Environmental Law Review

Environmental Law Review
2016, Vol. 18(1) 41–56
© The Author(s) 2016
Reprints and permission:
sagepub.co.uk/journalsPermissions.nav
10.1177/1461452916631889
elj.sagepub.com
SAGE

The Well-being of Future Generations (Wales) Act 2015: Duties or aspirations?

Haydn Davies
Birmingham City University, Birmingham, UK

Abstract
In 2015, the Welsh Assembly passed the Well-being of Future Generations (Wales) Act making it the first legislature in the world to enshrine in law a duty, falling on public bodies, to safeguard the well-being of future generations. The well-being duty is based on the principle of sustainable development and encompasses economic, social, environmental and cultural factors. Public sector duties are nothing new but this is the first which concerns the welfare of stakeholders who do not yet exist and hence require a guardian, in the shape of the Future Generations Commissioner. This paper discusses the nature and scope of the well-being duty and the extent to which it is an enforceable legal duty as opposed to an aspirational political duty. It is concluded that the Well-being of Future Generations (Wales) Act has the potential to be a world-leading provision but its success in safeguarding the interests of future generations will depend heavily on the political will and the personalities of those tasked with holding public bodies to account.

Keywords
Sustainable development, well-being, Wales, future generations, legal duty, public law.

On 29 April 2015, the Well-being of Future Generations (Wales) Act received Royal Assent. This is a ground-breaking piece of legislation creating legal responsibilities which fall on the current generation, to safeguard the interests of future generations. The Welsh Assembly can legitimately claim to be the first legislature anywhere in the world to enshrine this responsibility in law.[1] The notion of safeguarding the interests of future generations derives from the definition of sustainable development itself; this has been the subject of considerable theoretical and philosophical interest in recent times.[2]

1. Sustainable development legislation falling short of creating an explicit duty towards future generations has been passed in some Canadian states (Manitoba and Quebec), some states in Australia (notably New South Wales), and in Malta and Hungary.
2. See, e.g., R. Hiskes *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press: Cambridge, UK, 2009) and P.Lawrence, *Justice for Future Generations: Climate Change and International Law* (Edward Elgar Press: Cheltenham, UK, 2014).

Corresponding author:
Haydn Davies, Birmingham City University, Curzon Building, 4, Cardigan Street, Birmingham, B4 7BD, UK.
Email: haydn.davies@bcu.ac.uk

This paper undertakes an analysis of the extent to which the Act creates actual enforceable duties and the extent to which those duties might be enforceable in practice. To that end, the paper is presented in six parts. Part One briefly traces the policy background to the Act in Wales together with an examination of the evolution of the bill during the legislative process. Part Two describes the textual structure of the well-being duty and the public bodies on whom it falls. A more detailed analysis of the duty as it falls on public bodies, Public Services Boards and local community councils follows in Parts Three and Four, together with an assessment of the extent to which each of these can be described as a legal duty as opposed to a procedural or 'political' duty.[3] Part Five examines the accountability and enforcement arrangements in the Act before some general conclusions are drawn in Part Six.

I: Summary of the legal mandate, policy background and legislative history.[4]

The Act originated in the duty imposed on the Welsh Ministers in (the then) section 79 of the Government of Wales Act 2006:

> (1) The Welsh Ministers must make a scheme ("the sustainable development scheme") setting out how they propose, in the exercise of their functions, to promote sustainable development. . . .[5]

In 2009, the Welsh Ministers' intentions in respect of a sustainable development scheme were laid out in *One Wales: One Planet, The Sustainable Development Scheme of the Welsh Assembly* Government.[6] This laid out a number of headline indicators for sustainable development, including well-being. Most significantly, this document clearly stated the Welsh Government's intention to make sustainable development the 'central organising principle' of governance in Wales.[7] In May 2012, the initial consultation document *Proposals for a Sustainable Development Bill* was published.[8] It set out, among other things, the proposal that the Welsh approach to sustainable development should be based around the concept of well-being, specifically environmental, social, economic and cultural well-being. It also proposed the creation of a 'Commissioner for Sustainable Futures' in Wales (an idea which was ultimately to come to fruition in the form of the Future Generations Commissioner). At this stage, the proposed bill was to be called the 'Sustainable Development Bill'. Following the white paper in December 2012 entitled *A Sustainable Wales Better: Choices for a Better* Future,[9] a bill was introduced to the Assembly under that name on 7 July 2014. It was originally introduced by Jeff Cuthbert, the then

3. H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 11th edn (Oxford University Press: Oxford, 2014), p. 499. Professor Colin Reid has characterised climate change duties created in s. 1(1) of the Climate Change Act 2008 in this vein: see C. Reid 'A New Sort of Duty? The Significance of "Outcome" Duties in the Climate Change and Child Poverty Acts' (2012) *Public Law*, October, 749–767 at 754.
4. A more detailed treatment of the early history of the Act may be found at H. Davies 'The Wales Sustainable Development Bill' (2013) 25 *Environmental Law and Management* 99–105. Full details of the legislative history may be found at: www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=10103&Opt=0 (last accessed 11 November 2015).
5. Though this version of s. 79 was itself amended by s. 16 of the Well-being of Future Generations Act 2015. Section 79(1) now reads 'The Welsh Ministers must, in the exercise of their functions, make appropriate arrangements to promote sustainable development.'
6. Available at: http://gov.wales/docs/desh/publications/090521susdev1wales1planeten.pdf (last accessed 5 November 2015).
7. Ibid. at 25.
8. Welsh Government 15440 'Proposals for a Sustainable Development Bill'. Available at: http://wales.gov.uk/docs/desh/consultation/120508susdevbillconsulten.pdf (last accessed 11 November 2015).
9. A Sustainable Wales Better Choices for a Better Future WG17030. Available at: http://wales.gov.uk/consultations/sustainabledevelopment/sdwhitepaper/?lang=en (last accessed 11 November 2015).

Minister for Communities and Tackling Poverty. However, following a government reshuffle in September 2014, responsibility passed to Carl Sargeant, AM, Minister for Natural Resources, who was to pilot the bill through to completion. However, in July 2013, the name of the bill was changed to the 'Future Generations Bill',[10] before finally being introduced as the 'Well-being of Future Generations Bill'.

The Act introduces a well-being duty on public bodies in Wales at a number of levels. Specific public bodies in Wales are subject to the duty individually, but they are also subject collectively through their participation in Public Services Bodies. Finally, a number of the larger (in financial terms) local community councils are subject to the duty, though in a somewhat 'lighter' form. The fundamental idea is that all these bodies should 'carry out sustainable development' through the medium of well-being objectives designed to achieve centrally defined well-being goals for the whole of Wales. These objectives must be set by the bodies themselves and all reasonable steps must be taken to meet them.

II: The structure of the well-being duty on public bodies

As stated, the well-being duty in the Act falls on 'public bodies'.[11] These are:

(a) the Welsh Ministers;
(b) a local authority;
(c) a Local Health Board;
(d) the following NHS Trusts–
  (i) Public Health Wales;
  (ii) Velindre;
(e) a National Park authority for a National Park in Wales;
(f) a Welsh fire and rescue authority;
(g) the Natural Resources Body for Wales;
(h) the Higher Education Funding Council for Wales;
(i) the Arts Council of Wales;
(j) the Sports Council for Wales;
(k) the National Library of Wales; and
(l) the National Museum of Wales.

The explanatory memorandum which accompanied the Act (revised in March 2015) indicated that the rationale for the selection of these public bodies was based on the extent of their funding, their activities and functions, and their status as 'auditable public authorities'.[12] The draft statutory guidance (out to consultation at time of writing) indicates that, initially at least, 43 public bodies in Wales will be subject to the well-being duty.[13]

10. See the ministerial statement of 17 July 2015 issued by Jeff Cuthbert AM, Minister for Communities and Tackling Poverty. Available at: http://gov.wales/about/cabinet/cabinetstatements/2013/futuregenerationsbill/?land=en (accessed 11 November 2015).
11. WBFA 2015, s. 6.
12. See Revised Explanatory Memorandum at [61]. Available at: www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IId=10103. To qualify as a 'public body' a body must: (i) be at least 50% publicly funded; (ii) undertake functions or activities that impact on the economic, social and environmental well-being of Wales or their local area; (iii) carry out strategic functions; and (iv) be an 'auditable public authority' as defined in Sch. 7 of the GOWA 2006. The WMs have the power to extend or reduce the list or amend the definition – see WFGA 2015, s. 52.
13. *Statutory Guidance for the Well-being of Future Generations (Wales) Act 2015,* (Llywodraeth Cymru/Welsh Government, 2015) WG25848, Consultation Document, at 5.

The well-being duty (WBD) requires that:

(1) Each public body must carry out sustainable development.
(2) The action a public body takes in carrying out sustainable development must include:
  (a) setting and publishing objectives ("well-being objectives") that are designed to maximise its contribution to achieving each of the well-being goals, and
  (b) taking all reasonable steps (in exercising its functions) to meet those objectives. . . .[14]

Clearly the duty depends on the definition of 'carrying out sustainable development'. This is defined as the *process* of

> . . . improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the wellbeing goals (see section 4).[15]

This contains elements of the classic Brundtland definition,[16] but the full meaning can only be ascertained when read in conjunction with the sustainable development principle:

> . . . any reference to a public body doing something "in accordance with the sustainable development principle" means that the body must act in a manner which

> . . . any reference to a public body doing something "in accordance with the sustainable development principle" means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs[17] . . . a public body must take account of [those things listed in s. 5(2)].[18]

The duty thus requires public bodies to undertake a *process* in accordance with a *principle* directed towards the achievement of particular *outcomes*. This is intended to accomplish the intentions of the Welsh Government, expressed in the consultation documents, to embed sustainable development as the 'central organising principle' of public governance in Wales.[19]

However, this duty, whilst requiring public bodies to embed processes 'aimed at achieving' the well-being goals, does not require that the goals themselves are achieved. The duty is to undertake a process, but not necessarily to achieve the ultimate outcome of that process. This comes as no surprise to those who have followed the development of this legislation as the Welsh Government made it clear during the consultation phase that achieving outcomes was never intended to be subsumed into the well-being duty to be imposed on public bodies.[20] It could be argued that this falls short of the recommendations of the OECD in respect of

14. WFGA 2015, s. 3. Depending on the nature and purpose of the body it may set objectives for the whole or part of Wales, WFGA 2015, s. 3(3)&(4).
15. Ibid. s. 2. The well-being goals are listed in s. 4, Table 1 as: A prosperous Wales; A resilient Wales; A healthier Wales; A more equal Wales; A Wales of cohesive communities; A Wales of vibrant culture and thriving Welsh language; A globally responsible Wales.
16. United Nations. Report of the World Commission on Environment and Development, *Our Common Future.* A/42/427 (1987). Ch. 2, para. 1.
17. WFGA 2015, s. 5(1).
18. Ibid. s. 5(2). This is further discussed in part 3.3 *infra.*
19. *One Wales, One Planet* (Welsh Assembly Government, May 2009) at p. 9. Available at: http://gov.wales/docs/desh/publications/090521susdev1wales1planeten.pdf.
20. *A Sustainable Wales Better Choices for a Better Future: Consultation on proposals for a Sustainable Development Bill.* WG17030 (3 December 2012), paras 2.23–2.25. Available at: http://gov.wales/docs/desh/consultation/121203asusdevwhitepaperen.pdf (last accessed 7 August 2015).

the guidelines for national strategies on sustainable development – these emphasise the setting of achievable targets (that is, outcomes) as well as processes.[21] The well-being duty does require the setting of objectives by each public body and the taking of all reasonable steps to meet them. However, it is entirely possible that 'reasonable steps' could be taken, without the objectives being achieved, still less the well-being goals themselves. This consideration leads naturally to a discussion of the precise legal nature of the duty.

III: The legal nature of the duty

3.1 The duty in overview

The full scope of the duty can only be understood by simultaneous reference to sections 2–5 of the Act, together with the statutory guidance (currently in draft).[22] Condensing those sections into a single concise statement is difficult but, in essence, it amounts to: a duty on public bodies to carry out sustainable development[23] by taking action[24] which seeks to ensure that the needs of the present are met, without compromising the ability of future generations to meet their own needs, by taking account of the sustainable development principle,[25] the five elements of which are aimed at achieving the well-being goals;[26] carrying out sustainable development must include the setting of objectives and the taking of all reasonable steps to meet them.[27]

This incorporates a number of substantive and procedural duties, the collective effect of which is not immediately evident. Moreover, there is a considerable body of administrative law underpinning the operation of statutory duties, especially those requiring public bodies to 'take account of',[28] 'to seek to ensure' and 'to take all reasonable steps'. Thus working out precisely what may be required of a public body in order to discharge the well-being duty is a far from straightforward undertaking, though the draft statutory guidance does address the requirements in much more detail. A discussion of some of the potentially applicable case law and its implications will follow. However, some further discussion of the language of section 3 is necessary first.

Section 3(1) requires a public body to 'carry out sustainable development' and sections 2 and 5 indicate that this must include taking account of the sustainable development principle. Section 3(2) states that carrying out sustainable development *must include* (emphasis added) the setting of well-being objectives and the taking of all reasonable steps to meet them. The words 'must include' are mandatory, but not exclusive, and suggest that other means of carrying out sustainable development (in accordance with the sustainable development principle) might also fall within section 3(1). However, it seems that no other means are, in fact, envisaged as discussed below. Equally, a public body, which sets well-being objectives

21. *Good Practices in the National Sustainable Development Strategies of OECD Countries.* Organisation for Economic Cooperation and Development, 2006. pp. 11–13. Available at: www.oecd.org/greengrowth/36655769.pdf (last accessed 7 Aug 2015).
22. *Statutory Guidance for the Well-being of Future Generations (Wales) Act 2015,* (Llywodraeth Cymru/Welsh Government 2015) WG25848, for which the consultation period closed on 16 November 2015, is in five parts: Consultation Document; SPSF1 – Core Guidance; SPSF2 – Individual role (Public Bodies); SPSF3 – Collective role (public service boards), together with Collective Role (Annex A) and Collective Role (Annex B); and, SPSF4-Collective Role (Community Councils). At time of writing these are available at: http://gov.wales/consultations/people-and-communities/shared-future-shared-purpose/?lang=en (last accessed 17 September 2015).
23. WFGA 2015, s. 3(1).
24. Ibid. s. 2.
25. Ibid. s. 5.
26. Ibid. s. 4.
27. Ibid. s. 3(2).
28. This is generally considered synonymous with 'have regard to' see entries under 'H' in the Westlaw Key Concepts Library (Available in the 'Legislation' section of Westlaw UK).

and takes all reasonable steps, – thereby attempting to discharge the duties in section 3(2) – may nevertheless be held to have failed to have 'carried out sustainable development' – under section 3(1) – because the objectives and steps taken fail to take sufficient account of the sustainable development principle. Other sections in Part 2 of the Act suggest that this outcome was intended.[29] In particular, the powers of the Auditor General of Wales to report on the performance of public bodies in respect of the well-being duty are exercised by:

> . . . assessing the extent to which a body has acted in accordance with the sustainable development principle when–
>
> (a) setting well-being objectives, and
> (b) taking steps to meet those objectives . . . [30]

This language strongly suggests that acting in accordance with the sustainable development principle can only be satisfactorily demonstrated (in the legal compliance sense) by the setting of well-being objectives, *and in no other way*. This conclusion is further bolstered in the draft statutory guidance, which discusses the observance of the sustainable development principle exclusively in the context of the setting of well-being objectives and reporting on the extent of their being achieved.[31]

Nonetheless, it is suggested that the intention of the legislature may better have been captured with the use, in section 3(2), of the term 'consists of' or 'comprises' instead of 'must include' since it is clear from the rest of the Act and the draft statutory guidance that the setting of objectives in line with the sustainable development principle is the *only* mechanism envisaged by which the duty can be discharged.

3.2 The requirement to set well-being objectives which maximise contribution to the well-being goals

Further information on the scope and intention of the duty was issued in the Revised Explanatory Memorandum to the Act.[32] This envisaged ' . . . public bodies seeking to achieve the well-being goals, *by meeting the well-being objectives they set* pursuant to the sustainable development duty' (emphasis added) which further supports the conclusion reached in the previous paragraph.[33] The draft statutory guidance for public bodies makes it clear just how close the connection is between setting well-being objectives and the well-being goals. For example, a public body must design its well-being objectives so as to 'maximise the contribution . . . to achieving each of the well-being goals',[34] and to 'examine what it can do in working towards achieving the well-being goals and taking all reasonable steps to do so'.[35] However, it must be said that these aspirations are not very accurately reflected in the duty as rendered in the Act itself where public bodies must 'take all reasonable steps to meet the objectives' rather than being subject to an unqualified *requirement* to meet them. Moreover, there is no explicit statutory requirement on public bodies of either

29. For example, the reporting requirements in WFGA 2015, ss 7–9, 12 and 13 all refer exclusively to well-being objectives rather than any wider conception of 'carry[ing] out sustainable development'.
30. WFGA 2015, s. 15.
31. See, e.g., SPSF1 – Core Guidance above n. 22 at [19]–[23] and Diagram 3 (p. 9), [22] states that 'the setting of well-being objectives should be the *primary way* (emphasis added) in which a public body sets priorities. See also SPSF2 – Individual role (Public Bodies) above n. 22 at [3]–[22].
32. Well-Being of Future Generations (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes. (Welsh Government, March 2015).
33. Ibid. para.68.
34. See SPSF2 above n. 22 at [3].
35. Ibid.

'seeking to achieve', or 'working towards achieving' the well-being goals, though there is a requirement 'to contribut[e] to the achievement of' the well-being goals in that a public body must:

> set ... and publish ... objectives ("well-being objectives") that are designed to maximise its contribution to achieving each of the well-being goals ... [36]

and:

> publish a statement–
>
> (a) explaining why the body considers that meeting the objectives will contribute to the achievement of the well-being goals;[37]
>
> ...

The question is whether these two requirements are equivalent to 'seeking to achieve the well-being goals'. The phrase 'seeking to achieve' and its congeners occurs relatively frequently in public law, though it is not defined or elaborated upon in statutory guidance.[38] Nor is there any directly relevant case law which has addressed the precise meaning of the phrase,[39] hence it is appropriate to give its meaning in ordinary usage. Its use is invariably in the context of a public body exercising its best endeavours to bring something about without necessarily being able to do so. Hence, it is not a duty to 'achieve', but it could be said to be a duty to 'endeavour to achieve'.[40] However, the statutory language of the WBD concentrates almost exclusively on the well-being *objectives* rather than the goals, as does the draft statutory guidance. A public body discharges its duty by publishing well-being objectives (together with an explanation of how they are designed to contribute to the well-being goals) and then taking all reasonable steps to meet them. Thus, it is far more accurate to suggest that the WBD requires, as a matter of law, that a public body must seek to achieve its well-being objectives rather than the well-being goals. A public body must clearly maximise its contribution to achieving the well-being goals, but it is suggested that this is one step removed from being required to 'seek to achieve the well-being goals'. That this is a more accurate rendition is suggested by the fact that the draft statutory guidance recognises that 'different public bodies will have greater capacity and capability to contribute to achieving some or all of the well-being goals than others'; seeking to achieve each of the well-being goals may not, in fact, be possible for every public body.

Thus, the legal essence of the WBD is, in the author's view, encapsulated in the requirements to set objectives in line with the sustainable development principle – which maximise the public body's contribution to appropriate well-being goals – and to take all reasonable steps to meet them. It is considered that any legal challenges relating to a public body's endeavours in this regard are likely to relate principally to those issues, rather than to the extent to which a public body has sought to achieve the well-being goals themselves. The latter, it is suggested, is a collective endeavour spread across all the institutions of Welsh government and probably not directly amenable to legal challenge.

36. WFGA 2015, s. 3(2)(a).
37. Ibid. s. 7.
38. See, e.g., s. 43(3) of the Care Act 2014, which sets out the way in which a Safeguarding Adults Board must *seek to achieve* its objective 'to help and protect adults in its area ... ' Section 100(10) requires that Health Education England 'must *seek to achieve*' the objectives which is required to set under s. 100(4). Section 4(3)(b) requires that a local authority 'must *seek to ensure*' the adequacy of financial advice it supplies to adults 'relevant to the meeting of needs for care and support' (s. 4(3)9a)).
39. The phrase appears in more than 1,200 cases but, as far as the author has been able to discover, in none of them has the phrase been defined or subjected to judicial explanation.
40. Though it does appear to mean something different from 'take all reasonable steps' to achieve – see below

3.3 The requirement to carry out sustainable development through observance of the sustainable development principle

The sustainable development principle requires that public bodies (and public services boards[41]) 'must take account' of:

(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) the need to take an integrated approach, by considering how–
  (i) the body's well-being objectives may impact upon each of the well-being goals;
  (ii) the body's well-being objectives impact upon each other or upon other public bodies' objectives, in particular where steps taken by the body may contribute to meeting one objective but may be detrimental to meeting another;
(c) the importance of involving other persons with an interest in achieving the well-being goals and of ensuring those persons reflect the diversity of the population of–
  (i) Wales (where the body exercises functions in relation to the whole of Wales), or
  (ii) the part of Wales in relation to which the body exercises functions;
(d) how acting in collaboration with any other person (or how different parts of the body acting together) could assist the body to meet its well-being objectives, or assist another body to meet its objectives; and
(e) how deploying resources to prevent problems occurring or getting worse may contribute to meeting the body's well-being objectives, or another body's objectives.[42]

As stated above, the term 'take account of' is considered equivalent to 'have regard to' – a phrase which has given rise to a considerable body of case law. Where a duty is simply to 'have regard', a public body *must* consider all the specified matters – failure to do so will be grounds for judicial review of the decision; this arises quite commonly in the context of planning law.[43] However, provided that the decision maker has considered all of the specified matters, the weight to be accorded to each is a matter for the decision maker, not the court.[44] The draft statutory guidance makes it clear that 'only when a public body can demonstrate that it has taken into account the sustainable development principle in the setting, taking steps and meeting of its well-being objectives will it be compliant with the Act'. This statement, it is suggested, is an accurate and helpful summary of the case law principles alluded to above, though it might go too far in implying that a public body *must* meet its well-being objectives since what is actually required is that 'reasonable steps' are taken to meet them – a rather less onerous requirement. Certainly, though, any public body which fails, for instance, adequately to consider 'taking an integrated approach' to the economic, environmental, social and cultural effects of its decisions, can expect to be in receipt of recommendations by the Future Generations Commissioner, a negative appraisal by the Auditor General of Wales or, ultimately, an unfavourable judicial review.

41. See below.
42. Section 5(2), WFGA 2015. Extensive clarification of what these five elements mean in practice for public bodies is to be found in the draft statutory guidance. See SPSF1 above n. 22 at [31]–[57] and SPSF2 above n. 22 at [2].
43. See, e.g., the Town and Country Planning Act 1990, s. 70 which imposes on decision makers the duty to have regard to the statutory development plan and to all material considerations. A recent example of the application of this duty may be found in *Thomas Allen* v *Secretary of State for Communities and Local Government, Bedford Borough Council* [2015] EWHC 2463 (Admin) at [27].
44. Ibid.

Where the duty is to have 'due regard to', the case law clearly indicates that specified matters receive such attention as is 'appropriate in all the circumstances'[45] but that having to exercise due regard is not to be equated to a duty to achieve a result.[46] A useful summary of the applicable principles 'in the fields of race, sex and disability' was provided by Lang J in *R (JM and NT) v Isle of Wight Council*[47] where section 49A of the Disability Discrimination Act 1995 required public authorities to have due regard to six 'needs'. For example, a relevant public authority had a duty to have 'due regard to ... the need to eliminate discrimination that is unlawful under this Act'.[48] This did not require the authority to eliminate discrimination, but rather to adopt a 'substantial rigorous and open-minded approach' in addressing, *inter alia*, the *need* to eliminate discrimination.[49] Moreover, this had to be an *ex ante* engagement before any decision was made rather than a 'rearguard action following a concluded decision'.[50]

It remains to be seen whether the administration of the WBD and its imposition of the requirement to take account of the elements of the sustainable development principle outlined above is to be guided by the case law on 'have regard' or 'have due regard', but the latter seems more likely given the obvious commonalities between the equality duties and the WBD. In both cases the duty stops short of a requirement to achieve a set outcome (equality or well-being) but requires that account is taken of a prescribed set of criteria when making decisions (in the case of the equality duties) and setting objectives (in the case of the WBD). Given the complexity of the considerations in setting well-being duties, and the wide range of public bodies upon whom the duty falls, it is very likely, in the author's view, that a degree of consideration which is 'appropriate in all the circumstances' will be the preferred standard. Of course, it should be noted that all of the public bodies that are subject to the well-being duty in Wales, will be required, in the course of discharging the duty, to take account of the public sector equality duty as an element of the 'integrated approach'. This is one of the five elements of the sustainable development principle.[51]

3.4 All reasonable steps

Neither the act itself, the revised explanatory memorandum, nor the draft statutory guidance defines what is meant by 'all reasonable steps'. Where it is mentioned, it is invariably followed by reference to the five elements of the sustainable development principle. This does no more than to indicate what factors are to be taken into account when taking steps but is no guide to what is 'reasonable'. The draft statutory guidance does allude, under the title 'Meeting well-being objectives' to 'a limit to the amount of finance, people, time and assets ... available' in such a way as to imply that it might be unreasonable to expect a well-being objective to be met if any of these factors were lacking.[52] Unfortunately, this is followed by the statement

45. *R (Redcar and Cleveland Independent Providers Association and others)* v *Redcar and Cleveland Borough Council* [2013] EWHC 4 (Admin) at [36] (quoting Dyson LJ in *Baker* v *Secretary of State for Communities and Local Government* [2009] PTSR 809 at [30]). On the distinction between 'have regard to' and 'have due regard to' see comments of Justice Davis in *R (on the application of Meany)* v *Harlow DC* [2009] EWHC 559 (Admin) at [50]. The nature of duties to have 'due regard to' in the context of discrimination legislation is discussed by S. Fredman in 'Positive Duties and Socio-economic Disadvantage: Bringing Disadvantage onto the Equality Agenda' (2010) 3 *European Human Rights Law Review* 290–304 at 300–303; S. Fredman 'The Public Sector Equality Duty' (2011) 40(4) *International Law Journal* 405–427 at 419–424.
46. *Baker* v *Secretary of State for Communities and Local Government* [2009] PTSR 809 at [31].
47. [2011] EWHC 2911 (Admin) at [95]–[105].
48. Disability Discrimination Act 1995, s. 49A(1)(a). Note that these provisions were replaced in 2011 by the public sector equality duty introduced by s. 149 of the Equality Act 2010.
49. Above n. 22 at [99].
50. Ibid. at [102].
51. See SPSF2 above n. 22 at [37]–[43].
52. Ibid. at [17].

that 'the consideration of these factors needs to be reviewed through the five ways of working provided by the sustainable development principle balanced with the contribution made by the well-being objectives' – which adds very little indeed in terms of clarity.

Case law does provide some guidance, though it does tend to be rather specific to the public body involved and the precise nature of the statutory duty at issue. Generally, a good deal of deference appears to be accorded to the public body in determining what is 'reasonable'. For example, in the recent Court of Appeal judgment in *R (on the application of May) v Rother District Council & Ors,* Lewison LJ reviewed the Noise Policy for England in the context of a planning condition dispute.[53] He took the view that 'what is meant by the policy is that "all reasonable steps" should be taken to minimise noise . . . '[54] and then held that 'whether the imposition of a condition is a "reasonable step" is, in my judgment, one of planning judgment for the local authority . . . it is a judgment upon which reasonable people can disagree'.[55] In so holding Lewison LJ not only deferred to the planning authority's judgment, but also indicated that the assessment of reasonableness is a subjective endeavour best undertaken by those on the ground. Similarly, in *R(Croydon Property Forum) v London Borough of* Croydon,[56] Sir Stephen Silber (sitting as a High Court judge) was called upon to decide on whether a local authority had taken 'reasonable steps' in informing local interested parties of their decision to designate an area as a selective licensing scheme under the Housing Act 2004. Again, he accorded a good deal of deference to the authority's judgment in assessing the reasonableness of the activities it had to undertake to alert interested parties of the designation.[57] It is also noteworthy in this case that Silber J made a distinction between 'reasonable steps' and 'all reasonable steps'[58] which suggests that the latter requires more of a 'no stone left unturned' approach than the former. Public bodies and Public Services Boards affixed with the well-being duty will, therefore, have to take an expansive approach to meeting their duty – albeit with a degree of deference permitted as to what is reasonable in so doing.

Of course, there is an important difference between the schemes in these cases and that in the WFGA, in that the latter sets up a specific scheme for the review of both the well-being objectives and, presumably, their reasonableness. This responsibility falls primarily to the Future Generations Commissioner (where public bodies are concerned) or local scrutiny committees (where Public Services Boards are concerned). Both these roles in ensuring accountability and enforcement are fully discussed below. For present purposes it is sufficient to note that the power of the Commissioner and the scrutiny committee do extend to reviewing objectives and, in particular, to whether the objectives set and the steps taken to meet them accord with the sustainable development principle.[59]

In summary, in the WFGA and its supporting documents there is room for a good deal more clarity as to what constitutes 'reasonable steps'. At present, it seems that the principal criterion in deciding whether steps taken to meet the well-being objectives are reasonable is the extent to which they have been taken in accordance with the sustainable development principle. It may be that this was the intention of the Welsh Government, but the inclusion in the draft statutory guidance of references to finance, people, time and assets suggests that there may well be other factors. It is suggested that additional guidance to public bodies on this matter would greatly enhance the workability and transparency of the Act.

53. [2015] EWCA Civ 610.
54. See SPSF2 above n. 22 at [17].
55. Ibid. at [18].
56. [2015] EWHC 2403 Admin.
57. See SPSF2 above n. 22 at [45]–[58].
58. Ibid. at [45].
59. WFGA 2015, s. 20.

IV: Public services board and community council duties

4.1 Public services boards

In addition to the individual duties on public bodies, further collective duties are imposed by the creation of Public Services Boards (PSB). These are made up of four core members: the Local Authority; the Local Health Board; the Fire and Rescue Authority for the relevant area; and Natural Resources Wales.[60] Each PSB must invite other bodies to participate in the its activities, these statutory invitees being: the Welsh Ministers; the Chief Constable for the relevant area; the Police and Crime Commissioner for the relevant area; a representative of the probation services; and at least one body representing the voluntary sector.[61] However, a PSB can invite any body to participate provided it 'exercises functions of a public nature'.[62] Finally, a number of partners with whom the PSBs are 'required to engage' are listed in the act.[63] The list is largely comprised of the remaining public bodies which are subject to the individual duty under section 6.

The members of a PSB, most of whom will already be subject to the individual duty under section 6, are also under a collective duty by virtue of section 36, as follows:

> (1) Each public services board must improve the economic, social, environmental and cultural well-being of its area by contributing to the achievement of the well-being goals.
> (2) A public services board's contribution to the achievement of the goals must include—
> (a) assessing the state of economic, social, environmental and cultural well-being in its area (see sections 37 and 38),
> (b) setting objectives ("local objectives") that are designed to maximise its contribution within its area to achieving those goals, and
> (c) the taking of all reasonable steps by members of the board (in exercising their functions) to meet those objectives (but see section 39(2)(b)).
> (3) Anything a public services board does under this section must be done in accordance with the sustainable development principle.
> (4) Sections 39 to 45 make provision about local well-being plans including provision requiring public services boards to set out in such plans their local objectives and the steps they propose to take to meet them.[64]

The first half of subsection (1), at first sight, appears to place a more onerous duty on PSBs in that they 'must improve . . . well-being'. However, the second half indicates that this improvement is to be brought about by 'contributing to the achievement of the well-being goals'. Hence this is a 'requirement to contribute' rather than a 'requirement to achieve'. The contribution must be made by assessing the local state of well-being and then drawing up a set of local objectives 'designed to maximise its contribution . . . to achieving those goals' and taking all reasonable steps to meet those objectives.

The local objectives are to be drawn up into a local well-being plan;[65] this must be the result of a local well-being assessment undertaken and published at least one year before the well-being plan itself is published.[66] The draft statutory guidance makes it clear that the public bodies in a PSB, who are already

60. WFGA 2015. s. 29; See also SPSF3 above n.22. at [9]–[15].
61. Ibid. s. 30; Ibid. at [16]–[23].
62. Ibid. s. 30(2); Ibid. at [26].
63. Ibid. s. 32; Ibid. at [24]–[27].
64. Ibid. s. 36.
65. Ibid. s. 39.
66. Ibid. ss 37–38.

required to set objectives under section 6, can include these as local objectives in the local well-being plan, thereby attempting to achieve a degree of integration and coherence between the collective and individual contributions to the well-being goals.[67] As with the individual duty under section 6, the setting of local well-being objectives by a PSB must conform with the sustainable development principle.

4.2 Community council duties

Certain community councils[68] are also subject to a duty to contribute to the achievement of the objectives drawn up by a PSB in the local well-being plan which covers the council's sphere of influence. The duty requires that: 'A community council must take all reasonable steps in its area towards meeting the local objectives included in the local well-being plan that has effect in its area'.[69] However, this discharge of this duty is not, it seems, constrained by the need to take account of the sustainable development principle.

4.3 Legal nature of PSB and community council duties

The duty on PSBs is of much the same legal nature as the individual duties on public bodies already discussed, in that there is a requirement to take all reasonable steps to meet objectives, while taking account of the sustainable development principle in setting and meeting those objectives. The absence of a requirement on local community councils to take account of the sustainable development principle in taking reasonable steps is probably a reflection of the fact that the objectives are, in effect, set for them and consideration of the sustainable development principle will already have occurred.[70] A PSB, like an individual public body, must also seek to achieve the attainment of their local well-being objectives in such a way as to maximise their contribution to the well-being goals, but as with individual public bodies the 'sting' of the duty appears to relate to the well-being objectives, rather than the well-being goals themselves.

V: Accountability and enforceability of the duties

The WFGA sets out a statutory framework which makes a creditable effort, not only to embed well-being considerations into the heart of public decision-making in Wales, but also to integrate the effort across a wide range of different activities and roles in government. However, the extent to which the duties imposed can be considered legal duties, as opposed to political duties or mere aspirations, depends greatly on the mechanisms of accountability and enforcement which accompany them.

Of course, any decision of a public body is potentially subject to judicial review according to normal public law principles, but judicial review is a blunt and cost-inefficient instrument for securing compliance with public law duties. In any case, the somewhat aspirational language in which the duties are rendered, affords a certain protection from review in that neither the individual nor the collective well-being duty requires that the well-being objectives are achieved, but that all reasonable steps are taken to achieve them. Moreover, the achievement of the overarching well-being goals themselves is a collective enterprise and it is doubtful whether any individual public body could be held individually accountable for a failure in this respect. Not even the Welsh Ministers are charged with the attainment of the well-being goals; their duty

67. See SPSF1 above n. 22 at [26].
68. A Community Council will be subject to the duty only where, 'for each of the preceding three financial years prior to the local well-being plan for its area being published, either its gross income or its gross expenditure was at least £200,000'. WFGA 2015, s. 40(2).
69. WFGA 2015, s. 40(1).
70. Though it must be said that both individual public bodies and PSBs must take account of the sustainable development principle in setting objectives *and* taking 'reasonable steps', so to that extent the duty on local community councils is less onerous.

under section 79 of the Government of Wales Act 2006 to 'make appropriate arrangements to promote sustainable development' has arguably already been achieved by the passage of WFGA 2015 itself. The Act does not put any significantly greater onus on the Welsh Ministers in setting and achieving well-being objectives and maximising their contribution to the well-being goals than any other public body.[71] In any event, it can be argued that the attainment of well-being goals (as a proxy for sustainable development) is a journey, not a destination and that the goals are likely to be subject to continual revision in response to socio-demographic, economic, cultural, and climate change.

Nonetheless, if the Act is to be effective and not perceived by the Welsh public as mere window-dressing, there must be some mechanism by which public bodies can be held to account in respect of their duties.

The accountability mechanisms in the Act are jointly shared between the Welsh Ministers, the Auditor General for Wales (AGW), the Future Generations Commissioner (FGC) and scrutiny committees (SCs) in local government.

5.1 The Auditor General of Wales

The Auditor General for Wales (AGW) is empowered to 'carry out examinations of public bodies' in order to assess the extent to which they have carried out sustainable development by setting objectives and taking all reasonable steps to meet them.[72] Such an examination must be carried out at least once during each period of office of a Welsh government,[73] for each public body, and a report must be laid before the Welsh Assembly.[74] This must take account of any recommendations made to a public body by the FGC and must be compiled in consultation with the FGC. However, beyond the procedural duty to report to the Assembly, the Act makes no mention of any specific follow-up action by the Assembly itself, Welsh Ministers, the AGW or the FGC. Nor is there any provision for the sanctions that might follow where a public body is found wanting.

5.2 The Future Generations Commissioner

The Future Generations Commissioner (FGC) is appointed by the Welsh Ministers, in consultation with the 'responsible' committee of the Welsh Assembly.[75] Her 'general duty' is to:

(a) to promote the sustainable development principle, in particular to–
  (i) act as a guardian of the ability of future generations to meet their needs, and
  (ii) encourage public bodies to take greater account of the long-term impact of the things that they do, and
(b) for that purpose, to monitor and assess the extent to which well-being objectives set by public bodies are being met.[76]

Hence, the general duty extends to encouragement, monitoring and assessment; to this end, the FGC is empowered to seek advice and guidance from a wide range of sources and provide the same to public

71. Though it is the case that the Welsh Ministers must set up, maintain and review a system of national indicators for well-being and report on progress towards attainment of the well-being goals by reference to these indicators (WFGA 2015, s. 10)
72. WFGA 2015, s. 15.
73. The examination must take place between a date which precedes a general election by one year and the date which falls a year and a day before the next general election, Ibid. s. 15(6).
74. The language of s. 15(3) suggests that one overall report is envisaged rather than a separate report for each public body.
75. WFGA 2015, s. 17.
76. Ibid. s. 18.

bodies.[77] She can also undertake a review of the performance of any public body, which must take account of the results of any examination of that body by the AGW.

The making of recommendations by the FGC is the closest the Act comes to providing an enforcement power to a public official.[78] Following review, the FGC may make recommendations to the Welsh Ministers in respect of the well-being goals or the national well being indicators; she may also make recommendations to individual public bodies (including the Welsh Ministers) in relation to:

(a) the steps the body has taken or proposes to take to meet its well-being objectives; and
(b) how to set well-being objectives and take steps to meet them in accordance with the sustainable development principle.[79]

Where recommendations are made to a public body, that body must:

> . . . take all reasonable steps to follow the course of action set out in a recommendation made to it by the Commissioner under section 20(4) unless:
> (a) the public body is satisfied that there is good reason for it not to follow the recommendation in particular categories of case or at all, or
> (b) it decides on an alternative course of action in respect of the subject matter of the recommendation.[80]

Responses to FGC recommendations must be published and, if the public body has decided not to follow a recommendation, it must articulate its reasons and the alternative action it intends to take.[81] Any such published response must take account of any guidance on responses to recommendations issued by the Welsh Ministers.[82]

Thus, the power of the FGC to enforce the well-being duty is significantly circumscribed in that it is based on making recommendations which can be avoided if the public body can give reasons or decides on an alternative course of action. Note that these are alternatives, so that a public body can choose, if effect, to do nothing at all in response to recommendations (other than respond to them) provided it can publish a 'good reason'. Thus, the efficacy of recommendations in enforcing compliance with the duty will depend heavily on what amounts to a good reason. Would lack of resources be sufficient, for example? Or insufficiency of data or information? Moreover, provided that a public body has followed any guidance received from the Welsh Ministers on the FGC's recommendations, it is the *public body* which needs to be satisfied of the 'goodness' of the reasons for not following them. This places a good degree of discretion in the hands of the public body. The question is whether it may be too much discretion.

As noted already, there is nothing new in allowing public bodies a margin of discretion in deciding how best to discharge public duties, as the above discussion of some of the case law on 'reasonable steps' indicates. Doubtless the setting of well-being objectives is best decided by 'those on the ground' who know their limitations; the extent to which they can, in practice, maximise their contribution to the well-being goals and hence what reasonable steps they can take. However, the efforts of individual public bodies cannot possibly meet the well-being goals by themselves, and an overseer, in the form of the FGC, is

77. Ibid. s. 19.
78. Note that the FGC's power to make recommendations extends only to public bodies and not to PSBs. The FGC must 'provide advice and assistance' to a PSB on drawing up the objectives which form part of its local well-being plan (see WFGA 2015, s. 19(1)(c)) since each PSB is *required* to seek the FGC's advice (s. 42(1)) and to consult the FGC before publication of the plan (s. 43(1)) but the FGC has no power to make recommendations to a PSB thereafter.
79. WFGA 2015, s. 20(4).
80. Ibid. s. 22(1).
81. Ibid. s. 22(4).
82. Ibid. s. 22(2)–(3). Though presumably not if the public body is the Welsh Ministers themselves.

required to coordinate the collective effort to maximise the chances of meeting those goals. The FGC therefore has the 'big picture' in mind where each public body (and indeed each PSB) takes a narrower, more local, view. Some of the FGC's recommendations will, presumably, reflect the wider, national, needs of the future generations of Wales as a whole and it seems odd to permit the individual public bodies to avoid them on their own cognisance. It can be argued that this has the potential to fragment the bigger picture for the sake of the local one.

5.3 Local scrutiny committees

The accountability of PSBs is placed in the hands of scrutiny committees of the relevant local authority. Scrutiny committees are constituted according to Part II of the Local Government Act 2000.[83] They permit a local authority to create an 'executive arrangement' whereby a committee is established which has responsibility for certain functions of the authority. By virtue of section 35 of the WFGA 2015, a local scrutiny committee may review and scrutinise the decisions, governance or exercise of the functions of a PSB and make reports or recommendations to the PSB accordingly. It must also consider matters referred to it by the Welsh Ministers in respect of a PSB. However, a scrutiny committee has no role in the *approval* of a local well-being plan drawn up by a PSB,[84] though the committee must be consulted while it is being drawn up. Moreover, the draft statutory guidance strongly emphasises the local nature of accountability of PSBs and specifically points out that 'the Welsh Ministers will not approve local well-being plans'.[85] Hence, approval of the plan is exclusively in the hands of PSB members themselves.[86] However, the Welsh Ministers *can* direct a PSB to review its local well-being plan (and such review is mandatory)[87] and the PSB *may* revise it accordingly (thus revision is discretionary). These provisions seem, on the face of it, rather clumsy and a little contradictory. Local democracy is respected in terms of the approval of the well-being plan, but the approved plan can then be cast into doubt by a direction for review from the Welsh Ministers (even if this is done by referral through the local scrutiny committee). Thus, a PSB could approve its plan, following very considerable effort, and then be subjected to pressure to revise it by central government. Surely it would be much more sensible to have all parties (including the Welsh Government) involved at the stage of *approval,* thereby cutting out an unnecessary administrative step. As it stands, the two-step process seems overly bureaucratic and, frankly, rather an empty gesture towards local democracy. It was noted earlier that the achievement of the well-being goals will require the exercise of central coordination and it would be more transparent if this requirement was openly acknowledged together with its inevitable effect on the exercise of local democracy.

Conclusion

This paper set out to examine nature of the duties created by the WFGA 2015, the extent to which they may be considered binding duties and the ease with which public bodies might be held accountable in respect of them. A reading of Parts 1 to 4 of the WFGA 2015 leaves one with the impression of a comprehensive and rigorous system of administrative oversight and consultation in the setting of well-being objectives by public bodies and the drawing up and approval of local well-being plans – which incorporate well-being objectives – by a PSB. However, when it comes to meeting these objectives, public bodies and PSBs are required to take all 'reasonable steps' and this form of words does give rise to some disquiet as to the ease

83. Local Government Act 2000 Ch. 22, especially ss. 10–13.
84. WFGA 2015, s. 43(5).
85. Above SPSF3 at n. 22 at [161]–[164].
86. WFGA 2015, s. 43(5) and (6).
87. Ibid, s. 44(2).

with which these new duties might be discharged. The assessment of the reasonableness of steps is accorded considerable deference in the judicial interpretation of current similar duties and a great deal in this respect will depend on the attitude of the AGW, and the Welsh Ministers, and particularly the personality of the FGC[88] and the time and resources available to local scrutiny boards. While the Act itself and the draft statutory guidance contains fulsome guidance on what is to be taken into account when setting objectives (and particularly taking account of the sustainable development principle), there is very much less guidance on what criteria might be used to determine the reasonableness of the steps taken to meet them. Similarly, there is little guidance on what reasons might be acceptable for a public body to give in deciding not to follow the recommendations of the FGC. There is a danger, especially in a time of austerity, that the bar is set too low and the discharge of the well-being duty degenerates into a procedural exercise rather than a substantive one.

In terms of the accountability of public bodies and the enforceability of the duties, there remains a good deal of uncertainty. Political accountability is built into the Act in the form of the powers of the AGW, the Welsh Ministers, the FGC and local scrutiny committees and the hierarchy of governance mechanisms that already exists whereby one tier of government is accountable to another. Once again, though, what the objective standards of that governance might be in relation to the well-being duties is very difficult to judge. In terms of legal accountability, there appears to be very little, short of the 'back-stop' of judicial review. The Act does confer some powers on the FGC to make recommendations to a public body, but these may not, ultimately, be enforceable. The Welsh Ministers can direct a PSB to review a local well-being plan – which may result in its revision – but cannot subject it directly to approval. Furthermore, neither the Act nor the draft statutory guidance (nor indeed the Revised Explanatory Memorandum that accompanied the Bill) mention any form of sanction that might be available should objectives fail to be set or reasonable steps not be forthcoming. Given that sustainable development is set to become the central organising principle of governance in Wales, one might have expected more 'teeth' in terms of enforcement. By comparison with, for example, the public sector equality duty,[89] which is accompanied by a range of enforcement measures,[90] the well-being duty seems ill-served, despite the fact that in both cases the objective is intended to permeate all aspects of governance.

Much is expected of the WFGA in terms of making Wales a nation truly governed by the principle of sustainable development where the interests of future generations are subjected to legal protection. The Welsh Government must be warmly commended for its world-leading efforts in this regard. However, a detailed review of the Act and its accompanying guidance, leads one to the conclusion that this endeavour still over-leavened with expectation rather than assurance.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

88. On 3 November 2015, it was announced that Sophie Howe was to be appointed as the first FGC for Wales. This appointment has generated some controversy (see www.bbc.co.uk/news/uk-wales-politics-34709434, last accessed 12 December 2015) not least in relation to Ms Howe's comparative lack of experience of environmental matters. She was previously deputy police and crime commissioner for South Wales and will take up her new post in February 2016.
89. Equality Act 2010, Ch. 15, s. 149.
90. Ibid. ss 113–148.