

# **Scottish Parliament Social Justice and Social Security Committee**

## **Wellbeing and Sustainable Development (Scotland) Bill**

### **Written submission by UKELA (UK Environmental Law Association)**

#### **INTRODUCTION**

1. UKELA (UK Environmental Law Association) comprises over 2,000 academics, barristers, solicitors and consultants in the public and private sectors involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.
2. This document responds to the consultation called by the Social Justice and Social Security Committee of the Scottish Parliament on the Wellbeing and Sustainable Development (Scotland) Bill. The response has been prepared by UKELA Governance & Devolution Group in consultation with other UKELA Groups. It does not seek to represent the views and opinions of all UKELA members but has been drawn together from a range of its members.

#### **BACKGROUND<sup>1</sup>**

3. The Explanatory Notes to the Bill<sup>2</sup> state that
  5. The Bill creates a new public duty, which requires all public bodies to have due regard for the need to promote wellbeing and sustainable development in the exercise of their functions. It also establishes statutory definitions of the terms “wellbeing” and “sustainable development” for the purposes of the Bill.
  6. The Bill also establishes a Future Generations Commissioner for Scotland (“the Commissioner”), whose general function will be to promote the wellbeing of future generations by promoting sustainable development by public bodies in all aspects of their decisions, policies and actions. The Commissioner will be appointed by and financially accountable to the Scottish Parliamentary Corporate Body (SPCB) and will be independent from government.
  7. The Commissioner will oversee the implementation of the public duty created by the Bill. This will include publishing guidance for public bodies, promoting awareness and understanding of wellbeing and sustainable development, and encouraging best practice. The Commissioner will also review relevant law, policy and practice to assess their adequacy and effectiveness in giving effect to wellbeing and sustainable development. The Commissioner may also promote,

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<sup>1</sup> This background is to provide some context to readers. It does not form part of the formal response to the questions raised and submitted.

<sup>2</sup> <https://www.parliament.scot/bills-and-laws/bills/s6/wellbeing-and-sustainable-development-scotland-bill>

commission, undertake and publish research on matters relating to wellbeing and sustainable development.

8. The Commissioner will have the power to undertake investigations into how public bodies are complying with their duty under the Bill. This will involve examining whether, by what means and to what extent they have regard to wellbeing and sustainable development in their decision-making, policy development and actions. These investigations may be conducted at a general level across all public bodies, or they may focus on the specific decisions, policies or actions of one or more public bodies.
9. The establishment of the Commissioner is inspired by the Future Generations Commissioner for Wales, which was established by the Well-being of Future Generations (Wales) Act 2015. The model for the Commissioner, including their investigatory powers, is similar to that of the Children and Young People's Commissioner Scotland.

## CONSULTATION QUESTIONS

**Q1. Do you think that more needs to be done to embed sustainable development and wellbeing as primary considerations into public policymaking? Please tell us why.**

4. UKELA considers that much more needs to be done to embed sustainable development and wellbeing as primary considerations into public policy making and decision-taking. The Bill takes some steps towards this. However, for the reasons set out below they fall short of creating the transformative framework necessary to address Scotland's environmental and social challenges.
5. The Bill should more explicitly align with the United Nations Sustainable Development Goals (SDGs)<sup>3</sup>, which Scotland has committed to delivering. Without clear mechanisms linking public body duties to SDG targets and indicators, Scotland risks failing to show how and why the SDGs may apply and contribute meaningfully to local, national and global sustainable development commitments. This Bill presents an opportunity to foster connection to the SDGs through all public bodies.
6. The National Planning Framework 4 (NPF4) sets out Scotland's spatial strategy to 2045 with explicit focus on sustainable places, liveable places, and productive places. The WSD Bill should create stronger statutory connections to NPF4's principles, ensuring all public bodies consider these agreed-upon spatial priorities in their decision-making.
7. Further, the Bill's reliance on duties to 'have regard to' sustainable development could undermine the efforts to establish sustainable development and wellbeing as primary considerations in policy making and decision-taking. To 'have regard to' merely holds procedural weight, not substantive action. It would enable

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<sup>3</sup> <https://sdgs.un.org/goals>

public bodies to fully discharge their duty by simply noting sustainable development in meeting minutes, proceeding to prioritise economic or political considerations, and claiming complete statutory compliance. This creates a hierarchy where sustainable development and wellbeing become secondary considerations by default: something to be acknowledged but not acted upon. Primary considerations require mandatory duties such as ‘must pursue’ or ‘must not act inconsistently with’ to ensure they genuinely drive decision-making.

8. At the very least the legislation should provide that policy makers and decision-takers have ‘due regard to’ well-being and sustainable development. In UKELA’s view, the provision provides an important legal basis for these concepts and the legislation will be better conceived if it secures ‘due regard’ to matters as that phrase has been interpreted by the courts<sup>4</sup>. In particular, the duty must be ‘exercised in substance, with rigour, and with an open mind’—*not a question of ‘ticking boxes’*, and it must be fulfilled *before and at the time* when a particular policy is being considered or decision taken.

## **Q2. What is your view on the policy objectives of the Bill, as set out in the Policy Memorandum?**

9. While UKELA welcomes the intent behind the Bill, there are concerns about whether the policy objectives, as currently articulated in the Policy Memorandum, will deliver the transformative change necessary to address Scotland’s climate emergency and pervasive short-termism in policy making. The Bill’s objectives, whilst laudable in principle, lack the requisite statutory mechanisms and enforcement provisions to achieve meaningful progress towards wellbeing and sustainable development (as UKELA considers these concepts to be see the discussion below).
10. The proposed framework appears insufficiently robust to drive the cultural shift required. The current formulation risks creating what might be characterised as ‘soft law’, aspirational guidance lacking enforceability, rather than the binding framework necessary to address climate change and long-term socio-environmental improvement. This could be done through specific, measurable domestic targets and duties.
11. At present, UKELA is uncertain whether the existing statutory duties intended to ensure that attention is paid to environmental considerations are having much effect on policy and decision making. In the circumstances, it is important to have confidence that this further duty will make a real difference. The duties that already exist include those in relation to climate change and sustainability (Climate Change (Scotland) Act 2009 (CCSA 2009, s.44), environmental principles (UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, ss 14-15), biodiversity (Nature Conservation (Scotland) Act 2004), natural heritage (Countryside (Scotland) Act 1967, s.66), and more specifically to ensure compliance with EU Directives on the water environment (Water Environment and Water Services (Scotland) Act 2003, s.2) and habitats and species (Conservation (Natural Habitats, &c.) Regulations 1994, reg.3). These

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<sup>4</sup> See e.g. the judgment of Lord Justice McCombe in *R (Bracking) v Secretary of State for Work & Pensions* [2013] EWC 1345 in the context of the Equality Act 2010.

duties do not appear to have had a marked impact on how Ministers and public authorities act. There is then danger that adding a further duty without clarity and certainty could complicate the fundamental objectives to secure sustainability. In particular, the proposed new duty appears to overlap with the existing one under CCSA 2009, s. 44, requiring public bodies to act in a way that they consider is most sustainable. It is unclear how the provisions in the Bill and s. 44 will fit together. They should, of course, but key is ensuring Ministers, government departments and all public bodies act in according to all environmental and sustainability principles.

12. *Potential Learnings from the Welsh Model*

13. The Well-being of Future Generations (Wales) Act 2015 (WFGWA 2015) offers insight in how to give statutory 'teeth' to sustainable development objectives including e.g.:

- **Mandatory Public Body Duties:** The WFGWA 2015 requires public bodies to carry out sustainable development by setting and publishing wellbeing objectives designed to maximise contribution to wellbeing goals; taking all reasonable steps to meet those objectives; and ensuring public bodies work to improve economic, social, environmental and cultural wellbeing.
- **Devolved Implementation:** Wales grants greater autonomy to local authorities (and public bodies more broadly) in determining area-specific wellbeing outcomes, enabling localised responses whilst maintaining national coherence. This approach could address Scotland's diverse regional needs whilst maintaining the recommended policy coherence of the Scotland's International Development Alliance<sup>5</sup>.
- **Measurability.** The absence of specific, measurable targets is a critical weakness in the Bill's architecture. The Welsh National Indicators framework enables effective sustainable development legislation which utilise quantifiable metrics against which progress can be assessed; regular (but flexible) reporting cycles with parliamentary scrutiny; and clear accountability mechanisms for non-compliance.

**Q3. Which of the following best expresses your view on section 1, which requires public bodies to have due regard for the need to promote wellbeing and sustainable development?**

14. Support.

15. Subject to our comments on the definitions of wellbeing and sustainable development, UKELA supports the need for public bodies to have due regard to the need to promote wellbeing and sustainable development. While it is something that public bodies should be doing in any event. directly expressing it within Section 1 of the Bill highlights its importance and ensures public bodies work to set standards.

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<sup>5</sup> <https://intdevalliance.scot/>

**Q4. What is your view on the definition of “public body” (in section 17(2))? Is there a need for statutory definitions of wellbeing, and sustainable development?**

16. The definition provides clear guidelines as to what a ‘public body’ is in Scotland. There is need for a statutory definition of the terms mentioned above - this would help to provide clarity/ eliminate ambiguity.
17. Public Body The definition must avoid creating loopholes whereby bodies performing essential public functions could evade duties simply due to their organisational structure. The complexity of institutional structures means that simple answers are not available, but the varying scope of the term “public body/authority” for different purposes such as human rights, freedom of information, access to environmental information and various statutory duties should be borne in mind and consistency sought as far as possible. The cross-border public authorities’ inclusion is welcome but should explicitly clarify the extent of duties when operating within Scotland's jurisdiction.
18. Statutory Definitions The consultation analysis demonstrated strong support for this approach, recognising that a clear definition would provide essential clarity for public bodies implementing the legislation.<sup>6</sup>

**Q5. What is your view on the definition of “sustainable development” (in s. 2)?**

19. The inclusion of a statutory definition of ‘sustainable development’ represents a crucial advancement towards legal certainty and policy coherence. However, the definition requires substantial strengthening to achieve the policy’s objectives.
20. Alignment with the Brundtland Commission is welcome but should be elaborated upon to ensure operational efficacy. However, there should be acknowledgement that the Brundtland definition is now well over 35 years old and the continuing and worsening global crises mean that the attainment of sustainability and sustainable development is as urgent as it has ever been. For instance, the definition must explicitly establish that sustainable development and the pursuit of sustainability must include operating within planetary boundaries, the appreciation of natural capital and planning for changes in climate and population distributions. Additionally, the precautionary principle should be included to state that where uncertainty exists about long-term impacts, decisions should favour preservation. Irreversibility thresholds could also prove useful — where there is an identification of actions that permanently compromise future options and should thus be considered on this premise.
21. Thus, UKELA considers that while the definition of sustainable development within the Bill draws on the Brundtland definition its current emphasis is on social value and it is (a) too weak on environmental conditions, and (b) omits entirely consideration of the environmental limit or capacity of Scotland and the wider world. For instance, the value of nature and biodiversity including to

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<sup>6</sup> <https://www.gov.scot/publications/wellbeing-sustainable-development-bill-consultation-analysis/pages/4/>

humankind is not evident. An example of a more effective definition of sustainable development and sustainability is suggested by the European Environment Agency which notes that:

**“Sustainability is about meeting the world’s needs of today and tomorrow by creating systems that allow us to live well and within the limits of our planet. ...”<sup>7</sup>.**

**Q6. What is your view on the definition of “wellbeing” (in section 3)?**

22. The Bill offers an opportunity to better guide policy making and decision-taking in Scotland, taking sustainable development and the wellbeing of current and future generations into account. The definition of the latter, then, is of utmost importance.
23. As with our concerns about the overall policy objectives of the Bill, section 3 is restricted by its voluntary nature – as set out in Part 2, relating to the enforcement powers of the Future Generations Commissioner (FGC). The FGC's restricted power to sanction public bodies that breach sections 1-3, even when its investigative function is triggered as set out in sections 6-11, means that regardless of how ‘wellbeing’ is defined, there is little enforcement capability to ensure that definition is properly implemented.
24. As to the definition of ‘wellbeing’, the following should be taken into consideration as the legislative process unfolds:
  - (1)(a) – ‘Dignity’ requires further elaboration, as the scope for flexible interpretation and subsequently arising legal challenges is significant.
  - (1)(e) – ‘Adequate’ requires further elaboration, for the same reasons as above.
  - (1)(f) – ‘Access’ requires further elaboration without this there may be uncertainty over the nature and practicalities of what may constitute access.; ‘Natural environment’ requires further elaboration, for the reasons as above, the diversity of natural environment between urban, peri-urban, and rural areas should, for example, be taken into account.
25. On all counts, the definition of ‘wellbeing’ would benefit from a mechanism that sets quantifiable targets Ministers would be obliged to follow. Again, this could draw inspiration from the mechanism set out in the WFGWA 2015.
26. Finally, regard to the National Performance Framework should be explicitly made to take the provisions of the Community Empowerment (Scotland) Act 2015 into account.

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<sup>7</sup> <https://www.eea.europa.eu/en/topics/at-a-glance/sustainability>

**Q7. Which of the following best expresses your view on section 4, which establishes a Future Generations Commissioner?**

27. Subject to the comments above and below, UKELA broadly supports the approach to the establishment of the Commissioner provided by section 4, Schedule 1 of the Bill.

**Q8. Do you have views on the general function (as set out in section 5), powers, structure, and duties of the Commissioner?**

28. The general function in s. 5 is to guide and influence ‘best practice’ among public bodies as they embed sustainable development and wellbeing into their activities. It is therefore important for the reasons given above, that the concepts of sustainable development and sustainability are robust principles. If not, they will steer Scotland away from genuine sustainability as it is discussed above. Section 5 recognises that the general function is generally about promoting sustainable development and wellbeing rather than being any more formal function with e.g. sanctioning. Similarly, the investigation and reporting powers in sections 6 to 11 of the Bill do not include any formal sanctioning provisions to the Commissioner. Ultimately, reporting is to the Scottish Parliament (s. 10 of the Bill) rather than to, say, a court. Section 6 of the Bill acknowledges independence of the courts.

**Q9. Taking account of the Bill’s Financial Memorandum, what is your view on the financial implications (i.e. likely costs and savings) of the Bill?**

29. UKELA has no specific views on the financial implications save that having robust, certain and effective provisions to secure genuine well-being and sustainable development in society will be material and significant in the medium to long-term. This point is made and unquantified at paragraph 93 of the Financial Memorandum and by reference to the Christie Commission 2011. In essence, any short-term costs incurred will be nominal compared to the overall savings and improvements likely to be secured through pursuing policies and taking decisions according to meaningful concepts of wellbeing and sustainable development.,

**Q10. Do you have any other comments about the Bill?**

30. Drawing together the above points and, in conclusion, UKELA suggests that the Bill, as currently drafted, is a very welcome and encouraging step in the right direction, but it must be based upon robust and realistic concepts of well-being and sustainable development, and the Bill and subsequent legislation must reflect this. There must, for instance, be a recognition of planetary limits. UKELA acknowledges that the concepts of sustainable development and sustainability may not be easy to convey or to apply but avoiding more robust meanings will not assist Scotland and the wider world in the medium to long term.