

**National Assembly for Wales
Environment and Sustainability Committee
WFG 10
Well-being of Future Generations (Wales) Bill
Response from University of Dundee School of Law**



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Cardiff Bay, CF99 1NA.

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To the Committee Clerk

**Consultation
General principles of the Wellbeing of Future Generations (Wales) Bill**

I am delighted to have the opportunity to contribute to the consultation on the above Bill.

I have taught and researched in the areas of public, environmental law for 22 years and more specifically, in sustainable development law for the past 16 years. I am the author of *Sustainable Development Law in the UK – From rhetoric to reality* (Earthscan/Routledge, 2012). Recently, I have been examining national and sustainable discourses in both Wales and Scotland and following closely the numerous environmental law developments in Wales including the WFGB. I have also been advising the WWF in Wales on some aspects of the Bill.

Wales should be commended on its historically strong stance towards promoting a meaningful and transformative approach to sustainable development in its schemes especially One Wales, One Planet. It should also be commended on its decision to legislate to put sustainability at the heart of government and to dedicate an Act to so doing.

I do have a number of comments relating to the some of the terms of reference of your

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inquiry.

Point 1 of the Consultation How the Welsh Government should legislate to put sustainability and sustainable development at the heart of government and the wider public sector. In my book I suggested a version of the following approach to legislating to embed sustainability.

- a) A strong declaration of the Government's intent to put sustainability at the heart of government. One should not underestimate the importance of a strong, symbolic statement. A provision based on the commitment in the Welsh strategy would work very well as statement of purpose: 'sustainable development (the process that leads to Wales, becoming a sustainable nation) will be the central organising principle of Government, and we will encourage and enable others to embrace sustainable development as their central organising principle and a general duty imposed on all public bodies' (WAG, 2009, p13).
- b) A strong clear duty to promote sustainable development in ALL public sector activities. I suggested that the phrasing commonly used in UK statutes worked well 'contribute / further to the achievement of sustainable development'.
- c) I have come around to the view that a definition of sustainable development should be included but it should go beyond Brundtland and reflect the nations priorities. It is difficult to see past the excellent modern, progressive definition in the One Wales, One Planet: '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 in ways which 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. '(WAG, 2009, p8).
- d) The declaration and duty should be supported by strong procedural obligations that are enforceable and measurable. The obligation to produce the scheme (or include sustainability in the overall programme for government –even better) should be statutory and certain rules as to its development and review included. The basics about timeframes, consultations, targets and indicators should be included. The provisions in the 2006 Act could be incorporated in the Bill.
- e) Any report mentioned should be published and go somewhere to be reviewed.
- f) There should be clear lines of advice and accountability set out in the statute and an independent body charged with providing independent advice, support and review. The role of the SDC in Scotland before its demise provides a good model.
- g) The role of the Audit Wales should be explicitly set out in the Act and the relationship between the above body, the Audit Wales and the Assembly clearly explained would have been from being a statutory body.
- h) Other details about the principles behind sustainable development, consultation procedures, targets, indicators, the role of EIA, sustainability appraisal, other public sector reports and other procedures should be set out elsewhere in regulations or guidance. Important details like the principles should be subject to the affirmative

resolution. My reasons are fourfold:

- To make an impact, the essential and game changing aims of this Bill need to be clearly and plainly stated.
- The duties and procedures then need to logically follow on from this main aim. Too much detail runs the risk of watering down the message and the symbolism as the reader gets bogged down in layers of interpretation
- Too much detail crystallises what should be a fluid concept and runs the risk of binding future Governments to what is essentially the policy of the current Government. This increases the likelihood of amendments or repeal with every new Government.

Points 2 and 3 of the Consultation - These relate to the provisions in the Bill itself: general principles the “common aim” and “sustainable development principle” the approach to improving well-being, including setting of well-being goals, establishment of objectives by public bodies and the duties imposed on public bodies; measuring progress and reporting on progress; the Future Generations Commissioner for Wales, international obligations in relation to sustainable development etc., I have addressed these under slightly different headings: symbolism; overall structure; purpose / aim/ goals; duty / aim; procedures and institutions.

Symbolism

(a) The Bill will only really be ground breaking if it includes important symbolic and ambitious terminology. Its title goes a long way towards this aim. ‘The Wellbeing of Future Generations’ is the best title I have encountered. Spain has the Sustainable Economy Act, Canada, Manitoba and Quebec have Sustainable Development Acts, California has Global Warming Solutions Act, Illinois have the Green Governments Illinois Act.

(b) Compared to the symbolic and powerful language used in One Planet One Wales – ‘fair share of resources’, or ‘environmental limits’ much of the language in the actual Bill is watered down. There is also no mention taking into account ‘impacts of activities outside Wales’, Left unchanged and once crystallised as law, the current wording could actually slow progress.

Overall Structure

(a) This type of dedicated one stop shop approach to altering the way we govern is very innovative but it needs to genuinely be a one stop shop. The Welsh Ministers are already subject to similar obligations under the Government of Wales Act 2006 (to produce, review and monitor a scheme). There is no mention as to how these fit with the new objectives and reports in the Bill. Similarly, local authorities already need to produce and review various plans and there is no mention how these plans relate to the ones in the Bill. To be truly innovative, the Bill would set out the main governance tools for LA and WM. As far as I am aware no government has managed to achieve this in legislation. The Scottish Government comes close but it relies entirely on policy to do this. Obviously, the new provisions in the Bill

would need to be at equally robust as their predecessors. I do not think this is the case at the moment.

(b) Public bodies are subject to an aim, they must seek to apply the sustainable development principle (as defined), they must pursue the common aim by seeking to achieve the well being goals, they then must set and publish wellbeing objectives that are designed to maximise their contribution to the achievement of the well being goals. This approach is complicated and difficult to follow. The symbolism is lost in the layers.

(c) The Bill is long and repetitive compared to other dedicated legislation in Canada, Manitoba, Quebec, Hungary and certain US states.

Purpose of Bill / Aims and Wellbeing Goals

(a) The purpose and aim should be phrased as the drivers of the change towards embedding sustainable development. By limiting the purpose to governance arrangements, much of the symbolism in the Bill is unnecessarily lost. Public bodies by their actions will influence the behaviour and values of others - the regulated, individuals and businesses so there is no need for the purpose to be so limited.

(b) The phrase 'take into account' is very weak and again reduces the impact of the Bill. Stronger phrasing is used elsewhere such as 'promote', 'further' or 'designed to ensure'. More innovative, symbolic and powerful examples exist elsewhere that are not limited to governance. Some refer to environmental limits, future generations or global impacts more directly. See Sweden, Minnesota, Quebec, Australia

(c) The original aim set out One Wales, One Planet is much more symbolic, progressive than the purpose as set out as it explicitly makes reference to environmental limits, and only using our fair share of resources. Ideally, the Bill would also refer to taking account of the external impact of activities in Wales.

Duty / Aim

(a) Several dedicated "Sustainable Development Acts" fail to contain any aim or duty on public bodies and this is a major limitation to what are otherwise strong Acts. (See Manitoba and Canadian Federal Act). This Bill would be groundbreaking if it included a clear duty.

(b) The Bill asks public bodies to 'pursue a common aim'. The fact one needs to look elsewhere to find the aim affects the clarity of the message. It does not explicitly create a substantive duty on public bodies. This is unfortunate in terms of symbolism and in terms of allocating responsibility. An aim is not as powerful or as symbolic as a duty. An aim is a nice thing to happen, it is not an obligation to do something. If the word duty is problematic – 'responsibility', obligation, or simply 'shall' all are suitable and stronger alternatives.

(c) The aim to improve the economic social and environmental wellbeing is laudable as

it explicitly refers to integration however, there is no reference to environmental limits or to future generations or to impacts beyond Wales' borders. As such, it is a return to the balancing acts of the past and reflects a return to weak sustainability. Relying on the goals to address these issues takes away from the symbolism of the aim itself. This should be the 'WOW' factor of this Bill and it is not. This weakness is compounded by the fact it is worded as an aim not a duty (see above).

(e) It would be simpler, more powerful and more straight forward to, in one section, impose a duty on public bodies, the Welsh Ministers and public service boards that in the exercise of their functions they are to improve the wellbeing of Wales for the present and future generations in furtherance of sustainable development. Then have another section that provides that in exercising this duty they are to pursue the following goals.

(f) The explicit aim in s. 6 seems to only apply to named public bodies and not the Welsh Ministers themselves or other public bodies. This is limiting. Indeed many jurisdictions extend the duty to the private sector. This extension is not in keeping with UK legal tradition but it does highlight how the aim is not particularly ground breaking. See - Montana

(g) Provisions in Hungary, Quebec, Australia, Spain, Montana, Minnesota provide examples of stronger wording for public duties, objectives and aims as well as more direct references to limits, outside impacts and future generations. Some of these provisions have already been held to be enforceable.

(i) The definition provided for the 'sustainable development principle' does not accurately reflect the Brundtland definition. Moreover, by making SD a principle the aims become overly complicated. Further, 'seeking' is insufficiently ambitious. The definition of sustainable development set out in One Wales, One Planet is progressive, specific to Wales and would be transformative.

Procedures

(a) The statements of the wellbeing objectives are potentially very powerful. They are related to the Wellbeing goals and the common aim. However, the provisions themselves need to be streamlined and strengthened. They also need to be merged to avoid repetition and ensure the Welsh Ministers comply with the rules set out in s. 7 and 8.

(b) More specifically:

- i. Why is integration referred to only in s.8(2)(b) when it should actually apply to the whole Bill? Integration should be part of the Wellbeing goals.
- ii. How do the objectives fit with other objective setting and review activities for public bodies? Could these be assimilated into one obligation?
- iii. Arguably, much of the detail should appear in separate regulations. This would significantly improve the readability and symbolism of the Bill as a whole. Indeed, at present I am not sure what extra detail the guidance in s.15 could add.

- iv. What are the consequences of failing to produce wellbeing objectives, reports etc or failing to improve.? The basics do need to be included in the Bill
- v. It is unclear how the well being objectives of the Welsh Ministers and Future Trends reports fit with the obligations in the Government of Wales Act 2006 – this needs to be streamlined

Institutions

(a) Since the demise for the Sustainable Development Commission, the Future Generations Commissioner is a major advance compared to elsewhere in the UK. That said, the FGC could be more powerful and more independent. At the moment s/he is appointed by the Welsh Ministers (like Manitoba) so is not independent of government. S/he could be appointed by the Assembly (see Hungary). S/he 's duty is to promote and to monitor. There is very little opportunity for the FGC to 'call to account'. The section 21 report is vague and makes no mention of the word 'progress'. What are the consequences for no progress? (See Canada – Public Accounts Committee Scrutiny). The FGC only engages with public bodies, the Welsh Ministers and the Advisory panel who are named or appointed by the Welsh Ministers and thus, not independent either. There is no mention of the FGC's role in relation to the public (present or future) (See Hungary). Oddly there is no reference to civic society either. Moreover, many of the FGC's powers are permissive (may) rather than mandatory. Once again, the provisions are longwinded. See former arrangements of the SDC in Scotland, Hungarian Ombudsman

(c) Finally, there is no mention about how the FGC's work relates to that of the AGW or vice versa. This is crucial given the value for money reports the AGW has produced in the past and will do in the future. See SDC for Scotland above and Canada. Note the two Canadian acts (Auditor General Act 1985 and the Sustainable Development Act refer to one another and allocate power very clearly

Points 4-7 of the Consultation – Others are better placed to respond to these.

Overall, I believe the introduction of this Bill is a positive move that should be welcomed. As the Bill goes through the legislative process I believe effort should be made to improve the clarity of its message and thus, increase its potential as a driver for change by:

- making specific reference to living within environmental limits, using only our fair share of resources, taking into consideration of external impacts of activities in Wales in the Government's overall aim (see p.2 (a) above);
- imposing a clear duty on Welsh Ministers and public bodies in relation to sustainable development and future generations (see p. 4-5 (e) above);
- incorporating the provisions of s. 71 of the Government of Wales Act;
- taking out all the layers interpretation and leaving the detail to regulations and guidance;
- strengthening the provisions on the roles and relationship of the Commissioner and Audit Wales.

If I can be of any assistance, please do not hesitate to contact me at the address above.

Yours sincerely
Professor Andrea Ross