

National Assembly for Wales
Environment and Sustainability Committee
WFG 12
Well-being of Future Generations (Wales) Bill
Response from UK Environmental Law Association's Wales



**The UK Environmental Law Association's Wales Working Party
Evidence Submission on the Well-being of Future Generations Bill
to the
National Assembly for Wales's Environment and Sustainability
Committee**

Executive Summary

1. The UK Environmental Law Association (UKELA) is pleased to have the opportunity to submit its views and comments to the National Assembly for Wales's Environment and Sustainability Committee on the contents of the Well-being of Future Generations Bill.
2. UKELA aims to make the law work for a better environment and to improve understanding and awareness of environmental law. Its members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. UKELA attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors. The Association prepares advice to UK Governments with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared by UKELA's Wales Working Party with input from its Planning and Sustainable Development Working Party.
3. Overall, UKELA is supportive of the aims of this Bill and the proposals contained therein. It commends the Welsh Government for taking steps to embed the principle of sustainable development in the work of the public sector in Wales in the interests of future generations. UKELA is also of the view that a number of changes to the current Bill would strengthen implementation once it becomes legislation; afford equal weight to the environment alongside economic and social considerations; and help ensure accountability and effective delivery of

the aim and goals. The following points are put forward for consideration:

- A clear definition of sustainable development should be included and the following is put forward for consideration:

“Sustainable development means enhancing the economic; social; and environmental wellbeing of people and communities, achieving a better quality of life for our own and future generations in ways which:

Promote social justice and equality of opportunity; and

Enhance the natural and cultural environment and respect its limits using only our fair share of the earth’s resources and sustaining our cultural legacy.”

[Paragraph 9]

- The inter-relationship between sustainable development and well-being needs to be specified in the Bill.

[Paragraph 10]

- The wording in Sections 6 (1) should be changed to:

“Each public body is to pursue the common aim by fostering the achievement of well-being goals”.

[Paragraph 11]

- Consideration should be given to widening the scope of public bodies covered by the Bill.

[Paragraph 12]

- The definition of Well-being goals and their description need to be revised to take account of the full range of issues necessary for sustainable development, in particular inclusion of reference to living within environmental limits and using only a fair share of the earth’s natural resources.

[Paragraph 13]

- In Section 6, the environment goal and descriptor should be re-drafted to ensure that more prominence is given to protection and enhancement of the environment as a way of ensuring the well-being of future generations.

[Paragraph 14]

- Consideration should be given to including references to environmental principles as enshrined in the Treaty on the

Functioning of the European Union and EU secondary legislation.

[Paragraph 15]

- Sections 8 (1) (b), 37 (4) (b) and 39 (1) should be supplemented by drafting as to where responsibility lies for assessing reasonableness as to the requirement to “take all reasonable steps.....” and the nature of that assessment.

[Paragraph 16]

- The Future Generations Commissioner and the Advisory Panel should be appointed by the National Assembly for Wales, rather than Welsh Ministers to ensure independence for Government and impartiality (Section 16 (2).)

[Paragraph 17]

- The general duty of the Commissioner needs to be clarified and strengthened. It is suggested that the following should substitute the drafting in Section 17:

(a) *To uphold the sustainable development principle by-*

(i) *acting as the guardian of the interests of future generations, and*

(ii) *ensuring that public bodies take greater account of the long term impact of the things they do*

[Paragraphs 18 and 19]

- Consideration needs to be given to including more references to climate change throughout the Bill, in particular in the goals. The Commissioner should also have specific responsibility under Section 18 (1) (d) for advising on sustainable development and climate change.

[Paragraph 20]

- In Section 20, UKELA is concerned about the obligation on public bodies that “must take all reasonable steps” as this may provide scope for a public body to reject a recommendation or to take an alternative course of action in response to a recommendation.

[Paragraph 21]

- Under Section 22, UKELA suggests that the legislation should be amended so that the Commissioner has a general duty to consult a wide range of bodies and individuals about the

Commissioner's work and a specific duty to consult on the contents of the annual report.

[Paragraph 22]

- In respect of Section 24, UKELA is of the view that representatives of local authorities, the economy and the voluntary sector should be statutory members of the Future Generations Commissioner's Advisory Panel and that an amendment to this effect should be made.

[Paragraph 23]

- As regards Section 24 (2) consideration should be given to providing for all advisory panel members to be able to nominate an alternate.

[Paragraph 23]

- The Bill should make it clear where accountability lies for ensuring effective implementation of local well-being plans.

[Paragraph 25]

- In Sections 37 and 39, "*take all reasonable steps.....*" should be replaced with "*.....must foster the meeting of those objectives....*" and "*.....must foster within its area the meeting of objectives.....*" respectively.

[Paragraph 26]

DETAILED ANALYSIS

Overview

4. UKELA welcomes the stating of the purposes and aims at the commencement of the Bill. This should assist with interpretation of the Act at the time of implementation. It also notes that this is relatively unique in UK legislation. UKELA is supportive of the purpose of the Bill and applauds the Welsh Government's quest to further its commitment to sustainable development by embedding the principle of sustainable development into the work of the public services in Wales. The Welsh Government, through this legislation, has the opportunity to lead globally in developing a public services culture in Wales that puts sustainable development at the heart of policy making and service delivery.
5. The quality of the environment is fundamental to the well-being of current and future generations in terms of their health, and social and economic well-being. Protection and enhancement of the environment should, therefore, be the central plank of the legislation so it is disappointing that it is not particularly prominent in the draft Bill. UKELA is concerned that there may be a danger that the social and

economic pillars of sustainable development could dominate, particularly in view of the prominence given to prosperity. If the social pillar pursues well-being objectives that are dependent to a significant extent on the growth of GDP then inevitably the social and economic pillars of sustainable development will be capable of dominating the environment pillar. Sustainable development requires solutions that achieve a balance between the three pillars and make the most of synergies between them.

6. The landscape and environment of Wales is exceptionally diverse and beautiful, and should be protected and enhanced for future generations. UKELA is further concerned that the Bill, as currently drafted, does not give sufficient prominence to the importance of the inherent value of the environment as opposed to its functional qualities. Nonetheless, without a healthy, thriving natural environment Wales will not be able to prosper economically, the health of its people would suffer and our culture, heritage and communities would be at risk. The environment underpins the health and well-being of communities, by providing resources and assets that have the potential to produce value and service the Welsh economy. In UKELA's view, the importance of the environment is underplayed and appears to be at odds with the proposals for the Environment Bill, which is concerned with natural resource management to ensure that our landscapes, water, land and other living resources are maintained and enhanced to support the development of communities and businesses. Protection and enhancement of ecosystem services is fundamental to the well-being of future generations. The Well-being of Future Generations Bill and the proposals for the Environment Bill are fundamental to sustainable development in Wales. It is important, therefore, that there is consistency and complementarity in terms of their key principles and policy objectives.
7. Another concern relates to the Bill's focus on processes, rather than the achievement of desired outcomes for the environment that will support healthy living, economic development, preservation of culture and communities for the people of Wales. The absence of outcomes in relation to the goals is worrying, particularly in the light of the report of the recent United Nations High Level Political Forum¹ which states that sustainable development goals are to be accompanied by targets focused on measurable outcomes.
8. The Welsh Government has the chance, through this Bill, to be innovative and unique in the way it takes forward sustainable development. However, the Bill in its present form is not particularly pioneering as most of what it contains has precedents in other international legislation. UKELA is offering its comments below to

¹ www.sustainabledevelopment.un.org/focussdgs.html Introduction to the Proposal of the Open Group for Sustainable Development Goals U.N. 2014 (19 July 2014) Preamble @[18]

support the development of legislation that is truly ground breaking to serve the people of Wales and serve as a model for other administrations.

Purpose, Aim, Sustainable Development Principle and Classification of Public Bodies

9. The purpose of the Bill is commendable. It is fundamental for the Bill to achieve its purpose that it contains an appropriate definition of sustainable development. UKELA notes that the definition in the draft Bill is a modified and, in our view, a somewhat compromised version of the Brundtland sustainable development definition. It is disappointing that a definition of sustainable development in the context of the Welsh public service has not been included. The absence of a clear definition of sustainable development in respect of Wales could lead to varying interpretations of what the principle means in practice and may not achieve the overall aim of improving the economic, social and environmental well-being of Wales. UKELA believes that it would be better to adopt the definition of sustainable development included in “One Wales, One Planet”² which is as follows:

“Sustainable development means enhancing the economic, social and environmental wellbeing of people and communities, achieving a better quality of life for our own and future generations in ways which:

Promote social justice and equality of opportunity; and

Enhance the natural and cultural environment and respect its limits using only our fair share of the earth’s resources and sustaining our cultural legacy.”

This is a more comprehensive definition of sustainable development and one with which the Welsh public sector is already familiar. The definition also makes clear the importance of respecting environmental limits to the achievement of sustainable development.

10. It is recognised that the well-being duty reflects broadly that for local authorities which is enshrined (for Wales only, following the Localism Act 2011) in section 2 of the Local Government Act 2000. However, the bringing together of well-being with sustainable development could lead to a lack of clarity amongst those interpreting the legislation as to whether decisions are to achieve sustainable development or well-being, or where the balance should lie between the two concepts. It is important to specify the inter-relationship between sustainable development and well-being in the legislation, as this will provide the

² <http://wales.gov.uk/topics/sustainabledevelopment/publications/onewalesoneplanet/?lang=en> One Wales: One Planet – The Sustainable Development Scheme of the Welsh Assembly Government. May 2009.

foundation for the follow up guidance, which should aim to ensure that those implementing the duty will have a clear understanding of the relationship between the two concepts. However, if the sustainable development definition suggested above in paragraph 9 is adopted, the connection between sustainable development and well-being would be clearer.

11. UKELA's main concern in relation to the duties for improving well-being is the relative weakness of the terminology in Section 6 (1), i.e. "Each public body is to pursue the common aim by seeking to achieve....." This is an easy duty to discharge and in legal terms would be difficult to challenge if a particular body was not diligent enough in carrying out their duties. It is suggested that an amendment be made to change the wording to:

"Each public body is to pursue the common aim by fostering the achievement of the well being goals"

would place a stronger duty on public bodies to achieve the legislation's intentions. As illustrated in Sections 6 (i) and 17 (a), implementation is highly contingent on the loose language contained in the Bill. It is important that the drafting is tight and clear to ensure there is no scope for avoiding taking forward the necessary commitment of sustainable development in order to ensure the well-being of future generations.

12. It is disappointing that the classification of public bodies in the Bill is quite narrow and does not cover the full range of public bodies operating in Wales or even those listed in the White Paper. In particular, UKELA is disappointed at the omission of Higher Education Institutions and community councils, as they are considered crucial to the achievement of sustainable development. Welsh universities are well placed to introduce sustainable development into curricula for numerous relevant course programmes, whilst community councils have an important role to play in ensuring sustainable development is embedded at local levels. The failure to include as wide a classification of public bodies as possible will inevitably lead to a disjointed approach to driving forward sustainable development, as those outside the scope of the legislation will not have the same impetus to achieve its overall aim.

Well-being Goals

13. UKELA is of the opinion that neither the definition of well-being goals nor their descriptors address the full range of issues necessary for progress towards sustainable development to be assessed. It is possible that these goals may have been based on the National Well-being indicators published by the Office of National Statistics, only four of which relate to the environment. Collectively, these indicators amount to a narrow concept of sustainable development and UKELA is concerned about the considerable scope for their misinterpretation. The goals are also very similar to the vision of sustainable development in

“One Wales: One Planet”, the Welsh Government’s Sustainable Development Scheme, with the exception being a reference to environmental limits and use of natural resources. UKELA considers that reference should be included to respecting environmental limits and using only our fair share of the earth’s resources.

14. UKELA believes that the environment goal 2 in Section 6 simply referred to as “A resilient Wales” and described as “aiming for a bio-diverse environment with healthy functioning eco-systems that support social, economic and ecological resilience” is inadequate. The use of the phrase “A resilient Wales” is not particularly meaningful to most people and the accompanying description does not reflect the goal in any meaningful way. The word “resilience” implies withstanding shock. The dictionary definition refers to “being capable of regaining original shape following some sort of deformation” or “a person recovering from hardship or illness”. It follows, therefore, that this terminology will not be a readily understood goal in relation to protection of the environment and consequently technical interpretation may be difficult. Furthermore, UKELA is of the view that the goal and its description as currently drafted imply maintaining the status quo, rather than improving the environment for future generations. This is particularly the case, given the use of the word “support” in the description, which indicates an intention to sustain, rather than enhance, the environment in accordance with both the precautionary principle and also the higher level environmental principle enshrined in Article 3 of the Treaty on the Functioning of the European Union, referred to in the following paragraph 15. It is also important that this legislation supports the reforms that have been proposed for environmental law in Wales. The proposals in the Environment White Paper aim to ensure the “maintenance and **enhancement** of Wales’s natural resources”; we believe it would be better to use this terminology here.
15. The new approach to applying the sustainable development principles in Part 2, clause 8 (2) is helpful and unique in UK legislation. However UKELA is concerned generally about the absence throughout the legislation of reference to the environmental principles enshrined in the EU Treaty and the practices and standards incorporated in EU secondary legislation on the environment. In particular, there is no mention of the precautionary principle and the overarching EU principle that requires “a high level of protection and improvement of the quality of the environment” (Article 3 of the Treaty on the Functioning of the European Union). It is evident, therefore, that the goals and their descriptors present too narrow a framing of sustainable development.
16. UKELA is concerned about the wording in Section 8(1) (b) which states that [A public body must] “take all reasonable steps (in exercising its functions) to meet those objectives in accordance with the sustainable development principle”. It is unclear as to who will be assessing reasonableness and whether such an assessment would be subjective (i.e. does the relevant public body itself consider them reasonable) or

objective (i.e. would a [hypothetical] reasonable public body in the same circumstances consider the steps reasonable). Moreover, it would be helpful in legislative terms if it could be made apparent whether this is “reasonableness” in the common public law ‘Wednesbury’ sense or whether it is the steps themselves which must be reasonable.

The Future Generations Commissioner

17. The appointment of the Commissioner (Section 16) by Welsh Ministers could give rise to perceptions of lack of independence and the appointment possibly being open to political interference, particularly in the light of clause 7 (2) of Schedule 2 which gives Welsh Ministers the power to dismiss the Commissioner. In the interests of impartiality and independence, UKELA is of the view that the appointment of the Future Generations Commissioner should be made by the National Assembly for Wales, rather than Welsh Ministers. Similarly, in order for the Commissioner’s Advisory Panel to be free from political influence, UKELA suggests that its appointments under Section 22 (2) should be made by the National Assembly.
18. The general duty of the Commissioner (section 17) is unclear in relation to whether the duty is to monitor the extent to which the well-being objectives are being met, or simply with respect to sustainable development. This is a fundamental point that needs to be addressed. UKELA is concerned that, in practice, the Commissioner will have limited powers and no wider powers to investigate areas of concern or possibly even question public bodies on their performance in relation to the legislation’s aim.
19. As mentioned above in paragraph 11, UKELA is of the view that the wording “seek to safeguard” in the specification of the duty of the Commissioner should be strengthened by changing to “foster the safeguarding of ...” as in legislative terms the words “seek to” is a very loose requirement and, in effect, an aspiration only. There is a danger that a Commissioner could take a narrow view of the requirement and consequently be insufficiently instrumental and effective as possible in helping to ensure that public bodies achieve the well-being goals. It is suggested that a more robust wording for the Commissioner’s role could be as follows:
 - (a) *To uphold the sustainable development principle by-*
 - (iii) *acting as the guardian of the interests of future generations, and*
 - (iv) *ensuring that public bodies take greater account of the long term impact of the things they do*

However, if the drafting of the Bill is amended to ensure a role for the Commissioner in respect of meeting the well-being objectives, rather

than sustainable development *per se*, the above suggested amendment will need to be adapted accordingly.

20. In 18 (1) (a), the reference to providing advice on climate change is noted. However, apart from mention of a low carbon emission economy in the goal of a prosperous Wales, there is no further reference to climate change elsewhere in the Bill. The single mention of climate change is indicative of a parochial approach. Overall, the Bill is very specific to Wales and its administrative and physical boundaries; we believe that account should be taken of Wales's impact on the UK and international situations and its contribution to the global effort. If it is envisaged that the Commissioner is to play a meaningful role in relation to climate change, UKELA suggests that this needs to be evident in the drafting, possibly by inclusion of a particular reference in the goals. As regards, 18 (1) (d), UKELA suggests that this should also include reference to advice being given on the sustainable development principle, as well as achievement of the well-being goals.
21. In respect of section 20 on the duty to follow the Commissioner's recommendations, UKELA is concerned again about the use of the wording "must take all reasonable steps". As currently drafted, a public body can avoid compliance with recommendations if it is satisfied on its own account that it has taken into consideration the guidance from Welsh Ministers. Therefore, publication of a response to the Commissioner's recommendations does not guarantee their adoption. The current wording could lead to the power of the Future Generations Commissioner being undermined and, even more importantly, dilute accountability for delivering the goals, whilst taking account of sustainable development. UKELA believes that the section provides scope for a public body to either reject a recommendation or to take an alternative course of action in response to a recommendation. This is worrying, particularly as the circumstances under which these courses of action can be taken are unclear.
22. Section 22 refers to the Commissioner's duty to consult the advisory panel, public bodies and other organisations and individuals. This is to be done before the annual report is published, but the purpose of the consultation is unclear. UKELA is unclear on the interpretation of public bodies in this context. If the legislation intends to empower the Commissioner to consult the wider public sector and non-governmental organisations, the drafting should make this clear. UKELA also suggests that the duty to consult should cover two aspects: first, a general duty to consult a wide range of bodies and individuals about the Commissioner's work and secondly, a specific duty to consult on the contents of the annual report.
23. The membership of the Commissioner's advisory panel (Section 24) covers the interests of children, older people, the Welsh language, public health and the environment. Although it is noted that Welsh Ministers have the power to appoint other persons, UKELA is concerned at the

absence of a member representative of the economy and suggests that the Bill should refer specifically to an individual, such as the Chair of the Confederation of British Industry in Wales, as a statutory advisory panel member. This will ensure a balance between social, economic and environmental interests. In the light of the key role public service boards and local authority scrutiny committees will have in the implementation and governance processes, UKELA considers that there should be representation from local authorities on the advisory panel. The voluntary sector also has a major part to play in helping achieve the desired legislative outcomes and should be represented on the advisory panel. UKELA, therefore, suggests that amendments to this effect should be introduced. UKELA has noted an inconsistency in Section 24 (2) whereby there is no provision for delegating for alternates in respect of the Commissioner panel members ((2)(a), (b) and (c)).

Public Service Boards

24. UKELA welcomes the requirement for local integration and is pleased to note that the proposed legislation details how this integration is to be brought about. Nevertheless, it needs to be recognised that the role of overview and scrutiny committees will be crucial to the success and effectiveness of the Local Well-being plans.
25. UKELA believes that the Bill should be amended to specify lead responsibility for accountability on implementation of local well-being plans. As currently stated (Section 44), annual progress reports detailing implementation are to be sent to overview and scrutiny committees, as well as to Welsh Ministers, the Auditor General Wales and the Future Generations Commissioner. However, a particular weakness is the failure to state where ultimate power for ensuring implementation of plans is effectively carried out.
26. In respect of local well-being plans (Section 37), public services boards, in the same way as public bodies, are expected to “take all reasonable steps.....”. The same argument set out in paragraph 15 above, applies here. It also applies in relation to community councils (Section 39). UKELA proposes that “take all reasonable steps.....” should be replaced with the stronger requirement of “.....must foster the meeting of those objectives.....” and “must foster within its area the meeting of objectives on the local well-being plan that has effect in its area”, respectively. UKELA is concerned that, whilst community councils with gross income or expenditure over £200k p.a. are required to take steps towards meeting the objectives set out in local well-being plans, such bodies will not be subject to the general duty.

Professor Robert Lee Dr Haydn Davies Dr Victoria Jenkins
UKELA Wales Working Party