

PROPOSALS FOR A SUSTAINABLE DEVELOPMENT BILL – WELSH GOVERNMENT

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the UKELA Wales Working Party.

UKELA MAKES THE FOLLOWING COMMENTS ON THE PROPOSALS FOR A SUSTAINABLE DEVELOPMENT BILL

Note: figures in square brackets relate to the paragraphs of the consultation document 'Proposals for a sustainable Development Bill (WG15440)

General Observations

The proposal document heavily favours the socio-economic aspects of sustainable development at the expense of wider, non-anthropocentric environmental considerations. There are few references to wildlife or biodiversity as elements of the putative sustainability factors. Whilst we broadly welcome this proposal, we are also concerned that the wider environment should receive greater consideration than the proposal appears to incorporate at present.

A new sustainable development duty

Q.4 Have we identified the most appropriate level of organisational decision-making at which the duty should be applied? Please explain.

It is our view that the level at which the duty is imposed in organisations is intimately connected to the nature of the duty itself. If the duty is to be composed both of behaviours and objectives, then high-level decision-makers (at the level of chief executives, leaders, directors and members - [85] of Consultation document) are the appropriate targets since they will be required to ensure that their sustainable development behaviour actually results in the achievement of

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: City Point, One Ropemaker Street, London, EC2Y 9SS www.ukela.org

President: Rt. Hon. Lord Carnwath of Notting Hill CVO PC

sustainable development objectives, both at the level of decision making and, ultimately, at the level of delivery. However, if the duty comprises sustainable development behaviours only, there is a danger that the duty could be discharged by the high-level decision-makers but with no necessary guarantee that the public service is delivered more sustainably. In the latter case the duty might need additionally to be imposed at lower levels of organisational decision-making.

Q.5 Would this approach risk capturing some decisions which should not be subject to the duty? What would these be?

If the duty is to be the 'central organising principle' of Welsh government, then it would seem rather illogical to identify decisions that should not be subject to the duty, unless they are subject to other conflicting legal requirements.

Q.6 Are there any decisions that are not captured by this approach which should be subject to the duty? Again, what would these be?

Again, if the duty is to be the 'central organising principle' that permeates all decision-making it is difficult to see what decisions (other than those giving rise to legal compliance conflicts) would not be subject to the duty.

Q.7 Should we include decisions which govern an organisation's internal operations? If so, which internal operations should we include?

Q.8 Should budget proposals be subject to the duty? Please explain. {I'd particularly like views on this question}

It is quite difficult to envisage a situation where an organisation is required to discharge a duty towards sustainable development in the delivery of its services which does not apply to its internal operations. The duty to deliver sustainable development through sustainable development factors should apply to an organisation's internal and budgetary operations as well, though it is recognised that the involvement of stakeholders in decisions (the fifth of the behaviours listed in para [90]) may not always be appropriate and could compromise the efficiency and cost-effectiveness of internal operations.

Hence, whatever approach is ultimately chosen it is essential that decisions relating to organisations' internal operations and budgeting should be included.

Factors reflecting sustainable development behavior

Q.9 Are all of the behaviours we identify critical to acting in ways that reflect sustainable development thinking? Please explain.

The behaviours identified are necessary to achieve sustainable development thinking. The removal of any one of them would weaken the coherence and comprehensiveness of the approach.

Q.11 What are the advantages and disadvantages of designating behaviours

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: City Point, One Ropemaker Street, London, EC2Y 9SS www.ukela.org

President: Rt. Hon. Lord Carnwath of Notting Hill CVO PC

as the sustainable development factors that must influence high level decisions?

The principal advantage of designating behaviours as the sustainable development factors is that this will inculcate a mind-set that will place sustainable development at the heart of decision-making at the highest levels of organisations. A significant disadvantage, however, is that it is possible to imagine a situation where the sustainable development behaviours have been observed in decision-making but they do not, ultimately, result in the operational delivery of sustainable development.

There will also be occasions (as there are now) where conflict will arise between these behaviours or between aspects of a particular behaviour (e.g. the simultaneous achievement of social justice and environmental protection is not always possible as the environmental justice movement in the US and the UK has shown). Thus judgments will need to be made as to which behaviour or which aspect of a behaviour should take precedence in a particular situation. While this might be seen as a disadvantage, it could also result in more careful consideration of the sustainable development impacts of decision making than has been the case in the past. Provided that exercise of judgment achieves the requisite Wednesbury level of reasonableness, this should not prove an insurmountable obstacle to the observance of the duty.

Q.12 How much influence should sustainable development behaviours have over high level decisions – for example, should those decisions be lawful if they have been reached in a way that:

- is consistent with one, some or all of the behaviours;
- broadly reflects the behaviours;
- is not inconsistent with the behaviours?
- are there other options?

The term ‘duty’ carries with it an expectation of something greater than ‘broadly reflects’ or ‘not inconsistent with.’ The discharge of the duty ought to be consistent with the exercise of as many of the behaviours as is reasonable in the circumstances.

The objectives approach

Q.14 What are the advantages and disadvantages of designating sustainable objectives as the factors that must influence higher level decision making?

Arguably it is easier to design metrics to assess the achievement of objectives than it is to measure the effectiveness of the exercise of behaviours and hence objectives might be a more efficient means of demonstrating, in practice, that the duty have been discharged.

On the other hand, implementing all the sustainable development objectives listed may, in practice, be very difficult even where examples of their achievement are provided. For example, asking whether social justice has been achieved in the taking of a particular decision may not yield a definite answer. For some

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: City Point, One Ropemaker Street, London, EC2Y 9SS www.ukela.org

President: Rt. Hon. Lord Carnwath of Notting Hill CVO PC

stakeholders, the decision may represent an advance in social justice (e.g. the generation of new employment opportunities from the siting of a new waste to power plant); for others it will represent a diminution in social justice (another environmental burden sited in an already overburdened community.)

Q.15 How much influence should the objectives have over high level decisions – for example, should those decisions be lawful:

- only if they actively contribute to one or more of those objectives;
- if they do not detract from any of the objectives;
- even if they detract from some of those objectives, as long as they actively promote others?
- are there other options?

In practice it is likely that the first and third of these options will be achievable, whereas the second will not. Some of the listed objectives are mutually incompatible in certain circumstances and it is inevitable that compromises between objectives will need to be made.

The combined approach

Q.16 What are the advantages and disadvantages of basing a duty on sustainable development behaviours and sustainable development objectives?

The principal advantage of the combined approach is that both sets of factors is capable of informing the other. The incorporation of the behaviours into high-level decision making will ensure the adoption of a systemic approach to sustainable development while the observance of a set of objectives will provide a focus for the exercise of the behaviours. It is conceivable that the observance of the behaviour factors could result in the adoption of additional objectives to those that formally make up the duty. By the same token the existence of the baseline objectives could act as a focus for the observance of the behaviours. In short the whole will be greater than the sum of the parts.

The disadvantage is that the duty could be said to be more complex as a result and place a considerable additional burden on the decision-making process. There is also the danger that the inclusion of both sets of factors will result in greater legal uncertainty and a potential for frivolous challenges to decision-making which will undermine efficiency – itself an element of sustainable development.

The need for a combined approach is demonstrated by the consultation document itself. In para [93] the document discusses the need for ‘an integrated approach’ to promoting the achievement of objectives so that organisations do not ‘focus solely on one or two issues, or to change the focus between issues year to year’. As integration is one of the behaviours listed in para [90], the combined approach would seem the most apposite.

Early experience from practitioners in the planning system suggests that the overarching ‘presumption in favour of sustainable development’ that now governs planning policy in the UK (with sustainable development defined in page 2 of the

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: City Point, One Ropemaker Street, London, EC2Y 9SS www.ukela.org

President: Rt. Hon. Lord Carnwath of Notting Hill CVO PC

National Planning Policy Framework) is not very useful when dealing with individual development proposals. Hence we consider that a workable combined approach to the implementation of sustainable development (as described above) that can meaningfully guide not just policies but also decisions on individual cases is essential if the bill is to achieve its objectives.

A single sustainable development proposition

Q.17 What are your views on basing a duty around a single sustainable development proposition?

The problem with a single sustainable development proposition is unworkability. Sustainable development is itself a single proposition and, to the extent that it has been implemented as a global principle of environmental policy, this has been achieved by splitting the concept into conceptually more digestible principles such as the proximity principle, the polluter pays, differential but shared responsibility, and so forth. A single sustainable development proposition will simply replace one proposition with another without necessarily clarifying or achieving the first.

Defining sustainable development

Q.26 Are there other advantages or disadvantages to defining “sustainable development” and if so, what are they?

Q.27 If we were to define “sustainable development” do you think that the working definition above would be suitable and why?

Defining sustainable development within the bill is essential if it is to serve the enabling function that the government envisages. However, based on members' experience at local government level, we consider that the definition incorporating 'well-being' as proposed at [127] of the proposal is too complex and risks falling foul of differing perceptions of 'well-being' between the public and the government. We propose a simpler alternative that emphasises the significance of environmental limits as follows:

Public bodies in Wales must exercise their functions in order to contribute to sustainable development i.e., **“development that provides a balance between the economic, social and environmental concerns of the people of Wales, now and in the future, whilst respecting environmental limits.”**

Simplicity is central to the success of this substantive duty which should communicate the aims of the organisation clearly and concisely to all involved in the organisation and outside of it. Most of these people will be unaware of the Welsh Government's work on well-being and simply associate the term with physical health. This definition also makes it clear that a balance of economic, social and environmental considerations is important to sustainable development but also subject to environmental limits. Finally, it provides an intergenerational perspective that is central to sustainable development

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: City Point, One Ropemaker Street, London, EC2Y 9SS www.ukela.org

President: Rt. Hon. Lord Carnwath of Notting Hill CVO PC

Q.29 Do you have any views on the preferred approach regarding the main functions of a new body?

We are concerned that the functions of the new body are at present too vaguely defined. The preferred approach suggests that the body will primarily have an 'advice and guidance' role but at the same time provide a 'level of challenge' to bodies charged with the duty. It is by no means clear what the term 'level of challenge' refers to in practice. Presumably it falls short of scrutiny and compliance since this role is associated with the Auditor General of Wales. If the level of challenge amounts to being a 'critical friend' this would seem already to be encompassed by the terms 'advice and guidance'; if it implies some degree of scrutiny or compliance function then it would seem to overlap with the functions of the AGW. UKELA is of the view that such overlap of function does not foster coherence or integration in environmental law.

The proposal is also vague (or even silent) on the question of the facilitation of public scrutiny of sustainable development by the new body. It is essential to have a means of public scrutiny of the work of public bodies in Wales in addition to the proposed review carried out by the WAO. The new SD body should therefore have a duty to collate information on the progress of sustainable development in Wales.

Issues not covered by the consultation questions

The consultation is not clear on what is meant by 'organisations delivering public services in Wales'. Is this to include private bodies that deliver public services on behalf of the government, or private utility companies such as Dŵr Cymru? The clarification of this question is important given the uncertainty that has characterised such terms in the context of Environmental Information legislation (e.g. the recent Upper Tribunal's decision in the *Smartsources v Information Commissioner and a Group of 19 additional parties* [2010] UKUT 415 (AAC)).

It is important that the proposed Bill should clarify the precise scope and application of the new duty. The credibility of the legislation in the eyes of the public will suffer if private or quasi-private companies in Wales that provide public services (either under contractual or statutory terms) are not seen to be subject to the duty. For companies contracted to deliver public services, the duty need not be imposed directly, on the basis that the awarding (and renewing) of such a contract (by a public body) is subject to the duty and that the award of the contract is predicated on the company demonstrating a commitment to the sustainable development factors. This kind of indirect duty could be promoted through guidance. Where companies deliver public services on a statutory basis (as with utility companies) and where the availability of alternative suppliers of these utilities is limited or non-existent there must be a stronger case for imposing the duty directly.

16th July 2012

UK Environmental Law Association: making the law work for a better environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: City Point, One Ropemaker Street, London, EC2Y 9SS www.ukela.org

President: Rt. Hon. Lord Carnwath of Notting Hill CVO PC