

Gethin Thomas: Back to the Wellbeing of Future Generations Bill

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On 24 March 2020, the [Wellbeing of Future Generations Bill 2020](#) was [introduced into the House of Commons, for its first reading, by Caroline Lucas MP](#). The Bill had been introduced into the House of Lords on 21 October 2019, by Baroness Jenny Jones, on behalf of Lord John Bird (who is best known as the founder of Big Issue). Whilst the Bill is not supported by the Government, it has garnered cross party support, and the Bill's [co-sponsors are drawn from all of the major UK political parties](#).

During her speech, Ms Lucas observed that:

[i]t is essential to deal with

coronavirus as it is—a global emergency—but it is clear we must work harder to predict and prepare for the existential risks we face. Not only the threat of pandemics, but the climate crisis

The Bill would essentially make the provisions of the trailblazing [Well-being of Future Generations \(Wales\) Act 2015](#) (“the 2015 (Wales) Act”) apply UK-wide, with a few significant changes that I consider further below.

Key concepts

By way of an overview, the Bill would make provision for requiring public bodies to act in pursuit of the environmental, social, economic and cultural well-being of the United Kingdom in a way that accords with the ‘future generations principle’. It would also require public bodies to establish and meet well-being objectives and report on these and their actions.

The Bill defines its key concepts in substantively identical terms to the 2015 (Wales) Act:

- ‘Sustainable development’ is defined, in clause 2, as the process of improving the economic, social, environmental and cultural well-being of the United

Kingdom by taking action, in accordance with the future generations principle, aimed at achieving the well-being goals.

- In clause 3, the 'future generations principle' is that the needs of the present are met without compromising the ability of future generations to meet their own needs.

One of the differences in the draft Bill as introduced in the Commons, compared to the draft as introduced in the House of Lords in October last year, is the deletion of defined well-being goals within the Act, and their replacement by a process of consultation, which would expressly lead to a Citizens' Assembly that must make recommendations on the final wellbeing goals, to be implemented by secondary legislation. The public consultation and Citizens' Assembly must be concluded within nine months of this Act coming into force.

New obligations

Each public body must carry out sustainable development. The action a public body takes in carrying out sustainable development must include:

- setting and publishing objectives ("well-being objectives") that are designed to maximise its contribution to achieving each of the wellbeing goals (and each government department would need to set and publish its own well-being objectives as

well),

- meeting, in the exercise of its functions, its well-being objectives.

In fulfilling its wellbeing duty, a public body would be obligated to take account of the following things:

(a) the importance of balancing short-term needs with the need to safeguard the ability to meet long-term needs, especially where things done to meet short-term needs may have detrimental long-term effect;

(b) how deploying resources to prevent problems occurring or getting worse may contribute to meeting the body's wellbeing objectives, or another body's objectives;

(c) the importance of deploying resources to undertake long-term planning;

(d) the need to forecast and manage emerging risks that may undermine the body's wellbeing objectives, or another body's objectives.

Moreover, a public body would be required to publish future generations impact assessments when publishing a proposed policy change, and to report on and seek to increase their preventative expenditure.

Commissioner for Future Generations

Finally, the Bill would also establish a Commissioner for

Future Generations for the United Kingdom to advise, assist and oversee public bodies in doing things in accordance with the Act. The Commissioner would promote the needs of future generations by monitoring and reporting on the extent to which public bodies are setting and seeking to meet their well-being objectives in accordance with the future generations principle.

The Commissioner would also have a broad power to carry out ad hoc reviews of public bodies, to assess the extent to which they are meeting its well-being duties, and complying with its well-being objectives. In conducting a review, the Commissioner may make recommendations to the public body as to: (i) the steps that the body has taken or proposes to take to meet its well-being objectives, and (ii) how to set well-being objectives and take steps to meet them in accordance with the future generations principle. The Commissioner must publish a report of a review (including any recommendations made), and send a copy of it to the Secretary of State.

The Bill would also provide for the establishment of a Joint Parliamentary Committee on Future Generations. The Bill itself does not set out any clauses pertaining to the powers and functions of this committee. However, during the course of its introduction in the House of Commons, Ms Lucas MP explained that its functions are intended to be (at least), 'to scrutinise legislation for its effect on future generations, to hold Ministers to account

for short-term decision making and to report on future trends...’ There are currently only three Joint Committees which meet on a regular basis, on: (i) human rights, (ii) national security strategy, and (iii) statutory instruments. The Joint Committee on Human Rights provides a likely blueprint, as it scrutinises every Government Bill for its compatibility with human rights in a way that would be expected of legislative scrutiny by a Joint Parliamentary Committee on Future Generations.

Enforcing breaches

The key difference between the Bill and the 2015 (Wales) Act is that the Bill would provide an express legal right, exercisable by ‘a person’, to bring proceedings against a public body on the grounds that it has acted (or proposes to act) in a way which breaches its ‘future generations’ obligations, in the High Court. There are no particular standing requirements prescribed in the Bill, restricting who could bring such proceedings. As drafted, the Bill would afford a one year limitation period (which would be considerably longer than the 3 month judicial review longstop).

Under the 2015 (Wales) Act, the strongest remedial process that the Commissioner for Future Generations can employ is to conduct a “section 20” review, into the extent to which a public body is safeguarding the ability of future generations to meet their needs, by taking account of the long term impact of things the body does.

For example, the [Commissioner has very recently announced a section 20 review into the procurement practices of nine public bodies in Wales](#), including the Welsh Government, a number of specific county councils, the National Library of Wales, the Velindre NHS Trust, and Cardiff and Value University Health Board. The review follows a 6 month research project undertaken by the Commissioner's team, in partnership with Cardiff University, as to how the 2015 (Wales) Act is informing commissioning and procurement across all 44 public bodies in Wales covered by the legislation. The findings of the section 20 review will be published in July 2020.

Under the new proposals contained in the Bill, in relation to any act (or proposed act) of a public body which the court finds is (or would be) a breach of its obligations, the Court may grant such relief or remedy, or make such order within its powers, as it considers just and appropriate. This is an extremely broad remedial discretion. In particular, a court may, in having regard to guidance published by the Commissioner, impose a fine, payable to the Commissioner, in an amount prescribed by regulations made by the Secretary of State. Moreover, the Bill also provides for the direct referral of a case of an alleged breach for investigation to the Commissioner.

Lessons from Wales

The main provisions of the 2015 (Wales) Act came into force in 2016. Public bodies were required to set their

first well-being objectives by April 2017. As the 2015 (Wales) Act did not provide for any legal mechanism by which its provisions could be enforced, it is not possible to concretely assess the impact of the Act by reference to specific instances of demonstrable breaches being directly remedied. Its success has to be judged against less tangible benchmarks. Has the 2015 (Wales) Act begun to influence and change the behaviour of public bodies, as intended?

In May 2018, the Wales Audit Office [published its assessment](#) of how public bodies in Wales responded to the 2015 (Wales) Act. Overall, the Auditor General concluded that public bodies supported the principles of the Act, and were taking steps to change how they work. For example, some public bodies began to integrate 'well-being impact assessments', addressing sustainable development, into their planning and decision-making processes. However, cultural and behavioural change is challenging to effect, as well as measure, and in any event, will be a gradual process.

The Auditor General will be undertaking further work to assess the impact of the 2015 (Wales) Act, by examining the 44 bodies within its scope, and assessing how those public bodies are meeting their well-being objectives, and applying the sustainable development principle. The Auditor General's report is due to be laid before the National Assembly for Wales later this year.

Future generations, sustainable development and climate change

Climate change is arguably the greatest threat facing future generations. The measures proposed in the Bill could complement and facilitate the achievement of the 'net zero' target prescribed in [section 1 of the Climate Change Act 2008](#), to ensure that the net UK carbon emissions for the year 2050 is 100% lower than the 1990 baseline.

Indeed, in Wales, the Future Generations Commissioner has taken an active role in promoting climate change awareness. For example, in June 2019, the Future Generations Commissioner for Wales published [a ten point plan](#) to fund Wales' climate emergency, with suggestions as to how the Welsh Government can make budgetary commitments to meet carbon emission reduction targets.

Moreover, the obligation on public bodies to carry out sustainable development, which is very broadly defined in the Bill, would provide a statutory hook upon which policies and functions can be subjected to a rigorous assessment of sustainability. 'Sustainable development' is not a novel statutory concept. It is regularly employed in the planning context, and is a core tenet of the [National Planning Policy Framework](#). Moreover, for example, under the Planning Act 2008, the Secretary of State must, when designating or reviewing a national policy statement

under that Act, do so with the objective of contributing to the achievement of sustainable development (see also the [Planning and Compulsory Purchase Act 2004, s 39](#)). The Divisional Court made the following observations of the concept of sustainable development in [R. \(on the application of Spurrier\) v Secretary of State for Transport](#) [2019] EWHC 1070 (Admin) (the judicial review of the airports national policy statement favouring the development of a third runway at Heathrow airport), at para 635:

Sustainable development" is not defined in the CCA 2008; but it is an uncontroversial concept. Paragraph 7 of the National Planning Policy Framework (July 2018) ("the NPPF"), adopting the definition used in Resolution 42/187 of the United Nations General Assembly ("the Brundtland definition") and in substance replicating the earlier version of the National Planning Policy Framework (March 2012), states:

... At a very high level, the objective of sustainable development can be summarised as meeting the needs of the present without compromising the ability of future generations to meet their own needs.

Although this decision was successfully appealed before the Court of Appeal, with the claimants succeeding in their argument that the Secretary of State failed to consider whether he could take account of the Paris Agreement, contrary to section 5(8) of the Planning Act 2008, the sustainability assessment was not, *per se*, deemed unlawful.

The Bill would apply the objective of sustainable development more widely across the public sector, beyond the planning system. It would impose a legally binding imperative to integrate a new focus on sustainable development, and the 'future generations principle', into the day to day functions of public bodies. The Bill's enforcement mechanism would provide a further means of challenge and accountability for non-compliance with the objective of sustainable development. This could help facilitate the achievement of the net zero target.

Future trends and future risks

The current Covid-19 crisis has thrown the importance of balancing short-term demands with the imperative of safeguarding the ability to meet long-term needs, whilst conserving resources, into sharp focus. It illustrates the importance of a broader, longer term approach to social planning. For example, [a report of the Health Foundation in March 2019](#) concluded that the inadequacy of investment in the NHS over the past decade has been the result of a short-termist approach, which risked patient care and staff productivity, even without the acute crisis inflicted on the UK's healthcare system by the pandemic.

The Bill would impose two obligations on the UK Government to address future trends and future risks within the first 12 months of a new government (either after a general election or the appointment of a new Prime Minister):

- First, the Secretary of State would be obliged to publish a "future trends report" that contained predictions and plans to manage likely long-term future trends concerning the economic, social, environmental and cultural well-being of the UK, including emerging and existential threats. This would mean that the Secretary of State's mind would be applied to considering the possible management of pandemics and climate change, among other potential threats, in advance.
- Secondly, the Secretary of State would also have to

publish a “national future risk assessment” that contains: (a) an assessment of risks, including environmental and global risks that may emerge or grow in the future, for at least the forthcoming 25 years, and (b) each department’s plans to manage and prepare for the identified future risks.

These two obligations are intended to improve the level of governmental preparation for existential risks, such as the current sudden pandemic. However, even if the production of these reports, and of departmental plans, resulted in relatively modest improvements (if any) in the actual preparedness of the UK Government for events such as the Covid-19 crisis, in terms of capital spending (for example), it would, at the very least, lead to an increase in awareness across government, the private sector, and indeed the general public, of particular existential threats, at a local and global level. It may also provide the opportunity to identify serious flaws and gaps in the UK’s ability to deal with, and weather, such risks if they materialised.

Conclusion

The Bill is a long way from reaching the statute book. Without gaining government backing, it may well never become law. The implementation of a new cause of action against public bodies, predicated on an open textured and broad obligation, to ensure the needs of the present are met without compromising the ability of

future generations to meet their own needs, would not be without its obvious practical challenges. It is also likely not to endear the Bill to the current government, which has already indicated [its desire to limit judicial review](#).

However, the ambition of the Bill is laudable. The implementation of the legally binding obligations contained in the Bill would impose the impetus and structure to facilitate *beginning* to consider addressing intergenerational inequality and sustainable development in a novel holistic way.

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