



All Assembly Members

11 October 2017

Dear Member

You will be aware of the recent contribution by the Well-Being of Future Generations Commissioner, Sophie Howe, to the ongoing M4 Corridor around Newport Project Public Inquiry. The Commissioner's involvement in the Inquiry process is of course welcomed in ensuring that the interpretation of the Act is robust and that this important piece of legislation is at the forefront of the minds of the independent inspectors, the Welsh Ministers and all stakeholders in deciding the future of this significant project.

Evidence has already been presented to the inquiry on how the principles, ways of working and goals of the Act have been considered in the development of the Project. In the interests of openness and transparency I would particularly like to draw your attention to the Commissioner's latest letter to the Inquiry and the Project team's response, both of which are attached.

The outcome of the M4 Inquiry will inform a final decision on whether to proceed with construction next year. I am unable to comment any further on the ongoing statutory process other than to say that the final decision on this Project will be fully informed by all views and all relevant legislation including of course the Well-Being of Future Generations Act.

Yours faithfully

Ken Skates AC/AM
Ysgrifennydd y Cabinet dros yr Economi a'r Seilwaith
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We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

By email

13th 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

Adran yr Economi a'r Seilwaith
Department for Economy and Infrastructure



Llywodraeth Cymru
Welsh Government

Issue Ref ISU0024

File Ref WG/REB/ISU0024-2 - Howe

Response to Supplementary Evidence of Sophie Howe

(Future Generations Commissioner for Wales)

1. EVIDENCE

1.1. Details

- 1.1.1. The Future Generations Commissioner, Sophie Howe, (the Commissioner) has submitted a letter to the Inspector dated 13 September 2017 in relation to the draft statutory Orders associated with the Welsh Government's proposals for the M4 Corridor around Newport, which has been received via the Programme Officer. In her letter she states that it is supplementary to her evidence submitted to the inquiry in February 2017 and requests the Inspector to accept it as a written representation. The Inspector has agreed to her request.
- 1.1.2. The Welsh Government has previously responded to the Commissioner's evidence submitted in February 2017 (Document WG/RS/ISU0024). This response is to the letter of 13 September 2017.
- 1.1.3. The letter from the Commissioner raises the following main points:
1. Incorrect adoption and interpretation of the principles under the Well-being of Future Generations (Wales) Act 2015 (the Act) may lead to misunderstanding and ambiguity across the public sector in Wales. The misapplication of the duties under the Act could set a wrong precedent and should be avoided.
 2. The Well-being of Future Generations (Wales) Act 2015 (the Act) requires moving from a traditional approach to sustainable development to the innovative concepts introduced in the Act. The Future Generations Framework is a useful tool to help take decisions in accordance with the sustainable development principle for infrastructure projects.
 3. The four pillars of well-being, the five ways of working, the seven goals and the well-being objectives of public bodies under the Act should be considered together and equally to carry out a true balancing exercise. We must look for solutions that address the four pillars together and select the one that delivers best against all four; one pillar cannot override the others. Public bodies must identify solutions that maximise a contribution to all 4 pillars of well-being and disregard those contributing to one or two pillars.

4. Duties under other legislation must be interpreted in the light of the Act; public bodies must comply with all their duties. It was developed alongside the Environment (Wales) Act 2016 and the Acts should therefore reinforce each other.
5. The M4 proposals seem to directly contradict the Natural Resources Policy required under the Environment (Wales) Act 2016.
6. Section 5(2) of the Act, which refers to public bodies taking an integrated approach, makes it clear that decisions must be made in light of the bigger picture and not ignoring the impact a decision would have on others.
7. Transitioning from a traditional approach to the new innovative and revolutionary ways of working in the Act is challenging but business as usual is no longer an option. The M4 project given its scale and importance must not set the wrong example, which could permanently damage the spirit of the legislation.

2. RESPONSE [JOHN DAVIES]

2.1. Point 1 – Interpretation of the Well-being of Future Generations (Wales) Act 2015

2.1.1. The main points made by the Commissioner are that incorrect adoption and interpretation of the principles under the Well-being of Future Generations (Wales) Act 2015 (the Act) may lead to misunderstanding and ambiguity across the public sector in Wales. The misapplication of the duties under the Act could set a wrong precedent and should be avoided.

2.1.2. The Welsh Government is in full agreement with the Commissioner that the Act must be correctly interpreted and applied. Nonetheless, in the case of the Scheme for the M4 corridor around Newport, the subject of this inquiry, the Welsh Government is satisfied and submits to the Inspectors that it has correctly interpreted the Act and has acted in accordance with the sustainable development principle and its duties under the Act. I expand on these points below in response to the specific issues raised in the Commissioner's letter using the same headings used in her letter.

2.2. Point 2 – Sustainable Development under the Act

2.2.1. The main points made by the Commissioner are that the Act requires moving from a traditional approach to sustainable development to the innovative concepts introduced in the Act. The Future Generations Framework is a useful tool to help take decisions in accordance with the sustainable development principle for infrastructure projects.

2.2.2. I have made the point in my proof of evidence and in other rebuttals that sustainable development has been at the heart of the policies and actions of successive Welsh Governments for many years because of the legal duties in the Government of Wales Acts 1998 and 2006. The Commissioner argues that further scrutiny is required to ascertain whether actions and decisions meet the new statutory requirements, which are different from those in previous policy. I have carried out that scrutiny in my proof of evidence (WG1.23.1, paras 35-44) where I describe the decisions and processes leading up to the published Scheme and conclude that the Welsh Government's actions were in accordance with the sustainable development principle as enshrined in the Act.

- 2.2.3. In paragraph 36 of my proof I deal with the WeITAG process used to appraise the various options in the development and identification of the published Scheme. The Commissioner maintains that the 2008 guidance on the WeITAG process does not reflect current thinking and or statutory requirements introduced in the Act, such as wider impacts on health, culture and communities.
- 2.2.4. However, as part of the WeITAG process an appraisal of options was undertaken against the three 'Welsh Impact Areas' corresponding to the three "pillars" of sustainable development policy at the time – the economy, environment and society. The Welsh Government's Aims and subsequent Transport Planning Objectives were developed against the Welsh Sustainable Development Scheme, so that the whole appraisal process revolved around the duties and policies of the Welsh Government in relation to sustainable development at that time. The WeITAG process included an appraisal both of the various options and their ability to achieve the identified objectives, which were arrived at following stakeholder and public consultation. This involved development work including economic assessment, social impact assessment and environmental assessment. Furthermore, at the stage of Plan making, a Strategic Environmental Assessment (SEA) was undertaken, published and subject to statutory consultation (Document 4.4.6). Separate environmental objectives were developed as part of the SEA, as explained in the Sustainable Development Report (Document 2.3.11).
- 2.2.5. The suggestion that impacts on health, culture and communities were not taken into account is incorrect. The WeITAG process incorporated Health Impact and Equality Impact Assessments and these were carried out at each stage of appraisal (Documents 4.4.2, 4.4.4, 4.5.8 and 4.5.9). In addition, following the adoption of the Plan and modified preferred route in July 2014, an Environmental Impact Assessment (Document 2.3.2) was carried out incorporating a combined Health, Social and Equalities Impact Assessment (Document 2.3.2, Appendix 5.4). That was published alongside a suite of reports supporting the draft Orders (Section 2 of the Inquiry Library) including the Sustainable Development Report (Document 2.3.11), which considered the Scheme in the light of the Act and explained its contribution to the 7 well-being goals.

2.2.6. An updated WelTAG has been subject to consultation (December 2016 to March 2017)¹. The proposed update to WelTAG combines the HM Treasury 5 Case Business Model and sets out that transport appraisal should take into account the objectives of the Act. The update of WelTAG has yet to be adopted by the Welsh Government, but a Business Case applying the Treasury 5 Case Model was prepared (Document 4.5.17) although it was not a requirement at that time. It is therefore clear that the Welsh Government made particular efforts to go above and beyond the minimum requirements in the WelTAG guidance at the time to ensure that the appraisal process was thorough and comprehensive and fully in accordance with the ethos of sustainable development.

2.2.7. The Commissioner's desire to assist by putting forward her Future Generations Framework is welcomed, but WelTAG is the recognised means of appraising new transport planning proposals in Wales. This process, as explained above, has been explicitly developed to reflect and comply with the Welsh Government's sustainable development duties and there is no basis for concluding that the process was flawed simply because it was carried out before the Well-being of Future Generations (Wales) Act came into force. It would not be helpful to assess the published Scheme against a new Framework that has no recognised formal status and does not appear to have been the subject of the same consultation process as that involved in developing WelTAG².

2.3. Point 3 – Balancing under the Act

2.3.1. The main points made by the Commissioner are that the 4 pillars of well-being, the five ways of working, the seven goals and the well-being objectives of public bodies under the Act should be considered together and equally to carry out a true balancing exercise. We must look for solutions that address the pillars together and select the one that delivers best against all 4; one pillar cannot override the others. Public bodies must identify solutions that maximise a contribution to all 4 pillars of well-being and disregard those contributing to one or two pillars.

¹ <https://consultations.gov.wales/consultations/welsh-transport-appraisal-guidance-2017>

² I am not aware of any consultation with the Welsh Government during the development of the Framework. Nor am I aware of any other consultation with other stakeholders or the public.

- 2.3.2. I fully accept that public bodies should seek solutions that deliver the best outcome across all four aspects of well-being included in the definition of sustainable development in Section 2 of the Act – economic, social, environmental and cultural. However I do not agree with the Commissioner that all decisions must improve all four aspects of well-being. This is not what Section 2 of the Act says or means. ‘Sustainable development’ is defined as the “*process*” of improving the four aspects of well-being by taking action in accordance with the sustainable development principle. The action in this case is the published Scheme and I have shown that the Welsh Government has acted in accordance with the sustainable development principle.
- 2.3.3. The Scheme would provide economic, environmental and social benefits by addressing the serious congestion on the motorway around Newport. I have also explained in paragraphs 214-5 of my proof why I consider it would also contribute to an improvement of the cultural aspect of sustainable development. Others may disagree with my reasoning and conclusions. However, even if the Scheme would not contribute to every aspect of well-being this would not imply that it does not accord with the requirements of the Act. It would still be part of the ‘process’ of improving well-being as one of the many projects the Welsh Government will be carrying out as part of its 5 year programme for government to collectively improve well-being in Wales, but would individually contribute in different measure to each of its four aspects.
- 2.3.4. Also, I have explained in paragraph 241 of my proof that the duty under Section 3 of the Act does not mean that every Welsh Government project or policy must contribute equally to each of the 7 well-being goals defined in the Act. The duty is to maximise “*its*” contribution to achieving those goals, which clearly means the impact of the Welsh Government’s actions as a public body, rather than the impact of individual actions.
- 2.3.5. This is demonstrated in the Welsh Government’s draft Budget 2018-19³, which has been developed in consultation with the Commissioner to ensure the Act is embedded in the budget-making process. The draft Budget document describes (beginning at para 1.18) the steps the Welsh Government is taking to embed the sustainable development principle into its budget process. Three specific areas of focus have been agreed with the

³ Doc ID137

Commissioner, which offer opportunities to think differently about how to use resources to support Welsh Government priorities - participatory budgeting, decarbonisation and procurement. The draft Budget document describes development work in these three areas, including case studies, demonstrating how the Welsh Government is working with others in the many different areas for which it has responsibility. These include:

- developing methods and digital tools to involve the public in decisions on the distribution of public funds and policy decisions
- additional funding of £50m to develop a new rail station in Llanwern, along with extensive park and ride facilities and line improvements
- funding of new-build schools and colleges being conditional upon energy efficient and sustainable design and construction
- working with local authorities and other partners to apply the collaboration and involvement ways of working in a series of pilot projects to develop best practice approaches to procurement
- embedding the principles and goals of the Act to the procurement of the South Wales Metro.

2.3.6. A theme that has arisen often in the objections to the published Scheme for the new section of motorway is that it is not consistent with the Welsh Government's duties under Part 2 of the Environment (Wales) Act 2016 in respect of carbon reduction. The Welsh Government's response has been, first, that the Scheme would achieve a reduction in carbon emissions, albeit small and, second, that Welsh Government is not reliant on the Scheme to deliver a low carbon strategy; many other measures can be employed to encourage a low carbon lifestyle (see *Doc WG/RS/ISU0024 – response to Future Generations Commissioner, pages 30-31*). The decarbonisation and procurement proposals in the draft Budget 2018-19 confirm the Welsh Government's previous statements that it is taking cross-cutting action, across the many areas for which it is responsible, both to set and to meet its carbon reduction targets.

2.3.7. The draft Budget 2018-19 document confirms the borrowing powers for infrastructure schemes including “*the planned M4 relief road around Newport, subject to the outcome of the independent public inquiry*” (para 3.51). The

allocation of £50m to the new Llanwern station demonstrates the sustainable development principle of integration in operation, as the published Scheme would connect with the new station and park and ride facility through the Glan Llyn junction. This would contribute to carbon reduction and improve connectivity for communities on the east side of Newport (paras 1.34, 4.61). Other allocations confirmed in the draft Budget 2018-19, which are relevant to the Scheme and demonstrate the Welsh Government's cross-cutting approach, are as follows:

- £7.5m capital to reduce tidal flood risk in Newport and support wider connectivity objectives, including the proposed M4 relief road; supporting a resilient Wales, responding to the challenge of rising sea levels and climate change (para 4.61). This is the project referred to as Stephenson Street in the Welsh Government's evidence, completion of which would ensure the Scheme would not cause detriment in a 0.1% tidal flood event up to 2030 (WG 1.23.1, para 153).
- £173m for the provision of the South Wales Metro between 2017 and 2021 (Doc ID137, page 68, para 53). This allocation confirms the Welsh Government's commitment, as stated in its evidence to the inquiry (WG 1.23.1, para 37), that the new section of motorway and the Metro are complementary and would be taken forward together.

2.3.8. Returning to the points made by the Commissioner, I do not agree that the Act requires public bodies to cease taking actions that would harm elements of well-being. It would be impractical to rule out any development if it were to cause harm to one aspect of well-being without assessing that harm against the improvements to other aspects of well-being it could bring. An example would be the benefits of providing new housing to meet the needs of population growth against the visual, landscape and other impact of building on a greenfield site on the edge of the built-up area. To decide whether such development should proceed would require a balanced decision that weighs the likely impact against the benefits to well-being.

2.3.9. The Commissioner takes issue with the use of the phrase "*trade-offs*" in relation to the balancing process, arguing that the Act moves us away from the traditional 'trade-offs' approach. I note that this phrase is part of the

Commissioner's Future Generations Framework, which suggests as one of the questions to be asked when considering the 'prevention' element of the 5 ways of working:

What are the trade-offs emerging between different aspects of well-being and sustainability and how have these been minimised?

2.3.10. In any event, the Commissioner's interpretation of the balancing exercise is incorrect. This does not mean attaching more weight to one aspect of well-being or weighing them against one another, but evaluating and comparing the benefits and disbenefits of a particular project to well-being. The Commissioner claims that evidence presented to the inquiry is contrary to the Act by allowing economic well-being to outweigh others. I assume this is a reference to my evidence since I have carried out the balancing exercise but the Commissioner has misunderstood the task I have carried out. In paragraph 243 of my proof I quote from Planning Policy Wales, which has been updated to reflect the duties in the Act and states:

Local planning authorities are required to ensure that the economic benefits associated with a proposed development are understood and that these are given equal consideration with social and environmental issues in the decision-making process, and should recognise that there will be occasions when the economic benefits will outweigh social and environmental considerations.

2.3.11. It is clear from this up to date Welsh Government guidance, first, that the different aspects of a development are to be given equal weight and, second, that it is the "benefits" that are to be weighed. In carrying out the balancing exercise I have not given additional weight to economic considerations but have concluded that the social, economic and environmental benefits outweigh the environmental disbenefits. The Oxford Dictionary definition of balance quoted by the Commissioner is not a correct description of the exercise I have undertaken. The appropriate definition would be 'to assess' or 'to weigh up' the different elements involved rather than seek a situation where the different elements "are equal or in the correct proportions". It would be unrealistic to interpret the Act as meaning that the contribution of a particular project to all aspects of well-being should be equal; in practice this situation would be so rare as to rule out most forms of development.

- 2.3.12. The Commissioner argues that Section 5(2)(a) of the Act, which refers to the balancing of short term needs with the need to safeguard the ability to meet long term needs, requires an approach which actively seeks to give equal weight to different sets of needs. The Commissioner is correct that each aspect of well-being should be given equal weight in terms of assessing a project. But that does not mean that the decision eventually reached will promote each aspect of well-being to the same degree. The purpose is to reach a conclusion based on which elements outweigh others. In the Welsh Government's response to Friends of the Earth I have concluded that the benefits the Scheme would bring to meet the needs of the present provide a compelling case in its favour. This does not mean that I have merely given greater weight to short term needs but that I have found the benefits of meeting the current serious problems on the M4 around Newport are considerable and therefore attract great weight. I should add that I do not consider the Scheme would simply address short term needs. The traffic evidence indicates that congestion will get worse over time under the Do-Minimum scenario and thus the Scheme will benefit future as well as current generations.
- 2.3.13. The Commissioner maintains the letter of the Act demonstrates that this approach is wrong, referring to Section 5, which defines doing something "in accordance with the sustainable development principle" as acting "*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*". I would point out, first, the phrase "*seeks to ensure*" and, second, that I have met the requirements of Section 5(2)(a) by balancing the need for, and benefits of, the Scheme in meeting present day needs against its impact on the ability of future generations to meet their own needs.
- 2.3.14. In carrying out that exercise I was mindful of the comprehensive mitigation proposals prepared by the Welsh Government including the SSSI Mitigation Strategy, which has been agreed with Natural Resources Wales. Whilst these mitigation measures may take a number of years to have a meaningful impact on, for example, the replacement of lost woodland or biodiversity, it is appropriate to take account of such measures when considering the long term and the effect on future generations. The response to the evidence of James Byrne on behalf of the Gwent Wildlife Trust (Document WG/REB/OBJ0270.16

– Appendix 1) sets out a number of examples of successful mitigation schemes.

2.3.15. The fifth way of working requires public bodies to consider the contribution to well-being of deploying resources to prevent problems occurring or getting worse. There is a pressing need to take action to address the current problems associated with the M4 around Newport; this was a further factor that I was entitled to take into account in accordance with the requirements of the Act. In reaching my conclusions I was satisfied that the mitigation measures would reduce the long term impact significantly, as pointed out in paragraph 248 of my proof. The balancing exercise I undertook when preparing my proof was entirely in accordance with the requirements of Section 5 of the Act, as it took all factors into account. The further evidence presented in the Welsh Government's response to objectors in relation to mitigation reinforces the conclusions in my proof.

2.4. Point 4 – Interface between the Act and other duties

- 2.4.1. The main points made by the Commissioner are that the duties under other legislation must be interpreted in the light of the Act; public bodies must comply with all their duties. It was developed alongside the Environment (Wales) Act 2016 and the Acts should therefore reinforce each other.
- 2.4.2. The Commissioner refers specifically to the 'Resilient Wales' well-being goal of the Act – *"A nation 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)"*. In paragraphs 118, 133, 169 and 213 of my proof of evidence I explain how the published Scheme would contribute to the Resilient Wales goal, particularly in paragraph 169 and the preceding section where I deal with the impact of climate change. The duties of the Welsh Government in relation to biodiversity and sustainable development are dealt with in the responses to the Royal Society for the Protection of Birds and James Byrne (Documents WG/REB/OBJ0030 and WG/REB/OBJ0270.16). I summarise the relevant parts of those responses below.
- 2.4.3. The duties of the Welsh Government in relation to biodiversity and sustainable development are contained in the Wildlife and Countryside Act 1981, Section 28G (the WCA); the Well-being of Future Generations (Wales)

Act 2015, Section 3(1) (the WFGA); and Part 1 of the Environment (Wales) Act 2016.

2.4.4. Beginning with the WCA, section 28G(2) states:

The duty is to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.

2.4.5. The duty is not simply to conserve and enhance but to “*take reasonable steps, consistent with the proper exercise of the authority's functions*” to further conservation and enhancement. Loss of land or other impact on the SSSIs does not simply equate to a breach of the legislative requirements.

2.4.6. This interpretation was confirmed in the judicial review *R (Friends of the Earth England, Wales and Northern Ireland Limited) v Welsh Ministers [CO/4433/2014]*. The Judge rejected the Claimant's submission that the Welsh Government failed properly to understand the nature of its duty under s.28G, stating that it -

does not impose a general duty on the decision-maker to have some particular regard to the desirability of protecting and preserving SSSIs; it imposes an entirely different type of obligation, namely a duty to 'take reasonable steps ... to further the conservation and enhancement of the flora, fauna or geological or physiological features by reason of which the site is of special scientific interest'.

2.4.7. The Judge accepted that the process leading to the Welsh Government's decision to adopt the Plan was focussed on the potential harm to the Gwent Levels SSSIs and the mitigation of that harm. The route had been chosen to minimise impact on the SSSIs and a comprehensive mitigation strategy was being developed. The design of both the Scheme and the accompanying mitigation strategy has continued to evolve, in consultation with NRW, culminating in a wide measure of agreement on the substantive issues. The Welsh Government has hence taken the 'reasonable steps' to further the conservation and enhancement of the features of the SSSIs throughout the process, as required by its duties under the WCA.

2.4.8. Turning next to the EWA, section 6(1) requires the authority to 'seek' to maintain and enhance biodiversity in the exercise of its functions and promote

the resilience of ecosystems “so far as consistent with the proper exercise of those functions”. In this instance, the Welsh Government has to have regard to the duty under Section 6(1) so far as that is consistent with its functions and responsibilities for the safe and efficient operation of the motorway network and for the Welsh economy.

- 2.4.9. EWA Section 1 defines the purpose of Part 1 of the Act as “to promote sustainable management of natural resources”, which is linked by Section 3(2) to the objective of maintaining and enhancing the resilience of ecosystems so as to achieve sustainable development and contribute to the well-being goals of the WFGA.
- 2.4.10. With regard to “natural resources” as defined in the EWA, air quality overall would be improved. Water quality and quantity in the SSSIs would be maintained and quality improved, because currently unmanaged ditches would be brought under management. The drainage system for the new section of motorway would improve existing highway drainage within the Gwent Levels by providing attenuation lagoons on side roads crossing the new section of motorway. The SSSI mitigation areas would enable new reens and ditches to be created, with managed grazing marsh and species-rich grassland. The mitigation areas have the potential to enhance biodiversity as they would replace areas of the SSSI in poor condition. In addition, areas of land contamination would be remediated, with soil treated and utilised where possible in road construction, thus removing contamination and minimising the need for new construction material. Finally, landscape planting would significantly increase the amount of woodland habitat in the longer term.
- 2.4.11. The mitigation measures prepared by the Welsh Government in consultation with, and agreed by, Natural Resources Wales are in line with the principles of sustainable management of natural resources. They have been designed to maintain and enhance biodiversity and to promote the resilience of ecosystems as far as possible and to the extent that this is consistent with the Welsh Government’s functions in respect of the motorway network and the Welsh economy, as required by its duties under the EWA.
- 2.4.12. Turning then to the WFGA, section 2 defines sustainable development as “the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable

development principle (see section 5), aimed at achieving the well-being goals (see section 4)".

2.4.13. Section 3 sets out the well-being duty, which requires each public body to carry out sustainable development and must include setting and publishing objectives. Section 4 defines the 7 well-being goals.

2.4.14. Section 5 defines the sustainable development principle, stating "any reference to a public body doing something "in accordance with the sustainable development principle" means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs." The Act hence recognises that development must take place in the present day to satisfy the needs of today's society, but that the form of that development should not preclude choices for future generations.

2.4.15. A decision regarding a major item of infrastructure such as the Scheme will require the consideration and balancing of a wide range of effects across the economic, social, environmental and cultural spheres. Whilst the WFGA requires new processes and gives statutory expression to the concept of "sustainable development", it does not prescribe answers or outcomes. It does not say that the environment must always outweigh economic, social or cultural considerations but requires a balance to be struck across all elements of well-being and all considerations. The Welsh Government's evidence demonstrates that the balance of advantage lies with the Scheme. The objectors may disagree with that judgement but the Act does not prevent the Welsh Ministers from reaching such a conclusion.

2.4.16. The notion of balancing considerations does not mean that the Welsh Ministers may do less for biodiversity under the WCA Section 28G duty. This duty and that under Section 6(1) of the EWA require the Welsh Ministers to balance the conservation and enhancement of biodiversity with the requirements of their other functions and responsibilities. I have explained how that balance has been struck in choosing the route, designing the Scheme, seeking to maintain and enhance the resilience of ecosystems wherever possible, and preparing comprehensive mitigation measures accordingly in conjunction and in agreement with NRW. I consider that the detailed work of the ecological, water quality, contamination and

engineering/construction teams, in consultation with NRW, to develop “reasonable steps” for the protection of the Gwent Levels SSSI features (as well as other natural resources, biodiversity and ecosystems) has been exemplary.

2.4.17. The new legal duties arising from the Welsh legislation require a balanced judgement weighing up sometimes competing considerations. There should be no dispute that ecological and environmental interests do not necessarily outweigh all other considerations. Many objectors disagree with the way in which the Welsh Government has balanced these considerations, but that does not imply it has misapplied or incorrectly interpreted the law, or that its judgement is wrong or irrational. Following receipt of the Inspectors’ report, it will be for the Welsh Ministers to weigh the competing considerations in the light of all the material, including evidence of the extensive steps which the Welsh Government proposes to take to maintain and enhance biodiversity in general and SSSIs and protected species in particular, in accordance with its duties under the Acts discussed above.

2.5. Point 5 - Welsh Government Natural Resources Policy

- 2.5.1. The Commissioner’s concern is that the M4 proposals seem to directly contradict the Natural Resources Policy required under the Environment (Wales) Act 2016.
- 2.5.2. The Welsh Government’s Natural Resources Policy published in August 2017 is dealt with in the responses to the RSPB (Document WG/REB/OBJ0030) and James Byrne (Document WG/REB/OBJ0270.16). The relevant points are summarised below.
- 2.5.3. Section 9 of the Environment (Wales) Act 2016 imposes a duty on the Welsh Ministers to prepare, publish and implement a national natural resources policy. The first Natural Resources Policy (NRP) was published in August 2017. It sets out three key challenges and three national priorities, and explains how these will be delivered in key policy areas; one of these is transport. The NRP states that through the Wales National Transport Strategy and Finance Plan the Welsh Government is promoting a more sustainable road transport network and a modal shift away from roads for people and freight.

- 2.5.4. The National Transport Finance Plan 2015 (Document 5.1.7) sets out the schemes the Welsh Government will deliver, across all the different areas of transport for which it is responsible, in order to meet its policy objectives set out in the National Transport Strategy One Wales: Connecting the Nation (Document 6.1.3). Whilst these objectives include a modal shift, as explained in the NRP, this does not preclude new road schemes. Annex A of the Finance Plan 2015 sets out a schedule of schemes in two categories: those estimated to be delivered in the period up to March 2020 and those to be completed after April 2020. These schemes include new roads and road improvements; schemes to address freight movement; schemes involving ports; rail infrastructure schemes, including new lines and stations; the South Wales Metro; improved bus services and other public transport improvements. The need for a specific scheme to address the problems on the M4 motorway around Newport is recognised in the Finance Plan by scheme R8, described as “*Improvements to the M4 Corridor around Newport – a new section of motorway south of Newport and complementary measures including reclassification of the existing M4 between Magor and Castleton, an M48-B4245 link and cycling and walking friendly infrastructure*”.
- 2.5.5. The Finance Plan 2015 therefore confirms that Welsh Government policy to move to a more sustainable road network and a modal shift away from roads for people and freight does not imply an embargo on the construction of new road infrastructure. Such a policy objective will not be achieved in the short term and requires action across all areas of transport, as demonstrated by the Finance Plan 2015. In particular, where road congestion issues need to be addressed to ensure they do not get any worse, the sustainable development principle requires the Welsh Government to take action and it is for this reason that it is promoting the published Scheme. This is in accordance with scheme R8 of the Finance Plan and the Welsh Government’s programme for government 2016-21 ‘*Taking Wales Forward*’ (Document 5.1.11), which states a commitment to deliver an M4 relief road.
- 2.5.6. *Taking Wales Forward* set out the headline commitments to be delivered by the Welsh Government between 2016 and 2021. *Prosperity for All: the national strategy* (Document 5.2.10) published in September 2017 places those key commitments in a long term context. It makes explicit reference to the Well-being of Future Generations (Wales) Act 2015 and states that the

national strategy represents a new way of working. The 4 key themes from *Taking Wales Forward* are retained. As part of the 'Prosperous and Secure' theme the strategy states 'We will break down the barriers many face to getting a job, and create the right environment for businesses to grow and thrive'. Under the 'United and Connected' theme it states 'We are building the vital links that make it easier for people to come together, for the economy to grow, and for us to become a confident nation at ease with itself'. The three objectives for the *United and Connected* theme include 'delivering modern and connected infrastructure'. The specific projects under that heading include delivering the South Wales Metro and

Deliver a significant improvement to the M4 around Newport, as well as enhancements to the A55, the A40 in West Wales and other trunk roads.

- 2.5.7. The fact that the improvement of the M4 around Newport is highlighted demonstrates the importance the Welsh Government attaches to this project. This does not imply that the published Scheme is the only one that could deliver the objectives of the programme for government or the national strategy. Nevertheless, the Scheme would deliver the "*significant improvement to the M4 around Newport*" intended by the national strategy. It is the only satisfactory solution to have emerged from the exhaustive exercise exploring the various options conducted by the Welsh Government. Furthermore, no satisfactory alternatives have in my view emerged from the inquiry process and I consider it is the only option before the inquiry that would satisfy Welsh Government policy in the national strategy '*Prosperity for All*'.
- 2.5.8. The Commissioner highlights the commitment in the NRP to take action to, amongst other things, enhance the resilience of our ecosystems and reverse the decline of biodiversity arguing that the M4 proposals seem to directly contradict this policy statement. However, I would emphasise the efforts made by the Welsh Government to have regard to biodiversity in the design and development of the published Scheme. In section 2.4 above and in my proof of evidence (WG 1.23.1) I summarise how the impact on the Gwent Levels and the avoidance and mitigation of that impact was central to the initial design of the Scheme and has been a major influence on its subsequent evolution. The highway drainage has been explicitly designed to protect the water environment on the Levels. The three areas created at

Tatton Farm, Maerdy Farm and Caldicot Moor as part of the SSSI mitigation strategy have the potential to enhance biodiversity and include 5.9km of extra ditch habitat. New landscape planting would significantly increase the area of woodland habitat.

- 2.5.9. The mitigation strategy is designed to maintain and enhance biodiversity and to promote the resilience of ecosystems to the maximum extent consistent with the Welsh Government's other functions and responsibilities, in this case for the motorway network and the Welsh economy. Extensive evidence in this regard is given by the Welsh Government's expert witnesses and particularly in the response to James Byrne of the Gwent Wildlife Trust (Document WG/REB/OBJ0270.16), which demonstrates through case studies that creation of areas of high biodiversity value is readily achievable. On the basis of this evidence I am entirely satisfied that the published Scheme is fully in accordance with the Welsh Government's Natural Resources Policy.

2.6. Point 6 - Integrated Approach

- 2.6.1. The Commissioner's main point is that Section 5(2) of the Act, which refers to public bodies taking an integrated approach, makes it clear that decisions must be made in light of the bigger picture and not ignoring the impact a decision would have on others.
- 2.6.2. I entirely agree with the Commissioner. This is precisely what the Welsh Government has done in its extensive and wide-ranging analysis of the options for addressing the problems on the M4 around Newport; its subsequent in-depth analysis of all the environmental consequences of the Scheme; the preparation of detailed reports to support the Scheme; and the presentation of detailed evidence by expert witnesses to the inquiry. The purpose of this work has been to identify the impacts of the various options prior to selecting the Plan for the M4 around Newport and, subsequently, the impacts of the published Scheme so that the Inspectors and hence the Welsh Ministers are in possession of all evidence when making their recommendations and subsequent decisions. All decisions on the Scheme have and will be made in the light of the bigger picture and in full knowledge of the impact of those decisions. This is one of the purposes of the public inquiry process, to gather all the information and evidence necessary to assist the decision.

- 2.6.3. Furthermore, rather than concentrate on one part of Section 5(2), that referring to integration, the Welsh Government has correctly addressed all aspects of the 5 ways of working, as I have explained in paragraphs 35-44 of my proof. The Act must not be applied selectively but taking all aspects of the sustainable development principle into account. It is implicit that judgement will be required in interpreting and applying the 5 ways of working.
- 2.6.4. Returning to the need to have regard to the bigger picture and the impact of decisions, this is the fundamental purpose of the balancing exercise. The exercise will be flawed and the decision maker at fault if all matters are not taken into account. The thorough analysis carried out on behalf of the Welsh Government by the other expert witnesses and the evidence they presented to the inquiry enabled me to conclude that the published Scheme was in accordance with the duties under the Act and that the benefits it would bring outweighed the cumulative planning policy conflicts (proof paragraph 248).

2.7. Point 7 - Conclusion

- 2.7.1. The Commissioner's main point is that transitioning from a traditional approach to the new innovative and revolutionary ways of working in the Act is challenging but business as usual is no longer an option. The M4 project given its scale and importance must not set the wrong example, which could permanently damage the spirit of the legislation.
- 2.7.2. The Welsh Government entirely agrees with the Commissioner that business as usual is not an option and its national strategy *'Prosperity for All'* emphasises the importance of the Act and the need to work differently. However, the Welsh Government does not consider that the published Scheme would set the wrong example or in any way "damage the spirit of the legislation". Legislation must be interpreted as it is written. Whilst the Act contains new provisions that require a particular approach to decision making its wording is not ambiguous and does not require any other source to aid interpretation.
- 2.7.3. The Commissioner stresses the importance of the new innovative and revolutionary ways of working required by the Act. The Welsh Government is actively taking forward the implementation of the Act to achieve new ways of working through the national strategy and the accompanying *Well-being statement 2017* (Document 5.2.9). This is now further confirmed by the draft

Budget 2018-19, which shows how the Welsh Government has begun the process of embedding the sustainable development principle into its working practices and hence demonstrates that it is taking a different approach.

- 2.7.4. In developing the published Scheme for the M4 around Newport the Welsh Government has consistently sought to be innovative and to do things differently. It decided to follow the Early Contractor Involvement method to procure the Scheme and the tender documents asked questions regarding the environmental impact, the carbon footprint and other main challenges (proof paragraphs 41-42). The success of the Project Team in applying sustainable development methods was recognised by an award under the CEEQUAL scheme (paragraph 43).
- 2.7.5. The design of the Scheme has demonstrated innovation, particularly in the design of the highway drainage to avoid polluted run-off from entering the Gwent Levels. In many other ways such as the junction strategy and embankment heights the design has sought to minimise the new section of motorway's impact. The construction strategy has focussed on the prevention of waste and re-use of materials won on site, including contaminated land, which would also significantly reduce the impact of construction vehicles on the local road network. The extensive mitigation strategy has been designed not simply to maintain but enhance biodiversity, as discussed above. The Scheme has been subject to detailed analysis of its carbon impact so that this can be properly taken into account in deciding whether the Scheme should proceed. The design of the Scheme and the way the Welsh Government has analysed and reported its impacts is in my view an exemplar, and a demonstration of a different way of doing things, entirely in accordance with the letter and spirit of the Well-being of Future Generations (Wales) Act 2015.
- 2.7.6. I confirm that the statement of truth and professional obligations to the inquiry from my main proof still applies.