

February 2024

ESS response to the Scottish Government's Wellbeing and Sustainable Development Bill: consultation

Introduction

1. ESS is a non-ministerial office directly accountable to the Scottish Parliament. Since 1 October 2021, it has been part of the system of environmental governance in Scotland following the UK's exit from the European Union and the end of oversight of implementation of European Union environmental law by the European Commission and the European Court of Justice. ESS' remit is to:
 - ensure public authorities, including the Scottish Government, public bodies and local authorities, comply with environmental law.
 - monitor and take action to improve the effectiveness of environmental law and its implementation.
2. The Scottish Government has published their *Wellbeing and Sustainable Development Bill: consultation* seeking views on their proposals on sustainable development, wellbeing and a Future Generations Commissioner. ESS has responded to specific questions in this consultation and our response is included below.

Wellbeing and Sustainable Development Bill – consultation response

Defining wellbeing

1. Is a statutory definition of 'wellbeing' required?

The principles of wellbeing and sustainable development make a significant contribution to environmental outcomes, taking a long-term approach and ensuring that Scotland protects and enhances its natural environment. Defining wellbeing on a statutory basis would help to ensure clarity for duty holders and members of the public by providing a specific meaning for the defined term.

2. Do you have any views on how 'wellbeing' can be clearly defined in legislation?

This should be supported by effective guidance on ways of working and how the principles should be operationalised, as well as provision of advice and appropriate resourcing for duty bearers. This will help to ensure effective and consistent implementation of the principle and associated duties. Wellbeing and sustainable development are fundamentally linked. If both wellbeing and sustainable development are defined in this legislation, it will be helpful to clearly articulate the interaction and synergies between the two principles. Wellbeing may be understood in several ways dependant on context, so it would also be helpful to consider what is meant by wellbeing and how it is defined. For example, in the Well-being of Future Generations (Wales) Act 2015, wellbeing is defined through the 7 'well-being goals' with public bodies required to carry out sustainable development through establishing 'well-being objectives' that maximise their contribution to the 'well-being goals'.

Defining sustainable development

3. Is a statutory definition of 'sustainable development' required?

The principles of wellbeing and sustainable development make a significant contribution to environmental outcomes, taking a long-term approach and ensuring that Scotland protects and enhances its natural environment. Defining sustainable

development on a statutory basis would help to ensure clarity for duty bearers and members of the public by providing a specific meaning for the defined term, recognising that the concept exists across a range of legislation and policy. It may also be helpful to explicitly recognise the link to the environmental principles established in the Scottish legislative framework in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 that are derived from the European Union. This definition should complement the proposed introduction of a right to a healthy environment in the Human Rights (Scotland) Bill, as well as recognising the broader social and economic rights.

4. Do you agree with our proposal that any definition of sustainable development should be aligned with the common definition: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”?

It is helpful to start with the with the ‘Brundtland definition’, however to support the operationalisation of the principle and support effective implementation by duty bearers, it may also be helpful to consider the interconnected pillars of sustainable development. These are commonly considered to be economy, environment and society though have also been supplemented with other pillars, such as culture, as in the Well-being of Future Generations (Wales) Act 2015. These pillars interact in complex ways and will require decisionmakers to balance synergies and trade-offs. A legislative and policy framework that effectively considers the decision-making process will aid decision-making and promote better outcomes. It is important that duty bearers and the public are clear about what sustainable development means in practice. To support this, it may be helpful to explicitly refer to the United Nations Sustainable Development Goals as part of this definition.

5. Do you have other views on how ‘sustainable development’ can be clearly defined in legislation?

This should be supported by effective guidance on ways of working and how the principles should be operationalised, as well as provision of advice and appropriate resourcing for duty-bearers. This will help to ensure effective and consistent

implementation of the principle and associated duties. If both wellbeing and sustainable development are defined in this legislation, it will be helpful to clearly articulate the interaction and synergies between the two principles.

6. What future wellbeing issues or challenges do you think legislation could help ensure we address?

The legislation should seek to further develop and support public bodies long-term decision making across the range of functions that they undertake, embedding the 'pillars' of sustainable development and their synergies and trade-offs in their activities. This will support better environment outcomes by promoting a long-term approach and ensuring that Scotland protects and enhances its natural environment.

7. We are aware that the term 'sustainable development' has been set out in various legislation of the Scottish Parliament since devolution in 1999, and that careful consideration will need to be given to how any new definition will impact on these. What impact, if any, would the proposed definition have on other areas of legislation?

If 'sustainable development' is defined in this legislation, the definition should aim to provide a clear and unambiguous description of what sustainable development means for duty-bearers, their decisions and remit. It would be helpful to explicitly refer to the existing usages of the term in other legislation in supporting guidance, to clearly establish a framework for applying the principle of sustainable development to decisions made by public authorities. As noted above, an effective legislative and policy framework will support duty-bearers when considering the synergies and trade-offs between the different 'pillars' of sustainable development and promote better outcomes.

Strengthening duties for the National Outcomes and sustainable development

8. How could a legal duty be defined to ensure that public authorities uphold sustainable development and the interests of future generations?
9. Are there specific areas of decision making that should be included or excluded from the Bill?

10. What issues, if any, may result from strengthening the requirement to have regard to National Outcomes?

Clarifying to whom the duties apply

11. Should any duty apply to Scottish Government?

Applying a duty to Scottish Ministers as well as public bodies will ensure these principles are applied across all functions of government and delivery and help to demonstrate strategic leadership.

12. Do you have any views on the range and type of organisations that any duty should apply to?

The Climate Change (Scotland) Act 2009 and the Climate Change (Duties of Public Bodies: Reporting Requirements) (Scotland) Amendment Order 2020 apply statutory duties related to sustainable development to a range of public bodies. Both use a definition that includes Scottish public authorities within the meaning of section 3(1)(a) of the Freedom of Information (Scotland) Act 2002 which includes Scottish Ministers and the Scottish Parliament.

Defining ways of working

13. Do you have any views on how we can better report the achievement of wellbeing objectives which supports clear accountability and scrutiny of public bodies in Scotland?

14. What additional steps are needed to ensure collaboration and working across boundaries?

15. Do you have any views on whether any duty related to ways of working could create conflicts with duties currently placed on you?

16. Do you have any views on the additional resource implications necessary to discharge any wellbeing duty in your organisation?

Determining an approach for future generations

17. Should Scotland establish an independent Commissioner for Future Generations?

Effective scrutiny, monitoring and reporting is a key element of ensuring that legislation is implemented well and in a timely manner. It is essential that this function, regardless of which public body undertakes it, is independent of Scottish Ministers, resilient and properly funded so that it can provide effective scrutiny.

18. In what ways could an independent Commissioner for Future Generations increase the accountability, scrutiny, and support for decision making?

An independent, resilient and properly funded scrutiny function would help to provide effective scrutiny of the implementation of these proposals by duty-bearers.

Dependant on the model and approach, this could include monitoring of delivery and reporting to the Scottish Parliament, scrutiny of implementation by duty-bearers and provision of advice and guidance to duty-bearers and members of the public on the principles.

19. Are there alternative ways we can increase the accountability, scrutiny, and support for decision making?

As with any new public body or functions, it is important that the existing landscape of commissioners and scrutiny bodies is considered when developing proposals for a new commissioner, body or function. This will help to ensure any potential synergies, overlaps or conflicts of functions are taken into account. ESS would welcome further engagement with Scottish Government on this topic in relation to our remit and interests following the consultation.