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# Legislating for culture change: the Wellbeing of Future Generations Act 2015 and planning in Wales

Caer Smyth\*

## Introduction

Around the world, we are seeing more and more examples of ambitious sustainable development legislation, spurred on by the United Nations Sustainable Development Goals<sup>1</sup> and the ever-worsening state of the global environment. It has been noted that these kinds of laws, as well as being ambitious, can be ‘vague, open-ended and aspirational, expecting prompt local implementation without much national guidance or support’.<sup>2</sup> This article reflects on the progress of one such piece of legislation, Wales’s Wellbeing of Future Generations Act 2015. The Wellbeing of Future Generations Act 2015 (‘WFGA’ or ‘the Act’) builds on Wales’s commitment to have sustainable development as the organising principle of the Welsh Government.<sup>3</sup> As stated by the then Minister for Natural Resources, Carl Sargeant, the Act: ‘requires real culture change: a fundamental change to how we plan and operate as organisations, and making those decisions for the long term that will benefit current and future generations’.<sup>4</sup> WFGA has inspired similar forms of legislation in other

jurisdictions, including: in Westminster, where Lord Bird and Caroline Lucas MP have introduced a Future Generations Bill,<sup>5</sup> in Gibraltar, where a Commissioner for Sustainable Development and Future Generations was appointed in 2018,<sup>6</sup> and in Scotland, where in September 2021 it was announced they would be appointing a Future Generations Commissioner.<sup>7</sup> Lastly, during Irish Foreign Minister Simon Coveney’s visit to Wales in November 2021, Coveney committed to considering a Future Generations Act for Ireland.<sup>8</sup> In 2023, Wales’s First Future Generations Commissioner Sophie Howe will step down and Derek Walker will take the role.<sup>9</sup> This article takes this moment of transition as an opportunity to assess the Act and its progress.

The enforceability of WFGA is an area of concern and a focus of some scholarship. WFGA is an example of ‘aspirational legislation’, one of four kinds of ‘non-law bearing’ legislation identified by Feldman.<sup>10</sup> Lord Thomas further proposed the Act as an example of aspirational

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1 United Nations Department of Economic and Social Affairs Sustainable Development, ‘The 17 Goals’ (2022): <https://sdgs.un.org/goals> (accessed 21 December 2022).

2 Suzanna Nesom and Eleanor MacKillop, ‘What matters in the implementation of sustainable development policies? Findings from the Well-Being of Future Generations (Wales) Act, 2015’ (2021) 23(4) *Journal of Environmental Policy & Planning* 432–445, at 432.

3 Government of Wales Act 2006 section 79(1). While it is beyond the remit of this article to set out the complex devolved arrangements, a summary understanding is helpful. Devolution in Wales has developed incrementally since the Government of Wales Act 1998; the legislative powers of the National Assembly evolved from the powers to enact secondary legislation to an increase in legislative powers for the National Assembly with the Government of Wales Act 2006. Finally, with the implementation of the Government of Wales Act 2006 Part 4 after the 2011 referendum, the National Assembly had powers to enact primary legislation.

4 Carl Sargeant, in ‘The United Nations Goals and the Well-being of Future Generations (Wales) Act 2015’ Deb, 24 November 2015, 15:21.

5 UK Parliament, ‘Parliamentary Bills: Wellbeing of Future Generations (No. 2) Bill Private Members’ Bill (under the Ten Minute Rule)’ (6 May 2021): <https://bills.parliament.uk/bills/2736> (accessed 21 December 2022).

6 HM Government of Gibraltar: Office of the Commissioner for Sustainable Development and Future Generations, ‘Roles and Responsibilities’ (2022): <https://www.futuregenerations.gi/about-us/roles-and-responsibilities> (accessed 21 December 2022).

7 Sophie Howe, ‘Wales leading the way with Future Generations Legislation – UN plans to adopt Welsh Approach (Comisiynydd Cenedlaethau’r Dydfodol Cymru: Future Generations Commissioner for Wales, 10 November 2021):

<https://www.futuregenerations.wales/news/wales-leading-the-way-with-future-generations-legislation-un-plans-to-adopt-welsh-approach> (accessed 21 December 2022).

8 *ibid.* Department of the Taoiseach, ‘Taking the well-being project forward’ (26 October 2021):

<https://www.gov.ie/en/publication/38566-taking-the-well-being-project-forward> (accessed 21 December 2022).

9 With Derek Walker due to start in the role in early 2023.

Llywodraeth Cymru Welsh Government, ‘Wales’ new Future Generations Commissioner announced: Cyhoeddi Comisiynydd Cenedlaethau’r Dyfodol Newydd Cymru’ (7 December 2022): <https://media.service.gov.wales/news/wales-new-future-generations-commissioner-announced> (accessed 21 December 2022).

10 David Feldman, ‘Legislation as aspiration: statutory expression of policy goals’, a lecture for the Statute Law Society delivered at the Institute of Advanced Legal Studies, London, 16 March 2015.

legislation in his Lord Renton lecture in 2019.<sup>11</sup> Thomas argues that the Act is not enforceable and that this is a significant problem:

It is difficult, in my view, to see that simply reporting a failure to follow the principles could amount to effective enforcement where there is an acute conflict of interest between short-term political considerations of governments and the long-term interests.<sup>12</sup>

Thomas worries that aspirational legislation, in particular WFGA, raises false hope and undermines the rule of law.<sup>13</sup> Nason suggests that the Act seeks to shape administrative decision-making, but that it does not do this through ‘endow[ing] individuals with legally enforceable rights against public bodies’.<sup>14</sup> Instead, she argues that constraints on Welsh law-making caused by the ‘jagged edges of devolution’ have encouraged approaches to administrative decision-making, of which the Act is an example, that are not bound to common law enforcement or through administrative courts, but instead rely on ‘catalysing cultural change within public bodies and civil society’.<sup>15</sup> If, as Nason says, the Act does not endow people with enforceable rights against public bodies, then what is its value? How does it effect change? Rhodri Williams KC, counsel for a group that sought to bring a judicial review case relying on the Act, has been highly critical of it, describing the Act as ‘toothless’ and ‘virtually useless’.<sup>16</sup> However, the Future Generations’ Commissioner seeks to emphasise the impact that the Act has beyond the enforcement of legal duties. In their evidence to the Commission on Justice in Wales, the Commissioner stated that the purpose of the Act was to bring about changes in decision-making ‘with a view to the long term and not merely an electoral cycle’.<sup>17</sup> The Commissioner’s 2022 Review of the Welsh Government’s implementation of the Act illustrates how the Commissioner understands the Act’s potential. Some of the Report’s findings highlighted: gaps between levels of awareness and understanding of the Act; inconsistencies in how WFGA was being utilised to change how policies were

being developed and implemented; ineffective use of WFGA’s accountability mechanisms; and the untapped potential for the Welsh Government in working with the public sector to deliver WFGA.<sup>18</sup> These findings illustrate the Commissioner’s contention that the Act will have an impact if it is embedded through policy development and implementation and if it is fully used and understood by government and public sector workers. This is a significant undertaking; it speaks to the ‘cultural change’ noted above by both Carl Sargeant MS and Sarah Nason. This article makes a contribution to the emerging scholarship around WFGA. While acknowledging that there are important questions to be asked around the enforceability of the Act, this article does not ask whether the Act is enforceable, or whether it should be. Instead, it takes the perspective of the Act’s proponents. It assumes that the enforceability of Act is less significant because the real impact of the Act is in its capacity to engender cultural change in decision-making and policymaking. The article explores how successful the Act has been in engendering cultural change. It looks at the approach the Act takes to deliver this cultural change and how this approach shapes the planning system. It identifies some factors limiting the impact of this change in planning. By taking this approach, this article aims to add a fresh perspective to this Act, moving past questions of enforcement and looking at its impact ‘on the ground’ in a planning, decision-making process.

This article employs empirical research to help identify and investigate obstacles facing the Act, drawing on a research project that explored how embedded rationalist assumptions in legal decision-making processes might affect the treatment of the environment in these processes. The fieldwork site was a public local inquiry in Wales that was held shortly after the Act was enacted. This was a socio-legal ethnographic research project; data was collected through participant observation and semi-structured interviews with inquiry participants and planning stakeholders in Wales. This inquiry considered the Welsh Government proposed scheme for addressing traffic congestion by Newport, termed the M4 corridor around Newport scheme (M4CAN). This was a major infrastructure project estimated to cost between £1.2 and £2 billion.<sup>19</sup> The proposed route went through the Gwent

11 Lord Thomas of Cymgieidd, ‘Thinking policy through before legislating – aspirational legislation’, Statute Law Society: The Lord Renton Lecture: Institute of Advanced Legal Studies, 21 November 2019.

12 *ibid*, at 9.

13 *ibid*, at 19.

14 Sarah Nason, ‘The “new administrative law” of Wales’ (2019) *Public Law* 703–723, at 708.

15 *ibid*, at 704.

16 Paul Martin, ‘Law to protect future generations in Wales “useless”’ (15 May 2019) <<https://www.bbc.co.uk/news/uk-wales-48272470>> (accessed 20 December 2022). This case is discussed in greater detail below.

17 Thomas, Note 11 above, at 9.

18 Future Generations Commissioner for Wales, *A government fit for future generations: a review into Welsh Government’s implementation of the Well-being of Future Generations Act: acting today for a better tomorrow*, 12 December 2022, at 8.

19 £1.32 billion excluding VAT. William Wadrup and Aidan McCooney, *M4 Corridor around Newport (M4CAN): Inspector’s Report on the Public Local Inquiries which were held at the Llysaght Institute, Newport between 28 February 2017 and 28 March 2018* (2018) at 74.



Levels, including four Sites of Special Scientific Interest (SSSIs). The M4CAN inquiry is a useful case study for examining this Act as it was seen by some of its actors as a test case for the Act. The scheme proposers at this inquiry contended that congestion on the M4 was a serious problem that affected regional economic development and that this scheme was the solution. The environmental objectors to the scheme contended the scheme would destroy a precious, protected habitat. The key problems facing the inquiry were thus framed as a conflict between economic development and environmental protection – exactly the kind of trade-off between economic, social, and environmental priorities that the WFGA aims to address. While the Inspector at the inquiry approved of the scheme, First Minister Mark Drakeford disagreed with the Inspector and did not approve the scheme. Significantly, the Future Generations Commissioner regarded this decision as an example of a positive effect of the Act.<sup>20</sup>

As noted above, there is an emerging trend towards forms of sustainable development legislation whose purpose is to engender a cultural shift throughout society, changing how we understand growth and how we value the environment. This article explores WFGA's approach to engendering such change, drawing on Hoffman's discussion of normative and regulative legislation to understand the distinctive aims and approaches of aspirational legislation like WFGA.<sup>21</sup> Hoffman describes the benefits of normative legislation and its suitability to decentralised governance; while Hoffman focuses on the legislative measure implementing the United Nations Convention on the Rights of the Child in Wales,<sup>22</sup> the concept has clear relevance for WFGA. Hoffman describes a normative model of compliance as having minimal formal enforcement measures. Instead, a normative approach sets out a 'framework for effective policy and action'; this framework establishes avenues for discourse that mean that 'the meaning and content of rights [or in the case of WFGA, wellbeing goals] ... become locally understood, and have a causal influence on policy outcomes'.<sup>23</sup> This article

suggests that WFGA follows a similar model and describes the 'normative model of compliance' established by WFGA as a web of obligations. The obligations are not very strong, but they are unavoidable and they are repeated throughout the processes of policy design and implementation; they are connections held not by force or material incentive but ultimately by shared values. In this way, WFGA's 'web of obligations' approach contains traces of Donella Meadows' systems thinking, cited by Jane Davidson, a key architect of the Act, as a major influence.<sup>24</sup>

The first section of the article outlines the Act's features and its key bodies: the duty on public bodies, the public service boards and the Office of the Future Generations Commissioner, outlining the main strands of this web. From there, the article considers how these bodies might affect change in the planning system. Has this approach facilitated situated understandings of and approaches to the wellbeing goals? Has it engendered cultural change in decision-making? The third and final section of the article reflects on how these intended changes were limited by obstacles identified at the M4CAN inquiry. These obstacles were: the limited authority of the Commissioner; ambiguity in the language of the Act; the timeliness of the Act; and the entrenched assumptions of some key actors at the inquiry. It is suggested that in better understanding how the Act is implemented and identifying obstacles the Act might encounter, the potential impact of aspirational legislation like WFGA can be better understood and hopefully better facilitated.

## The Wellbeing of Future Generations Act 2015

The Wellbeing of Future Generations Act 2015 was passed by the National Assembly for Wales<sup>25</sup> on 17 March 2015 and received Royal Assent on 29 April 2015. Wales is the first nation in the Global North to have a commitment to promote sustainable development explicitly stated in its constitutional statute, the Government of Wales Act 1998.<sup>26</sup> The Act developed out of this embedded commitment to sustainable development in Wales. WFGA has three primary functions, as laid out in its introductory text:

- to make provision requiring public bodies to do things in pursuit of the economic, social, environmental and cultural well-being of Wales in a way that accords with the sustainable development principle and to require them to report on such action;<sup>27</sup>

20 Thomas, Note 11 above, at 4; Clare Critchley, 'Sophie Howe and the art of the possible' (Institute of Welsh Affairs, Autumn/Winter 2019): [https://www.iwa.wales/wp-content/media/Agenda\\_63\\_Autumn2019-1.pdf](https://www.iwa.wales/wp-content/media/Agenda_63_Autumn2019-1.pdf) (accessed 21 December 2022) at 44.

21 Simon Hoffman, 'The UN convention on the rights of the child, decentralisation and legislative integration: a case study from Wales' (2019) 23(3) *The International Journal of Human Rights*, 374–391.

22 Rights of Children and Young Persons (Wales) Measure 2011.

23 Hoffman, Note 21 above, at 378. However, Hoffman notes that there is an accountability mechanism included in this measure; the exercise of the 'due regard' duty is amenable to judicial review challenge (ibid).

24 Donella Meadows, in Jane Davison, *#futuregen: Lessons from a Small Country* (Chelsea Green 2020) C3 p1.

25 Since November 2019 the Senedd Cymru or Welsh Parliament.

26 Davison, Note 24 above.

27 WFGA, section 3.

- to establish a Commissioner for Future Generations to advise and assist public bodies in doing things in accordance with this Act,<sup>28</sup> and
- to establish public services boards in local authority areas; to make provision requiring those boards to plan and take action in pursuit of economic, social, environmental and cultural well-being in their area.<sup>29</sup>

The Act establishes the duties on public bodies, the Commissioner for Future Generations and the public service boards. The Act further establishes the principles and objectives to which these duties align and that these bodies are expected to follow. The Act defines sustainable development as ‘the process of improving the economic, social, environmental and cultural wellbeing of Wales by taking action, in accordance with the sustainable development principle, aimed at achieving the wellbeing goals’.<sup>30</sup> The sustainable development principle set out in the Act follows the definition of sustainable development laid out in the Brundtland report:<sup>31</sup> ‘that the needs of the present are met without compromising the ability of future generations to meet their own needs’.<sup>32</sup> Reflecting the importance of Wales’s cultural and linguistic heritage, WFGA adds an additional pillar of cultural wellbeing to the traditional social, environmental and economic pillars. The wellbeing goals cited in the Act’s definition of sustainable development are set out in section 4. They are:

1. A prosperous Wales
2. A resilient Wales
3. A healthier Wales
4. A more equal Wales
5. A Wales of cohesive communities
6. A Wales of vibrant culture and thriving Welsh language
7. A globally responsible Wales.<sup>33</sup>

In addition to taking action ‘in accordance with the sustainable development principle’ and ‘aimed at achieving the wellbeing goals’, public bodies are required by the Act to adhere to the Act’s five ways of working. These are:

- a. Safeguarding the ability to meet long-term needs (long-term)
- b. Taking an integrated approach (integration)

- c. Involving people with an interest in achieving the wellbeing goals (involvement)
- d. Acting in collaboration to assist the body in meeting its wellbeing objectives (collaboration)
- e. Working to prevent problems occurring or getting worse (prevention).<sup>34</sup>

The remainder of this section describes the bodies established by the Act: the Office of the Future Generations Commissioner, the public services boards and the ‘WFGA’ public bodies (the public bodies that have a duty under the Act). This description will show how the definitions, the four pillars, the seven wellbeing goals and the five ways of working outlined above are threaded throughout the functions of these bodies.

### Public bodies

Section 3 of the Act places a duty on public bodies to carry out sustainable development. There are 48 public bodies with duties under the Act.<sup>35</sup> These bodies are listed in section 6 and include among other bodies, the Welsh Government, local authorities in Wales, local health boards and Natural Resources Wales. At time of writing, section 6 is being revisited with the aim of expanding this list. WFGA public bodies are required to publish wellbeing objectives ‘designed to maximise [their] contribution to achieving each of the wellbeing goals and taking all reasonable steps to meet those objectives’.<sup>36</sup> These objectives are to be embedded within corporate strategy documents to ensure that they are embedded throughout the bodies’ functions and not treated as an ‘add on’.<sup>37</sup> This speaks to the lawmakers’ intention to engender culture change with this Act. The four pillars of the Act aim to encourage public bodies to meet these objectives flexibly and creatively, though research by Nesom and McKillop suggests that these aims are undermined by a lack of guidance around the Act and a lack of resources, as well as a culture of distrust between local and central government.<sup>38</sup>

### Public Services Boards

The Act establishes Public Services Boards (PSBs) for every local authority area in Wales (there are 15 PSBs across Wales and 22 local authority areas as some of the PSBs have

28 *ibid*, section 17.

29 *ibid*, section 29.

30 *ibid*, section 2.

31 World Commission on Environment and Development, *Our Common Future* (Oxford University Press: Oxford, 1987) at 16.

32 WFGA, section 5.

33 *ibid*, section 4.

34 *ibid*, section 5(2)(a)–(e).

35 Although only 42 seem to be listed on the Commissioner’s website.

36 WFGA, section 3(2).

37 Welsh Government, *SPSF 2: Individual role (public bodies): Shared Purpose: Shared Future: Statutory guidance on the Well-being of Future Generations (Wales) Act 2015* (2016), page 3, para 5.

38 Nesom and McKillop, Note 2 above, at 433 to 434.

merged).<sup>39</sup> The role of the PSBs is to assess environmental, social, cultural and economic wellbeing in their area, to set objectives for improving the wellbeing of their area and for the members of the PSB to take all reasonable steps to meet these objectives.<sup>40</sup> The PSBs have statutory members, including the local council, the health board, the fire and rescue authority and Natural Resources Wales. Other bodies such as voluntary organisations can be invited to participate.<sup>41</sup> Each PSB must publish a local wellbeing plan and deliver annual reports on the plan's progress; they must seek the advice of the Commissioner when drafting their plans.<sup>42</sup>

### The Office of the Future Generations Commissioner

As noted in the introduction, the role of the Future Generations Commissioner is to advise and to help public bodies to act in accordance with the Act. The Commissioner provides advice on the Act to public bodies, to the Auditor General for Wales, to Public Services Boards and to 'any other person who the Commissioner considers is taking steps to contribute to the achievement of the wellbeing goals'.<sup>43</sup> In addition to these advisory duties, the Commissioner is tasked with promoting the sustainable development principle and assessing to what extent public bodies are meeting their wellbeing objectives.<sup>44</sup> The Commissioner has also commented on the extent to which PSBs have met their objectives; this has been the cause of some complaint among PSB members, who suggest it undermines the local focus of the Act.<sup>45</sup> It has been noted elsewhere that the Office of the Future Generations Commissioner has very limited resources,<sup>46</sup> and that this might hamper some of the Act's ambitious aims.

### The Wellbeing of Future Generations Act and the planning system in Wales

WFGA's intention is to change how policy is formulated and implemented throughout the public sector. The three bodies described above are the main channels through which it can deliver this change. This section considers the changes these bodies can engender in the planning system in Wales. As the Act is not planning-specific and is set out at a general level, the impacts on the planning system

considered in this section tend to be quite indirect. The aim of this section is to follow the logic of the Act and think through what impacts the Act's bodies might have on the planning system and how they might deliver greater sustainable development than was previously attained. More attention is given to the WFGA public bodies and to the Future Generations Commissioner as the role of the PSBs in planning is less direct.<sup>47</sup>

### Public bodies

Some of the WFGA public bodies, listed above, make planning decisions, for example the Welsh Government and local authorities in Wales. These bodies are required to carry out sustainable development and to demonstrate they are doing so through publishing wellbeing objectives. As sustainable development is embedded in these bodies' ways of working under the Act, the planning decisions these bodies make will have to be compatible with the sustainable development principle. This fairly indirect obligation on planning decision-makers joins existing sustainable development obligations. Developments should align with Future Wales: The National Plan (which was published in February 2021, replacing the Wales Spatial Plan).<sup>48</sup> The local planning authority must carry out a sustainability appraisal as part of their local development documents.<sup>49</sup> As these obligations were already in place, has this additional obligation on planning decision-makers made a difference? Advocates might argue that the concept of sustainable development in WFGA is more ambitious than that previously held in planning WFGA does not effect change by adding another requirement but by changing the understanding of the term on which the requirement is based. In publishing and taking steps towards meeting wellbeing objectives, the bodies are obliged to consider how they are contributing to the seven wellbeing goals, which arguably embeds a richer understanding of sustainable development.

Whether or not the concept of sustainable development underpinning the obligation has changed, however, it would seem that the obligation on WFGA public bodies to make decisions that are compatible with the sustainable development principle is quite weak. This was demonstrated in the Cymer Afan school case.<sup>50</sup> Neath Port Talbot local authority proposed closing Cymer Afan

39 WFGA, section 29.

40 *ibid*, section 36.

41 *ibid*, Part 4 section 30.

42 Note 37 above, page 21, para 104.

43 WFGA, section 19.

44 *ibid*, section 18.

45 Nesom and McKillop, Note 2 above, at 440.

46 The Commission on Justice in Wales, *Justice in Wales for the People of Wales* (October 2019) at 267.

47 For detailed study of the PSBs, see Nesom and McKillop, Note 2 above.

48 Welsh Government, *Future Wales: The National Plan 2040* (24 February 2021).

49 Planning and Compulsory Purchase Act 2004, section 19.

50 Rhodri Williams KC, the counsel quoted in the introduction (above) who said that the Act was 'virtually useless' was counsel in this case.

comprehensive school in late 2017.<sup>51</sup> This decision was challenged by local campaigners who argued that the local authorities had contravened their duties under WFGA, contending that the decision damaged the sustainability of the community, thus undermining the wellbeing goal, ‘a Wales of cohesive communities’.<sup>52</sup> Justice Lambert dismissed the case, finding that the Act could not trigger a judicial review:

I do not find it arguable that the 2015 Act does more than prescribe a high-level target duty which is deliberately vague, general and aspirational and which applies to a class rather than individuals. ... As such, judicial review is not the appropriate means of enforcing such duties.<sup>53</sup>

It would seem that while public bodies, including those with planning responsibilities, have a duty to carry out sustainable development, this duty is not clear enough to provide grounds for a legal challenge where it is contended that the body has failed to carry out sustainable development. If, as would seem to be the case, WFGA is not amenable to judicial review challenge, accountability under WFGA is weaker than under the UNCRC measure discussed by Hoffman.<sup>54</sup> Pritchard and Nason suggest it might be relevant that Justice Lambert is a ‘so-called “judge on wheels”, who has never practised law in Wales, and so might be less sensitive to Wales’s distinctive approach to sustainable development.’<sup>55</sup> They further suggest that judicial review might have been excluded because the Act provides for other accountability mechanisms, for example the Commissioner and the Auditor General for Wales.<sup>56</sup>

In October 2021, Planning and Environment Decisions Wales (PEDW) was launched, taking over the functions of the Planning Inspectorate in Wales. PEDW evidently plays a major role in the planning system in Wales. Does PEDW have obligations under the Act? It is not a WFGA public body and according to the criteria set out in a recent Welsh Government consultation on adding public bodies subject

to the wellbeing duty of the Act,<sup>57</sup> it is not likely to become so. While PEDW meets the other criteria, for example that its activities impact on the economic, social and environmental wellbeing of Wales, the consultation notes that advisory and inspectorate bodies are not considered to meet these criteria because they do not have strategic functions. As it is, PEDW does have some indirect obligations under the Act. Planning Policy Wales states that each decision-making body must show how it adheres to the five ways of working.<sup>58</sup> With its external-facing role, PEDW is well placed to promote collaboration and public involvement in the planning system in its ways of working. This would align with increasing collaboration and reconnecting people with planning, two objectives under land use planning and place making, one of the focus areas identified by the Future Generations Commissioner. More on the Commissioner and their role in planning below.

### The Future Generations Commissioner

As outlined above, the Commissioner promotes the Act, provides advice to bodies with obligations under the Act and assesses to what extent these obligations are being met. The Commissioner’s involvement in the planning system is consequently at quite a high level; the Commissioner seeks to shape the context in which planning policy is formulated and implemented, as opposed to getting involved in individual planning decisions.<sup>59</sup> As noted above, land use planning and place making is an area of focus for the Office of the Future Generations Commissioner. They have sought to engender change in planning policy through education and personal development; the Office has delivered training around the Act to staff at PEDW and to the Royal Town Planning Institute (RTPI).<sup>60</sup> They have further sought to change the planning policy context through influencing key planning policy documents in Wales, such as Planning Policy Wales and the National Development Framework for Wales.<sup>61</sup> This can be seen in the most recent edition of Planning Policy Wales, which sets out how the achievement of the wellbeing goals is at the heart of the planning system in Wales.<sup>62</sup> Previous editions of Planning Policy Wales have also stated that sustainable development is at the heart of the planning

51 Geraint Thomas, ‘Port Talbot comprehensive school set to close meaning long journeys for pupils’ (Wales Online, 3 November 2017): <https://www.walesonline.co.uk/news/wales-news/port-talbot-comprehensive-school-set-13854817> (accessed 21 December 2022).

52 Jenny Johnson, ‘Villagers’ “landmark” legal bid to save Cymer Afan school’ (BBC News, 10 October 2018): <https://www.bbc.co.uk/news/uk-wales-45800593> (accessed 21 December 2022).

53 Martin, Note 16 above; Sarah Nason and Huw Pritchard, ‘Administrative justice and the legacy of executive devolution: establishing a tribunals system for Wales’ (2020) 26(4) *Australian Journal of Administrative Law*, at 233 to 254.

54 Hoffman, Note 21 above, at 382.

55 Nason and Pritchard, Note 53 above, at 247.

56 *ibid.*

57 This consultation closed on 20 October 2022.

58 Welsh Government, *Planning Policy Wales (edition 11)* (2021), page 8, para 1.16.

59 Future Generations Commissioner for Wales, ‘Land use planning and placemaking’: [https://www.futuregenerations.wales/priority\\_areas/planning](https://www.futuregenerations.wales/priority_areas/planning) (accessed 1 September 2022).

60 *ibid.*

61 *ibid.*

62 Note 58 above.



system in Wales.<sup>63</sup> We might therefore question whether this marks a significant change, though this is perhaps unfair. Change in policy culture comes in increments and not from one policy edition to the next. It is not that WFGA suddenly brings sustainable development considerations into planning. These considerations have existed in planning for a long time. Arguably, the aim of the Act is to change the way sustainable development is understood and the way these policies are formulated throughout planning. The concept of sustainable development is widened through the four pillars and seven wellbeing goals and embedded in the obligations on the public bodies and public service boards; the language in these recent documents reflects these changes.

The lack of resources of the Office, exacerbated after years of austerity, were noted in the first section, as well as the concerns that lack of resources would hamper the Act's potential impact. The scope of the Commissioner's work is considerable; they are required to raise awareness of the wellbeing goals, to monitor activities towards these goals and to embed the Act's approach across multiple policy sectors. The scope of what they can do is limited by limited resources. The Commission on Justice in Wales Report states that the Commissioner's annual budget was £1.4 million and that they monitored 345 well-being objectives set by 44 public bodies.<sup>64</sup> This sets a limit on the Commissioner's ambition. Nesom and McKillop, while recognising this problem, caution against pessimism, and note that 'making ground-breaking, far-reaching culture changes to how public organisations think, make policy and deliver services is always going to take time'.<sup>65</sup>

### Public Services Boards

The role of the Public Services Boards is to assess their area's wellbeing and to set area wellbeing objectives. Therefore, they do not have duties directly related to the planning system. The planning duties linked to this public service boards' duty fall on the local planning authority, who must have regard to the local wellbeing plan in preparing the local development plan, for example by demonstrating how objectives in the wellbeing plan relating to land-use will be delivered.<sup>66</sup> Echoing what was stated above, this is quite a weak obligation; it is at its strongest where the wellbeing plan has specific objectives and actions relating to land-use and development.

63 Welsh Government, *Planning Policy Wales (edition 10)* (2018), page 9, para 1.11.

64 The Commission on Justice in Wales, Note 46 above, at 267.

65 Nesom and McKillop, Note 2 above, at 442.

66 Welsh Government, *SPSF 3: Collective role (public services boards): Shared Purpose: Shared Future: Statutory guidance on the Well-being of Future Generations (Wales) Act 2015* (2016), page 27, para 142.

Reflecting on the framework of the Act and the kinds of change the Act seeks to engender in the planning system, patterns start to emerge. There have been references to weak or indirect obligations, and obligations that are replicated in different contexts. These patterns give an idea as to the approach the authors of this Act intended to take. The purpose of the Act is to encourage and to embed a change in how sustainable development is understood; this is achieved through re-orienting policy design and implementation around sustainable development. Evident in the approach taken in this Act, it was not felt that change like this can be generated by establishing a strict legal test or enforcement mechanism. In fact, we have seen that the duty on public bodies under the Act has been held not to be amenable to judicial review challenge. Rather, the Act created a web of obligations over a range of public bodies. We have seen that this approach has been applied in the planning system, through the Commissioner's work embedding the WFGA framework in planning policy documents and through the overlapping obligations on local planning authorities (to publish wellbeing objectives and to have regard to their local wellbeing plan). The final section of this article explores the kinds of challenges that the 'web of obligations' approach might face in a planning decision-making process, drawing on the experience of the M4CAN inquiry.

### Factors limiting WFGA's impact at the M4CAN inquiry

This article has set out key features of WFGA and some of the changes it seeks to embed in planning in Wales. In this section, the example of the M4CAN inquiry is used to further examine the impact of the Act on planning in Wales. It considers four kinds of challenge limiting the impact of the Act at this inquiry. Two of these challenges are internal to the Act: the limited authority of its champion and the ambiguity of its language. Two of these challenges are external: the timeliness of the Act and entrenched assumptions in the planning system. Before considering these challenges, a somewhat negative focus, it is worth recognising the positive impacts of the Act that were evident at the inquiry. Environmental objectors noted that the Act provided them with useful tools for their case.<sup>67</sup> While their case did not rely solely on WFGA, the Act gave them the opportunity to move their argument into novel areas; for example, the environmental objectors called on expert witnesses who criticised the business case for the scheme,

67 Author's interview with research participant 'IR', 23 January 2018, as part of M4CAN research project.



not a traditional area for environmental objectors.<sup>68</sup> The Act also provided a narrative for the objectors to build their case around, as opposed to merely responding to the narrative set out by the scheme-proposers.<sup>69</sup>

### Limited authority of the Act's champion

Noted above, the Office of the Future Generations Commissioner does not tend to involve itself in individual planning decisions. Rather, it aims to align the planning system in Wales with WFGA by influencing the planning policy context. The Commissioner did get involved in the M4CAN inquiry and this was arguably to the detriment of their authority. Objectors to the M4CAN scheme stated that the Welsh Government scheme breached the Act. The Commissioner submitted written statements to the inquiry supporting this view, but they did not appear in person. In their written submissions, the Commissioner stated that the Act established a new balancing exercise in planning. Where traditionally economic benefits had been given precedence, the Act was developed to redress the balance to better protect the longer-term needs. The Commissioner stated that under the Act, 'we must look for solutions which address the four pillars of well-being together and select the one which delivers best against the four pillars of well-being. One pillar cannot override the others'.<sup>70</sup> The Inspector did not agree with the Commissioner's proposition that 'all of the wellbeing goals must be given equal weight in each decision' and found this to be 'unrealistic in the real-world situation of a major infrastructure proposal'.<sup>71</sup> The Inspector thus agreed with the Welsh Government's interpretation of the Act over the Commissioner's interpretation. The First Minister disagreed with the Inspector and did not approve of the scheme; the First Minister stated, however, that he did not disagree with the Inspector's understanding of the Act.<sup>72</sup>

This example highlights how the Commissioner's interpretation of the Act at the inquiry was not seen by the Inspector or by the First Minister as the authoritative interpretation. It is not stated in the legislation that their interpretation is authoritative. However, one might expect that the Commissioner, as the Act's champion, would be an authority on its interpretation. But in this case, their

interpretation was dismissed, directly by the Inspector and indirectly by the First Minister. It should be noted that WGFA was enacted late in the scheme timeline; the Secretary of State for Wales stated their intention to build a motorway on this (approximate) site in 1993 and the preferred route was established in 2014. The Commissioner was not long in post when the inquiry began.<sup>73</sup> We might suppose that their authority is more secure seven years on from the Act, though we are unlikely to get an equivalent case to the M4CAN inquiry at which to test it. If their interpretation of the Act can be questioned and weaker interpretations accepted, this surely limits the Act's capacity to engender change. It would seem to undermine the web of obligations established by the Act. This challenge links back to concerns regarding the resources of the Office highlighted above, that the effectiveness of the office is limited if they do not realistically have the resources to fulfil their duties. Likewise, their effectiveness is compromised, and the strength of the duties set out in the Act is weakened, if the Commissioner's interpretation of the Act is out of step with the Government's interpretation.

### Ambiguity in the Act's language

As highlighted above, the Commissioner in their written evidence to the inquiry stated that the Act set out a new way of balancing environmental, economic, social and cultural priorities when considering a new scheme. This was then disputed by the Inspector. The counsel for environmental objectors similarly believed that the balancing exercise conducted in a planning inquiry had not really been affected by the Act.<sup>74</sup> This confusion over the meaning of the Act's obligations and their practical application in the M4CAN inquiry reveals a common frustration with the Act. Objectors spoke about working with the 'spirit' of the Act. However, they noted that they relied on the 'spirit' of the Act in part because they felt it was not that clear how the Act would affect the decision. Objectors said that they found the Act challenging to use. The NRW<sup>75</sup> coordinator at the inquiry found the Act challenging in particular in comparison with the clear statutory duties with which they had experience.<sup>76</sup> This

68 Author's interview with research participant 'MW', 14 December 2017, as part of M4CAN research project.

69 *ibid*

70 *Letter from Sophie Howe, Future Generations Commissioner* (submitted to the Inquiry on 13 September 2017).

71 Wadrup and McCooey, Note 19 above, at 380.

72 Mark Drakeford, *First Minister Mark Drakeford, Speech to Assembly on M4CAN Decision* (Senedd Debate, Cardiff, 4 June 2019) (accessed 4 June 2019): <http://www.senedd.tv/Meeting/Archive/1ca9b03c-3791-4079-b6aa-53c40e517b90?>

73 Sophie Howe was in post in 2016. *Comisiynydd Cenedlaethau'r Dydfodol Cymru: Future Generations Commissioner for Wales*, 'Sophie Howe: Future Generations Commissioner for Wales': <https://www.futuregenerations.wales/team/sophie-howe> (accessed 1 September 2022).

74 Author's interview with research participant 'BM', 12 August 2019, as part of M4CAN research project.

75 Natural Resources Wales, the statutory environmental body in Wales.

76 Author's interview with research participant 'JP', 8 November 2018, as part of M4CAN research project; Statutory duties like section 28 of the Wildlife and Countryside Act 1981.

echoes commentators' concerns with ambiguity in the Act. For example, Davies notes a lack of clarity over how to assess the duty on public bodies to 'take all reasonable steps' in meeting their well-being objectives.<sup>77</sup> While actors might grow more adept at working with the Act over time, ambiguities in the Act could serve to limit its potential impact. The strength of the web of obligations approach is undermined if the Act's obligations are understood and followed in varying ways.

### Timeliness of the Act

Time was an issue for the Act at the M4CAN inquiry in two ways. Firstly, we must recognise that the Act is young and was even younger at the time of the M4CAN inquiry. As previously noted, the Act arrived late in the M4CAN scheme timeline, making it harder for it to have an impact. WFGA is a process-driven Act and was not intended to serve as a final check on whether a decision is in accordance with the sustainable development principle. By the time a scheme reaches the stage of a public local inquiry, the planning system is considering one particular solution and not the underlying problem. This limited the extent to which the Act could have an impact. The Act has now been in force for seven years. While it has become more embedded over this period, we are still in its early stages. This 'time' aspect, which we might term the youth of the Act, is intensified by the second 'time' aspect we will consider, the timeframes in which the Act operates.

The Act sets out a web of obligations across public bodies guided by the wellbeing goals. It can take some time for these processes to become embedded. While law can move slowly, arguably policy should be more responsive. At the time of the M4CAN inquiry, references to the Act were present in some of the planning policy documents but it was not widespread throughout planning policy. Planning policy informing the inquiry did not reflect WFGA for the most part. There are 19 Technical Advice Notes (or TANs) related to Welsh planning.<sup>78</sup> Only seven TANs have been updated since WFGA and only two of these seven mention the Act.<sup>79</sup> Only one TAN mentions the sustainable development principle;<sup>80</sup> six TANs mention earlier Welsh Government or UK commitments to sustainable

development.<sup>81</sup> As is evident from these planning policy documents, it has taken some time for planning policy to respond to the changes brought in by WFGA. The types of change WFGA seeks to produce also take time. The Act encourages bodies to approach their planning responsibilities according to the framework set out in the Act, but bodies are not necessarily sanctioned if they do not take this approach. It is a vehicle for slow, not sudden, change. It was always going to fail to deliver clear, transformative outcomes in cases like the Cymer Afan case and the M4CAN inquiry. Its purpose is to initiate processes that will engender slower change, to shape the working culture and practices in which policies are formulated and implemented. And it is at this level of workplace culture that we find the final type of challenge inhibiting the impact of the Act at the inquiry.

### Entrenched assumptions at the inquiry

This article suggests that two kinds of assumptions limited the Act's impact at the inquiry; assumptions around sustainable development and around environmental value. There were moments at the inquiry that seemed to reveal assumptions around sustainable development that limited the effect of the Act. Key actors questioned the extent to which the Act's approach to sustainable development was that novel. A senior stakeholder in the (then) Planning Inspectorate Wales, when asked about the Act and its impact in the Welsh planning system, commented that there had been a duty to sustainable development present in the planning system since the 1980s.<sup>82</sup> The planning system was already comfortable considering sustainable development. Consequently, they doubted whether the Act was going to initiate real change. This is further reflected in the Inspectors' report, where the Inspector found that sustainable development had been at the heart of Welsh Government decision making since 1998, that the M4CAN scheme accorded with the sustainable development principle and that he found no evidence that the scheme was contrary to WFGA.<sup>83</sup> Both these views would suggest that it was not wholly accepted that the Act was setting out an approach to sustainable development that was markedly

77 Haydn Davies, 'The Well-being of Future Generations (Wales) Act 2015 – a step change in the legal protection of the interests of future generations?' (2017) 29 *Journal of Environmental Law* 165.

78 Technical Advice Notes (TANs) provide planners with detail, augmenting the strategic plan set in *Planning Policy Wales*.

79 Welsh Government, *Technical Advice Note 20: Planning and the Welsh Language* (2017); Welsh Government, *Planning Policy Wales Technical Advice Note 24: The Historic Environment* (2017).

80 Welsh Assembly Government, *Planning Policy Wales: Technical Advice Note 5: Nature Conservation and Planning* (2009).

81 Welsh Government, *Technical Advice Note 2: Planning and Affordable Housing* (2006); Welsh Government, *Technical Advice Note 6: Planning for Sustainable Rural Communities* (2010); Welsh Government, *Technical Advice Note 15: Development and Flood Risk* (2004); Welsh Government, *Technical Advice Note 16: Sport, Recreation and Open Space* (2009); Welsh Government, *Technical Advice Note 18: Transport* (2007); Welsh Government, *Technical Advice Note 21: Waste* (2014).

82 Author's interview with research participant 'TT', 16 August 2019, as part of M4CAN research project.

83 Wadrup and McCooey, Note 19 above, at 380 to 382.

different from that which came before. If planning actors do not consider the Act to have established a new understanding of sustainable development that requires a significant change in approach, this must surely limit the effectiveness of the Act.

People's perceptions of environmental value are often deeply held, shaping beliefs and behaviours in subtle and unconscious ways.<sup>84</sup> These perceptions are closely related to sustainable development. A key aim of sustainable development is to change the relationship between humans and the environment.<sup>85</sup> We see this aim reflected in the wellbeing goals. The wellbeing goal mostly clearly relating to the environment, 'A Resilient Wales', aims for Wales to be a 'nation which maintains and enhances a biodiverse natural environment and with healthy functioning ecosystems that support social, economic and ecological resilience'.<sup>86</sup> This indicates that the environment has value outside of its benefit to humans, moving away from the instrumentalist view of nature present in traditional planning decision-making. While WFGA provided environmental objectors with a platform from which to question and to reposition the human-nature relationship, instrumental views of environmental value tended to dominate at the M4CAN inquiry. The inquiry prioritised an understanding of the environment that best suited an economic rational model, that treated nature as replaceable and moveable. Humans and the environment were treated separately and in competition with one another at the inquiry, reinforcing the instrumentalist view of nature; human interest and economic development were repeatedly conflated at the inquiry, against the environment. When an environmental objector argued that the scheme did not align with WFGA, Welsh Government counsel argued that the Act did not require that 'we put all life on hold' in the transition to a more environmentally sustainable society.<sup>87</sup> 'Life' is assumed to cover human development, infrastructure and so on; it would not seem to cover local biodiversity. Welsh Government counsel often returned to the idea of balance in cross-examination relating to WFGA, contending that the Welsh Government did not dispute that there would be negative impacts, but that the need outweighed the damage. They then argued that it was the duty of government to consider the 'balance striking' between the needs of 'public interest' and environmental

impact. As with the 'life' that gets put on hold, one must conclude that this account of the 'public interest' does not include environmental protection.

The article has previously argued that these are the kinds of changes the WFGA is seeking to instigate, changes of values and of culture. As argued above, this kind of change happens slowly. WFGA opens a space for these conversations and they were tried out at the inquiry. However, the strongest voices at the inquiry were those of the 'status quo'. Arguments questioning these views of environmental value did not seem to affect the Inspector's decision. We see that while the Inspector recommended that the scheme be approved, the First Minister did not approve the scheme. Did the Act and the conversations it generated around environmental value affect the First Minister's decision? Mark Drakeford in his decision letter suggests a re-assessment of environmental value (though he does not mention WFGA in this):

I attach greater weight than the Inspector did to the adverse impacts that the Project would have on the environment ... Ultimately, whilst I agree with the Inspector that '[t]here are valid and strong competing interests at issue here' [IR8.480], my judgement as to where the balance between the competing interests lies is different to that of the Inspector.<sup>88</sup>

While this comment in the decision letter is encouraging and it is tempting to see it as evidence of the change sought by the Act, it must be noted that the First Minister did not mention WFGA in the decision and did not cite any particular reason for attaching greater weight to the adverse environmental impacts.

## Conclusion

While critics of WFGA point to weaknesses in the Act's enforcement, some of WFGA's advocates dismiss these enforcement concerns, claiming that the purpose of the Act is to embed sustainable development throughout the Welsh public sector. Its purpose is to change the culture in which policy is formulated and implemented and in which decisions are made. Taking this position, it is argued that the Act is not a piece of regulative legislation and therefore should not be measured by such criteria. This article contributes to WFGA scholarship by moving past questions of enforcement and evaluating the Act as a piece of normative legislation. The article describes the 'web of obligations' approach the Act takes to engender cultural change and assesses its impact in a planning decision-making

84 Mark Tadaki, Jim Sinner and Kai M A Chan, 'Making sense of environmental values: a typology of concepts' (2017) 22(1) *Ecology and Society* 7.

85 Karen Morrow, 'Rio+20, the green economy and re-orienting sustainable development' (2012) 14 *Environmental Law Review* 279.

86 WFGA, section 4.

87 Fieldnotes 26 April 2017.

88 Mark Drakeford, *Letter 're: various schemes and orders in relation to the M4 Corridor around Newport'* (4 June 2019) at 6 to 7.

process. It sets out the key features of the Act and the way that this web of obligations approach can be seen in the planning system, through the duty on public bodies, the public service boards and the Office of the Future Generations Commissioner, and through the wellbeing goals, wellbeing objectives and ways of working. Drawing on empirical research conducted at the M4CAN inquiry, the article identifies and explores some obstacles facing the ‘web of obligations’ approach in planning decision-

making. These obstacles were: the limited authority of the Commissioner; ambiguity in the language of the Act; the timeliness of the Act and the entrenched assumptions of some key actors at the inquiry. It is hoped that by providing a situated understanding of the Act’s approach and the challenges it faces, this article can progress understanding of the Act as a form of normative legislation. It has aimed to offer useful experience and insights for those developing similar legislation in other jurisdictions.