

WHITE PAPER: A SUSTAINABLE WALES BETTER CHOICES FOR A BETTER FUTURE – 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 Wales working party.

UKELA MAKES THE FOLLOWING COMMENTS ON THE WHITE PAPER ON THE SUSTAINABLE DEVELOPMENT BILL

General Observations

In our last response we took the view that the proposals for a sustainable development duty favour the socio-economic aspects of sustainable development at the expense of wider, non-anthropocentric environmental considerations. Whilst we welcome the clarification of the duty and the details of its implementation in the white paper, we reiterate our concern that the wider environment should receive greater consideration than the proposal appears to incorporate. The white paper document sits uneasily alongside other plans to take account of eco-systems goods and services.

Question 1.

What are your views on the proposals for a new duty to embed sustainable development as the central organising principle of selected organisations in Wales?

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We understand from our reading of the paper that a general definition of the duty (based on an expansion of the *Brundtland* definition) will appear on the face of the bill with details of the outcomes and behaviours to follow in statutory guidance. This is a sensible approach but we would suggest that the guidance needs also to take account of situations where conflicts arise between the four aspects of sustainable development (defined in [1.9] as social, economic, environmental and long-term well-being in Wales). There are bound to be occasions where trade-offs between the four 'well-beings' will be required so clarity in this aspect will be essential. Paragraph [2.30] implies that all of the elements must be considered in setting outcomes so presumably a balancing act to ensure maximum overall contribution to well-being is envisaged.

It is made clear that there are no proposals to enhance public engagement in the process of embedding S.D. over and above the mechanisms already in place *viz.* the National Principles for Public Engagement [2.14]. It is our view that the National Principles for Public Engagement are probably broad enough to discharge requirements for public participation in environmental decision making under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 (The Aarhus Convention), though the statutory guidance should take account of mechanisms by which public engagement can *practically* be included in the process of embedding S.D. in high level policy processes, particularly since at least some of these, as processes that generate policy, will not be covered by the SEA directive.

The white paper states that the duty will fall principally on the strategic decision making processes in each organisation but the decisions that emerge from these processes will not themselves be subject to the duty, nor will the outcomes that each organisation must achieve be prescribed, though they must be clearly set out [2.21]. We suggest that the measurement of progress towards outcomes should be an essential element of the duty itself and should not be included only as an "expectation" [2.22]. Further we consider that the only workable means of measuring progress toward outcomes will be through a system of indicators. Whilst it is important that the public bodies develop these indicators themselves, we consider that they should have a statutory duty to do so. The duties of the Audit Committee should extend to considering the quality of these indicators as part of its process audit. Without this additional requirement it might be possible for an organisation to demonstrate that consideration of the four elements of well-being was incorporated into

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strategic processes and that they had identified clear outcomes (and thereby discharge the duty) without being required to demonstrate an operative and functional link between the two.

The white paper mentions in passing [2.38] the current obligation of the Welsh Government to “promote sustainable development” in s.79 of the GWA and suggests that this might need to change to “consider the economic, social, environmental and long-term well-being of Wales”. A duty that ‘requires [the government] ... to consider’ seems to us rather less compelling than one that requires the government to ‘promote’. Moreover, most legislative duties require the duty holder ‘to promote’ or ‘to contribute to’. Hence we suggest that one of these more robust alternatives should be adopted.

Question 2.

What are your views on the proposals for an independent sustainable development body?

Though we broadly welcome the creation of the independent body, we also have some concerns that its remit is rather broad and that there is a possibility of conflict between its responsibilities for providing support and guidance and being a ‘critical friend.’ How can the body be a critical friend to the Welsh Government if the latter approves its work programme and strategic priorities? Could this body, for example, adopt a stance against wind farms in opposition to government policy? The critical friend aspect in particular should be explicitly included in the objectives of the organisation as an essential part of its role. We also suggest that in addition to the independent body’s function in supporting the public sector, it should also provide advice and guidance on best practice to the private sector? This might be achieved in conjunction with other bodies dedicated to sustainable development practice in wider society such as Cynnal Cymru. This we consider particularly important given that private bodies that provide public services (such as Dŵr Cymru) are not to be included within the bodies subject to the duty.

We have some concerns -- based on remarks in [3.19] and [3.20] of the white paper -- about the degree of independence the body will enjoy. Whilst the body must clearly be accountable for its use of public funds we fear that the body’s independence may be compromised if its ‘work programme and strategic priorities’ (though set independently) are unduly constrained by the outcomes the government requires [3.20]. This might diminish

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the body's ability or willingness to act as a 'critical friend' to government. After all, the Welsh Government is one of the bodies to whom the sustainable development duty applies.

Question 3.

What are your views on the proposed phasing and implementation of the duty, including the timing of the establishment of the independent sustainable development body?

Paragraph [4.5] of the white paper mentions the barriers to embedding sustainability that were revealed by the first consultation exercise but makes no mention of what these barriers might be. More detail in this respect might have been useful and would perhaps have allowed a more meaningful response on the implementation.

The list of affected organisations responsible for delivering public services in Wales excludes any private entities that might have this function. We wish to reiterate our concern that the private sector appears exempt from the duty (at least directly). The utility companies arguably have the most significant impact in the country on sustainable development and in that sense are far more important than, for example, the fire service. We appreciate that the Welsh Government's direct control of these bodies may be limited but some attention to the applicability of the duty across both sectors in Wales would seem appropriate given the Government's intention that the duty should become a central organising principle.

Question 4.

What are your views on the proposals to improve the accountability framework for sustainable development in Wales?

We understand that ensuring accountability in respect of the duty falls principally (though not exclusively) to the Auditor General for Wales as "the most effective way to deliver clear accountability and robust scrutiny is to embed it within the frameworks already in place for public service organisations" [5.3]. The new independent body will liaise with the AGW [3.28 & 3.29] but will not have any role in assuring accountability itself. This would seem consistent with the goal of not adding to bureaucracy and would comply with UKELA's stated preferences for coherence and integration in that an existing accountability

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mechanism is to be used rather than creating an additional one. It might also lessen the possibility of agency capture since the advisory role will fall to the new independent body and the accountability function to the AGW, thereby avoiding a clear conflict of roles?

However, much will depend on the accountability processes to be employed.

It is envisaged that the AGW will amend the Code of Audit Practice to incorporate 'how the AGW proposes to carry out the audit and the principles to be applied' [5.9]. It is stated [5.9] that the AGW will be expected to scrutinise the extent to which organisations have complied with any statutory guidance published by the Welsh Government. This is well and good so far as it goes. However it is striking that there is no indication of what happens if an organisation is found wanting in the extent of its compliance. We would like to see more detail on what will happen in this eventuality. If the AGW simply reports her/his concerns to the Welsh Ministers we are concerned that this may not be enough to ensure the embedding of S.D. as the central principle of governance. Neither are we convinced that this mechanism will be close enough to the people of Wales to amount to public accountability in the fullest sense since the reports of the Audit Office will probably not attract sufficient public attention. Since the S.D. indicators (particularly headline indicators) will be most significant in the assessment of progress towards sustainable development we suggest that the Audit Office should strive to ensure the quality of these. Furthermore the Audit Office should ensure that indicators are clearly linked to procedures for considering sustainable development in corporate planning.

Question 5.

We have asked four specific questions. Do you have any related issues which we have not specifically addressed, for example with regards the implementation of the proposals? Please use the consultation response form to express your views.

UKELA has no addition issues to raise.

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