



## **RESPONSE TO DEPARTMENT FOR BUSINESS INNOVATION & SKILLS CONSULTATION ON A DUTY ON NON-ECONOMIC REGULATORS TO HAVE REGARD TO GROWTH**

### **INTRODUCTION**

1. The UK Environmental Law Association (UKELA) 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 and formulation of environmental law in the UK and European Union. UKELA attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.
2. 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 working parties concerned with planning & sustainable development, Wales and Scottish Law.
3. UKELA makes the following comments on the proposed duty for non-economic regulators to have regard to growth. The comments are specifically concerned with the impact of the duty on environmental regulators.

### **Short consultation period**

4. UKELA is concerned at the short amount of time given to respond to this important consultation. This short consultation period – which has coincided

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with the Easter holidays – has meant it has not been possible to garner views from the wider membership; nor has there been the time to prepare a detailed response that addresses all the questions.

### **Effect of the proposals on environmental regulators**

5. Nonetheless, UKELA makes the following brief points about how the proposals could affect environmental regulators.
6. One of UKELA's principal aims is to make the law work for a better environment. Our key concern with the proposed duty is that it overlaps with other current and proposed environmental laws and policies in a way that could weaken or undermine them. This could give rise to a risk of:
  - policy and legislative fragmentation – where relevant duties are spread across a range of legal and policy instruments and interact in sometimes complex ways, making the law less transparent and more incoherent or even inconsistent. This kind of fragmentation, and the general problems it gives rise to, are examined further in UKELA's research report *The State of UK Environmental Law in 2011-12* (copy available at [www.ukela.org/aim5](http://www.ukela.org/aim5)). One of the issues highlighted in that report is the way that devolution adds a further layer of complexity that needs to be better understood and managed. That is a particular issue here, given Welsh proposals for a sustainable development duty and Scottish proposals for all Scottish regulators, including SEPA, to be required to 'contribute to achieving sustainable economic growth'.
  - confusion that could make regulators less effective – where there is a lack of clarity about how to discharge their duties;

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- policy cannibalism – where the proposed duty could undermine other environmental laws and policies;
  - increased litigation – it is unclear what weight should be given to 'growth' in this context, and therefore, by trying to comply with the proposed duty, regulators may be exposed to greater risk of judicial review by dis/applying the duty in a way that is arguably inconsistent with other duties or policies (and are alleged to act *ultra vires*, for example). This includes the risk of infringement proceedings brought by the European Commission, should regulators apply the new duty in a way that is inconsistent with duties under European law.
7. We have set out below examples of areas of potential overlap or conflict. In each case, the current/proposed laws already address the question of how regulators should approach economic considerations. Given this context and the risks identified above, UKELA cautions against simply adding a new, different duty.
8. Rather, UKELA considers that present policies and laws promoting sustainable development already ensure that environmental regulators give due consideration to promoting economic growth. The sustainable development concept allows economic growth to be considered alongside and balanced against other issues that are relevant to regulatory decisions, in a way that is workable and meaningful. The concept is well understood and articulated in law, and consistent with the UK's European and international obligations.

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## Examples of areas of potential overlap or conflict

9. A key issue is how the proposed duty would relate to present and proposed sustainable development duties and policies, including:
- overarching UK government policy of ensuring policies and activities contribute to sustainable development. See <https://www.gov.uk/government/policies/making-sustainable-development-a-part-of-all-government-policy-and-operations>
  - duties on the Environment Agency, in particular section 4(1) of the Environment Act 1995
    - Section 4(1) makes it the Environment Agency's 'principal aim ... (subject to and in accordance with the provisions of [the EA1995] or any other enactment and taking into account any likely costs) in discharging its functions so as to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development...'
10. In the words set out on the Defra website, 'sustainable development means encouraging economic growth while protecting the environment and improving our quality of life - all without affecting the ability of future generations to do the same'. Adding a duty to have regard to growth to the various sustainable development duties and policies noted above could at best amount to unnecessary duplication by simply restating one of the considerations that already has to be taken into account. At worst, it could distort or undermine the proper operation of the sustainable development

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policy by suggesting that undue weight should be given to economic considerations.

11. Relevant legislation in the devolved administrations that needs to be considered includes:

- the proposed sustainable development duty under the Welsh Sustainable Development Bill. This already requires that organisations providing public services have regard to economic and environmental well-being. UKELA has pointed out to the Welsh Government the conflict of interests that this might give rise to (see consultation responses at <http://www.ukela.org/wales>). Should the present proposed duty to have regard to economic growth also apply (see further below), it would exacerbate that conflict still further.
- the proposed duty on all Scottish regulators, including the Scottish Environment Protection Agency (SEPA), 'to contribute to achieving sustainable economic growth'. This is set out in the Regulatory Reform (Scotland) Bill (currently clause 4(1)): available at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/61582.aspx>. Clause 38 also inserts a new section 20A into the Environment Act 1995 requiring SEPA to contribute to achieving sustainable economic growth. UKELA has some concerns about the Scottish proposals, which it has raised in consultation with SEPA and the Scottish Government: see October 2012 and January 2013 consultation responses at <http://www.ukela.org/scotslawwp>. Principally, UKELA is concerned that the notion of 'sustainable economic growth' is not well understood, unlike the present

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sustainable development duty. In any event, 'sustainable economic growth' must be a different concept from 'economic growth'.

12. In relation to Scotland and Northern Ireland, the BIS proposal accepts that any duty could not apply to regulatory functions which are 'devolved' in the case of Scotland or 'transferred' in the case of Northern Ireland. Whilst this limits the scope for overlap and confusion between the proposed duty to have regard to economic growth and the proposed duty on Scottish regulators to contribute to achieving sustainable economic growth, there could still be practical difficulties: for example where SEPA needs to work closely with the Environment Agency to regulate cross border activities, or for regulators that operate UK-wide.

13. In relation to Wales, the consultation document does purport to make the duty apply except for 'regulatory functions exercisable only in or as regards Wales'. This difference with the position for Scotland and Northern Ireland reflects the somewhat unbalanced nature of the devolution settlement as regards Wales and it may be very difficult in practice to determine which regulatory functions are exercisable only in Wales. To take environmental regulation, even with a separate single environment agency for Wales (Natural Resources, Wales) the regulatory functions would generally owe their origin to legislation that applies equally to England and Wales, rather than functions capable of being exercised only in Wales. On one interpretation, then, the proposal could be construed as applying this duty to the Welsh Government's new regulators. This could cause difficulties due to potential conflict or overlap with future sustainable development duties (noted above, paragraph 11). Further, we wonder whether this would be a politically palatable outcome for the Welsh Government.

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## **Brief answers to the first two consultation questions**

*Question 1: Should primary legislation be used to introduce a duty for regulators to have regard to growth and the economic impact of their actions?*

14. No, at least as regards environmental regulators. This is unnecessary and could give rise to the kinds of problems noted above.

*Question 2: Is there an alternative means by which these objectives, described in paragraphs 2.1 to 2.6 above, could be achieved? Sustainable development means encouraging economic growth while protecting the environment and improving our quality of life - all without affecting the ability of future generations to do the same.*

15. The sustainable development duty on environmental regulators already provides for due consideration to be given to growth and economic impacts, as noted above.

16. There has not been sufficient time to address the other consultations specifically, but the introductory comments are relevant.

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