGW would be able to apply for judicial review without any constraint whereas OEP and ESS can only do so in urgent cases where the conduct of a public authority constitutes a serious failure to comply with environmental law. Given this assurance, the CCEIC has stated that it is content that the Bill does not include express reference to judicial review.⁷

We are not reassured. Whilst we accept that anyone can apply for judicial review, it does not follow that their application will be successful. As noted by the Cabinet Secretary, it would be for the courts to decide whether the OEGW had standing based on a test of sufficient interest.⁸ We acknowledge that this would be the case regardless of whether or not judicial review is included as one of OEGW's functions. In our view, however, establishing standing will be more difficult if judicial review is not included in the functions. While the power to apply could be considered to be included in the supplementary powers, we think this approach might well be challenged in court by those opposed to the application on the grounds that there is no specific reference to a function that is clearly stated on the face of the Acts governing the OEGW's sister bodies. We note the comments made by Professor Bob Lee in his evidence to the CCEIC.⁹ He contrasts the judicial review of a specific incident or decision with the powers of the OEGW to look at systemic problems rather than at individual decisions. Without express reference to judicial review there is a real danger that the courts will deny standing. Given the acknowledged success of OEP's intervention in judicial review cases, we think Wales would be put at a serious disadvantage if the OEGW

⁵ Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill Schedule 1, Part 9, paragraph 23(1).

⁶ CCEIC Session 18/09/2025 paragraph 195; Huw Irranca-Davies.

⁷ CCEIC Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill Stage 1 Report, October 2025 at paragraph 257.

⁸ CCEIC Session 18/09/2025 paragraph 193; Huw Irranca-Davies.

⁹ CCEIC Session 09/07/2025 paragraph 124.

were to be denied standing by a court because of the lack of express reference to its functions with respect to judicial review.

The question was raised by the CCEIC whether it was true that the provision had not been included due to limitations on the Senedd's legislative competence.¹⁰ This was stated not to be the case. Instead, it was not included because it is not necessary to do so. Furthermore, the OEGW would not be subject to the restrictions imposed in UK and Scottish Acts which require applications to relate to serious failures to comply with environmental law.¹¹ It is understandable why some stakeholders have misunderstood the situation, however. It was stated in stakeholder meetings that because the MOJ is responsible for the governance of access to justice proceedings it would not have been possible to include such provisions without prior MOJ agreement. The practicalities involved in obtaining this agreement could have led to unacceptable delays in finalising the Bill. This may have led stakeholders to believe that the Welsh Government would have liked to include the provision if time had allowed.

Judicial review proceedings are not entered into lightly and we think it would be extremely unlikely that the OEGW would be seeking review in anything other than the most urgent serious cases. We remain of the view that express provisions comparable to those applicable to OEP and ESS would be preferable but accept that there is no real prospect of the Bill being changed. We do think however that the effectiveness of the Bill would be improved by appropriate wording, setting out the Welsh Government's view, as summarised above, in the Explanatory Notes accompanying the Act when it is passed and in any statement of the OEGW's functions and powers. In the longer term, we suggest that the Act be amended to include provisions for judicial review and intervention.

¹⁰ CCEIC Session 18/09/2025 paragraph 194; Julie Morgan.

¹¹ CCEIC Session 18/09/2025 paragraph 195; Huw Irranca-Davies.

We recommend that the Welsh Government ensures the Explanatory Notes to the Act include reference to judicial review and to intervention in proceedings in respect of the supplementary powers in Schedule 1, Part 9, paragraph 23.

We recommend that the Welsh Government, in the next Senedd term, work with the MOJ to amend the Act to include express provision for the OEGW to apply for judicial review in urgent cases and to intervene.

Aarhus Convention Compliance

The submission also referred to the consistent criticism of the UK for failing to adhere to its obligations under the Aarhus Convention. The latest National Report from the UK has been presented as an updated addendum to the 2021 report.¹² It was produced following a call for evidence issued by the MOJ in September 2024.¹³ Some of the issues addressed in the report date back more than a decade and relate to decisions of the Aarhus Convention Compliance Committee (ACCC) and the Meeting of the Parties (MoP). The most recent decision adopted by the MoP in October 2021 expressed concern over failures to comply with a previous MoP decision¹⁴ and a number of ACCC findings.¹⁵

Although some of the findings adopted by the MoP in the past relate solely to Scotland and Northern Ireland, the bulk of them relate to issues in England and Wales.

As the Aarhus Convention is an international agreement, responsibility for addressing any issues of non-compliance rests primarily with the UK Government's MOJ. It would seem that, despite the fundamental importance of the environmental rights established by this Convention, oversight of the UK's compliance with it does not come within the remit of either the OEP or ESS or the proposed OEGW. The IEPAW has not powers to consider compliance. Nevertheless, we would like to take this opportunity to

¹² Available at <https://aarhusclearinghouse.unece.org/national-reports/reports>

¹³ Available at <https://www.gov.uk/government/calls-for-evidence/access-to-justice-in-relation-to-the-aarhus-convention>

¹⁴ VI/8k.

¹⁵ ACCC/C/2013/90, ACCC/C/2015/131 and ACCC/C/2016/142.

express our concerns that the UK has been found to be in breach of the Convention in several ways for a number of years.

Appendix 1 Submission on Aarhus Principles

Q1. Please provide a brief summary of your concern:

The Aarhus Principles – the rights of access to environmental information, public participation in environmental decision-making and access to justice in environmental matters – should be introduced into Welsh law alongside the principles of integration, precautionary principle, prevention, rectification at source and polluter pays in the Environmental Principles and Biodiversity Bill.

Q2. Which of these three categories best describes your concern? You may select more than one category if appropriate.

- a. The law does not deliver the intended objectives and outcomes.*
- b. Guidance or information about the law is not accessible.*
- c. Practical delivery of the law is impeded.*

Q3. Please explain why your concern fits into the category(ies) you selected in response to Q2:

The Environmental Governance Stakeholder Group recommended in their March 2020 Report, 'Environmental Governance in Wales Post-Exit from the European Union Report' that the Aarhus Principles be included in the Environmental Principles and Biodiversity Bill. However, the White Paper published January 2024, 'Securing a Sustainable Future Environmental Principles, Governance and Biodiversity targets for a Greener Wales', does not make reference to the Aarhus Principles.

While the summary of responses to the Consultation on Environmental principles, governance, and biodiversity targets, published July 2024, identifies several references to the Aarhus Principles from respondents – e.g. that 'the Welsh Government use this bill to more effectively implement the Aarhus Convention which gives the public the right to hold public bodies accountable and demand information';

that there is a need for ‘the inclusion of the Aarhus Convention’ and the ‘re-statement of the Aarhus Convention into Welsh Law as part of this legislation’, the Welsh Government response to the White Paper, published July 2024, makes no reference to the Aarhus Principles.

The Bill aims to embed environmental principles in Wales, to strengthen environmental governance and introduce a biodiversity targets framework. The Welsh Government in setting out the White Paper, echoed by the First Minister when he identified the Bill as a legislative priority in the Senedd in 9 July 2024, states that the Bill signals the Government’s ‘clear commitment that action and leadership to tackle the climate and nature emergency will remain as a top priority for this Welsh Government’. **I am concerned that without the inclusion of the Aarhus Principles, this law will not deliver its intended objectives.**

The Aarhus Principles reflect the three procedural environmental rights, the rights of access to environmental information, public participation in environmental decision-making and access to justice in environmental matters. Procedural environmental rights are recognised as key to improving national and international environmental decision-making, and consequently raise national and international standards of environmental protection. Boyle has described them as ‘the most important environmental addition to human rights law since the 1992 Rio Declaration’ (Boyle, in Peters 2018). The essential role of procedural environmental rights in the international response to the climate and nature emergency is evidenced by their inclusion in the UN Framework Convention on Climate Change Paris Agreement, the Convention on Biological Diversity and other international conventions.

The Aarhus Principles help to ensure that the interests and situated knowledge of people affected by an environmental issue are taken into account in the process of decision-making. They encourage implementation of and respect for environmental laws; they improve the quality of environmental decisions and enhance democratic legitimacy of environmental decisions. This democratic benefit is particularly salient to

environmental issues, because the intergenerational, cross-policy and transboundary nature of environmental issues does not fit comfortably into existing structures of representative democracy.

Wales has an additional incentive for ensuring that Aarhus Principles are effectively embedded in our national response to the climate and nature emergency. The Aarhus Principles align with the ‘collaboration’ and ‘involvement’ ways of working set out in Wales’s Well-being of Future Generations Act 2015. The Aarhus Principles link these ways of working to established rights and an international complaints mechanism that monitors adherence to these rights. Wales thus has the opportunity to be an innovative leader in this area, utilising the interconnections between this landmark piece of legislation and the UK’s international obligations under the Aarhus Convention.

The UK has consistently been criticised for failing to adhere to its obligations under the Aarhus Convention (see the most recent report from Aarhus Convention Compliance Committee cited below). Cases have frequently concerned the right of access to justice in environmental matters – one of the more recent cases that considered this right concerned a Welsh planning matter: *R (on the application of Catherine Lewis) v The Welsh Ministers v Velindre University NHS Trust* [2022] EWHC 450 (Admin). The UK needs to be more pro-active in fulfilling its duties under the Aarhus Convention.

Planning and the environment are devolved areas. The Aarhus principles should be embedded in Welsh planning and environmental law, and the ways in which Aarhus rights are secured for Welsh citizens should be clearly identified, where this falls within Welsh competence. A failure to embed these principles limits the rights of Welsh citizens and puts them at a disadvantage in comparison with other nations. This would make it challenging for this law to deliver its intended objectives and is plainly out of step with the progressive environmental ambitions of Wales.

Q4. *Please provide details of the environmental legislation related to your concern, being as specific as possible. This could include the name of the Act(s), Regulations(s), guidance, case law or other relevant documents. Please indicate the relevant section(s) or clause(s), if possible.*

Environmental Principles and Biodiversity Bill

Q5. *Please provide and describe as much evidence as possible in support of your submission to demonstrate that the environmental legislation referred to above is not functioning in Wales. This includes evidence such as documents, correspondence, media articles, statements of fact, photographs or legal advice. If possible, provide details by an attachment, an internet link or references in this form.*

R (on the application of Catherine Lewis) v The Welsh Ministers v Velindre University NHS Trust [2022] EWHC 450 (Admin)

<https://uk.westlaw.com/Document/I54D4FDA09BEA11EC99A3CEBD30D569E3/View/FullText.html>

UNECE Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Decision VII/8s concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*, 18–20 October 2021 (ECE/MP.PP/2021/2/Add.1)

https://unece.org/sites/default/files/2022-02/Decision_VII.8s_eng.pdf

Environmental Governance Stakeholder Group, *Environmental Governance in Wales Post-Exit from the European Union Report*, March 2020

<https://www.gov.wales/sites/default/files/publications/2020-11/report-from-the-environmental-governance-stakeholder-group.pdf>

Securing a Sustainable Future Environmental Principles, Governance and Biodiversity targets for a Greener Wales Date of issue: 30 January 2024

<https://www.gov.wales/sites/default/files/consultations/2024-01/environmental-principles-governance-and-biodiversity-targets-white-paper.pdf>

Securing a Sustainable Future Environmental Principles, Governance and Biodiversity targets for a Greener Wales: Summary of responses to the Consultation on Environmental principles, governance, and biodiversity targets: White Paper

<https://www.gov.wales/sites/default/files/consultations/2024-07/environmental-principles-governance-and-biodiversity-targets-white-paper-summary-responses.pdf>

Securing a Sustainable Future Environmental Principles, Governance and Biodiversity targets for a Greener Wales White Paper: A Welsh Government response to the White Paper

https://www.gov.wales/sites/default/files/consultations/2024-07/environmental-principles-governance-and-biodiversity-targets-white-paper-our-response_0.pdf

Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 613 in Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights' (2018) 30(1) JEL 1-27

<https://academic.oup.com/jel/article-pdf/30/1/1/24480658/eqx023.pdf>

Q6. *What environmental impact(s) are associated with your concern? For example, what kind of environmental harm may occur if your concern is not addressed? Please provide any relevant information on the severity of the issue that the Interim Assessor may need to be aware of.*

Poorer environmental decision-making and consequently, poorer environmental protection (see Q3 above).

Q7. *Please provide any evidence below to support your response to Q6. For example, data, statistics and an indication of whether the concern is localised or has an impact across Wales.*

Q8. *Does your concern have any impact outside of Wales? If so, please provide details.*

Failure to fully adhere to the Aarhus Convention is a concern across the UK and beyond. However, the omission of these principles from the Environmental Principles and Biodiversity Bill would only have impact in Wales.

Q9. *Are you aware of any ongoing investigations related to your concern? For example, by a Senedd Committee, a research organisation or an environmental charity. Please include any details of these investigations below:*

I am not aware of any ongoing investigations related to this concern.

Q10. *Have you reported your concern(s) to another organisation such as a regulator or local authority?*

Yes No

Q11. *If you answered **Yes** to Q10, please provide details of which organisation you reported your concern to, the date you reported it, and the outcome of your report. If possible, please provide supporting evidence for this reporting process in the box below via an attachment or an internet link or references in this form.*

Q12. *What action(s) would you like to be taken in response to your submission? For example, would a change to current legislation address your concern? Please provide details of these actions below:*

I would like the Aarhus Principles to be included in the Environmental Principles and Biodiversity Bill.

