

By email

13<sup>th</sup> September 2017.

### **The M4 Corridor Around Newport Public Local Inquiry**

Dear Inspector,

It has recently been brought to my attention that one of the objectors to the proposed M4 corridor around Newport has alleged that the Welsh Government has not appropriately interpreted the provisions of the Well-being of Future Generations (Wales) Act 2015 in relation to its proposals for the M4 corridor around Newport.

As somebody that is independent of the Welsh Government I am unable to comment on that allegation. However, I am concerned that such an allegation has been made and I feel duty bound to ensure that the duties under the Act are being applied in the correct manner. This is, not least, because the incorrect adoption and interpretation of the principles under the Act may lead to misunderstanding and ambiguity across those parts of the Welsh public sector covered by the Act. The misapplication of the duties under the Well-being of Future Generations (Wales) Act 2015 in this case might set a wrong precedent which I am keen to avoid.

The legislation provides a new framework for decision making in Wales, and requires a dramatic shift in the way we take decisions in Wales; my role is to ensure that these new ways of working and making decisions are adopted by those organisations covered by the Act.

It is for these reasons that I wish the inquiry to admit this letter as evidence, giving due consideration to its contents. I therefore ask that you exercise your discretion under regulation 24(10) of the Highways (Inquiries Procedure) Rules 1994 and regulation 18(11) of the Compulsory Purchase (Inquiries Procedure) (Wales) Rules 2010 and allow this letter to be taken into account as written representations made to the inquiry.

You will no doubt appreciate that it is my duty to promote the sustainable development principle and to act as the guardian of the ability of future generations to meet their needs. In holding an office that is independent of government, and impartial in decision making, this letter seeks to address, independent of any preference or view concerning the M4 corridor around Newport, the relevant issues when considering the duties under the Well-being of Future Generations (Wales) Act 2015. In February 2017, I submitted a proof of evidence to the inquiry and this letter is supplementary to, and should be read in light of, that proof of evidence.

### Sustainable development under the Act

Although sustainable development is not a new concept, its approach in Wales has evolved over the last few years culminating in the passing of the Act, which has introduced clearer, better defined, and

stronger principles that should be embedded in the decision-making process. I would like firstly to stress the importance of transitioning from a traditional approach to sustainable development to the *innovative* concepts introduced in the Act. I submit therefore that claims made by officials and witnesses in the Inquiry that they have been carrying out sustainable development for years and therefore know how to apply the Act, cannot be accepted without further scrutiny as to whether the actions being taken and the decision making framework being applied actually meets the new statutory requirements which are quite different from those set out in previous policy. I need to stress that while the terminology remains the same: 'sustainable development principle', its meaning under the Act has changed. I would therefore expect all public bodies covered by the Act and those taking decisions within them to demonstrate how they are doing things differently. I would expect to see reference to the new sustainable development definition and consideration of short term/long term needs and an explanation as to how they have reached their decision using the five ways of working.

I recognise that sustainability objectives have been part of the WelTAG process (guidance and criteria), and that this has been used to appraise various proposals and options. However, the current guidance dates back to 2008 and again doesn't sufficiently reflect the current thinking or statutory requirements introduced by the Act, such as wider impacts on health, culture and communities.

I have designed a framework to help take decisions in accordance with the sustainable development principle in relation to infrastructure projects, and in this case the framework may be useful when seeking to ensure that both the seven well-being goals and the five ways of working have been fully considered. Using the framework, it is anticipated that the questions I have listed or similar ones have 1) been asked and 2) considered properly in reaching a conclusion on the advantages and/or disadvantages of pursuing certain courses of action – in this case the decision whether or not to build a new section of motorway; and in deciding if a route is better than the others. I anticipate that applications not demonstrating how the sustainable development principle has been applied would not be progressed as they would not be compliant with the duty to carry out sustainable development under the Act.

### Balancing under the Act

Secondly, it has been alleged that the balancing exercise between different pillars of Well-being meant that one or more could outweigh others. I need to explain that the four pillars of well-being and the five ways of working under the Act should be considered together and equally (i.e. a true balancing exercise). The same applies to the seven goals and the well-being objectives of public bodies. I understand that historically it has not been uncommon for the economic benefits to be given precedence but this is one of the reasons why legislation was needed to redress the balance between the different needs and the different core elements leading to decisions which are sustainable in the long-term.

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. The same applies to balancing the needs of both current and future generations. I expect public bodies to demonstrate that they are seeking to take decisions which deliver the best outcomes across all four pillars of well-being. The projects and decisions must contribute to all of them as if they were one. The new Act requires public bodies to take holistic decisions and to cease making decisions which harm critical elements of well-being, including social economic environmental and cultural elements. I appreciate that this is difficult, and this is why in choosing between options, a public body must identify and retain the solution which maximises a contribution to all the pillars of well-being as well as take reasonable steps to meet their well-being objectives. I would expect that decisions only contributing to one or two pillars of well-being to be disregarded and those that have multiple benefits across each of the elements of Wellbeing to be selected. **The balancing in this revolutionary Act means giving as equal as possible weight to each element and not allowing one to tip the scale.** I mean that all decisions must improve the economic, social, environmental and cultural well-being of Wales which is the duty to carry out sustainable development under the Act. Within these decisions, those achieving best balance should be favoured. This should also apply to the weighing of different public interests. The Act, and Welsh Government's guidance, clearly refer to this as a "balancing" exercise rather than an exercise of trade-offs.

I therefore cannot agree with statements made by Morag Ellis, QC in the Welsh Government's Opening Statement.

By way of example, whilst I agree that:

*"4.38 [The sustainable development principle, therefore, precludes decision makers from taking a short-termist approach at the expense of future generations. The 5 ways of working are complementary to and subject to the imperative under s 5(1) to avoid compromising the interests of future generations;"]*

I fundamentally disagree with the next paragraph which states:

*"The ways of working acknowledge the fact that there may be **trade-offs** between desirable objectives and goals. The sustainable development principle therefore involves striking a balance between different desiderata."*

It is my view that not only is this an incorrect interpretation of the Act but it could set a damaging precedent which could undermine the spirit and intention of the legislation. The Act moves us away from the traditional trades-offs approach to one of balancing in a more literal sense. The Oxford Dictionary defines balance as "A situation in which different elements are equal or in the correct proportions", and it appears that some evidence put forward in this inquiry is directly the opposite i.e. Allowing one element of Wellbeing, in this case economic wellbeing (although there are of course arguments to the contrary and questions as to whether it achieves even this given the definition of A Prosperous Wales under Act) to outweigh another.

The Act imposes on public bodies a duty to take into account 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. This requires an approach which actively seeks to give equal weight to different sets of needs. I would therefore expect public bodies to demonstrate how they are operating this safeguard. This is where the mitigation elements of any proposals (including in relation to biodiversity, culture etc.,) should be very carefully considered and again taken in a holistic manner to maximise positive impacts.

I am therefore very concerned when I read in the Welsh Government's Rebuttal to Friends of the Earth statement that:

*"7 The evidence presented by the Welsh Government **clearly identifies the long term environmental effects of the Scheme and I acknowledge this in my proof, but this does not mean that such development must be rejected out of hand.** The WFG Act requires action to be taken to ensure **the needs of the present are met:** there is a pressing need to take action now to address the problems associated with the M4 around Newport.*

*8. A balanced judgement is required to decide whether taking action as proposed and constructing the new section of motorway would preclude choices for future generations.*

*9. In paragraphs 244-249 of my proof of evidence I have weighed all the evidence relating to economic, social, environmental and cultural issues in order to reach a balanced conclusion on the merits of the Scheme. **I conclude that the benefits the Scheme would bring to meet the needs of the present provide a compelling case in its favour.** The Scheme is in accordance with the Welsh Government's duties under the WFG Act, it has been developed in accordance with the sustainable development principle, and it would contribute to achievement of the well-being goals."*

This is clearly wrong as demonstrated by the letter of the law. Section 3(1) of the Act requires public bodies to carry out sustainable development, and in doing so section 5 of the Act requires the public body to *"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"*. Good and compliant decision making under the Act requires that BOTH sets of needs are met by the decision, or at least without compromising the ability of future generations to meet their own needs. I would anticipate a decision which does not allow for this would be abandoned as not complying with the statutory duty.

#### Interface between the Act and other duties

Thirdly it was alleged that the Act was used as a justification not to comply with other duties under the Environment (Wales) Act 2015 and the Wildlife and Countryside Act 1981. Again, while not commenting on the allegation itself, I feel I must stress that it would be damaging **not** to interpret the duties under other legislation in the light of the Well-being of Future Generations (Wales) Act 2015. It is a common public law principle that public bodies frequently find themselves under several duties and that when this happens the public body will have to comply with **all** their duties. A selective or trade-off is not a suitable course and risks a decision being open to challenge. From the perspective of the duties under

the Act, again I would anticipate mitigation being important when duties under the Act contradict others. I note the submissions of Natural Resources Wales in this regard, which clearly set out their position on this matter.

The Environment (Wales) Act was developed alongside the Well-being of Future Generations (Wales) Act 2015 and therefore the Acts should reinforce each other. The duties under the Environment Act particularly resonate with the Resilient Wales Goal which “maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change)”.

Welsh Government has recently published the statutory Natural Resources Policy, required under the Environment (Wales) Act 2016, which states that for **Transport** “*we are promoting a more sustainable road transport network and a modal shift away from roads for people and freight. This will reduce emissions and the impacts that transport has on our environment and our health. We are committed to improving active travel opportunities and promoting public transport. In taking this action forward we will take action on our transport network that enhances the resilience of our ecosystems and reverses the decline of biodiversity*”. The M4 proposals seems to directly contradict this policy statement as the scheme and the mitigation do not seem to support this aspiration.

#### Integrated approach

Finally, I refer to the provisions of section 5(2) of the Act, which states:

*(2) In order to act in that manner, a public body must take account of the following things—  
[...]*

*(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;*

I believe it is clear from this provision that decisions must be made in light of the bigger picture and not ignoring the impact a decision would have on others.

#### Conclusion

I fully recognise the challenge of transitioning from a traditional approach (when the idea of a new section of motorway was conceived) to this new innovative and revolutionary way of working in the Act but I believe that we must all rise to the challenge to ensure the benefits foreseen by the Act are fully realised. Business as usual is no longer an option. As I previously say the M4 project given its scale and importance must not set the wrong example which could permanently damage the spirit of the legislation.

In my first submission, I stressed the importance of using the five ways of working to reach any sustainable decision (which I felt were not accurately addressed by the Welsh Government) and the

importance of demonstrating that these decisions amount to them meeting their duty to take all reasonable steps to meet their well-being objectives and I will not repeat these arguments here. I also would like to offer the Future Generations Framework as a useful tool to be used when considering any infrastructure projects which I would suggest can help the inspector in reaching a suitable decision in the light of the Well-being of Future Generations Act 2015. I look forward to monitoring the progress of the proposals and the outcome of the inquiry. Should you require any further information or assistance concerning this letter, please do not hesitate to contact me.

Yours sincerely,



Sophie Howe