**Statute Law Society**

**The Lord Renton Lecture**

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**Thinking policy through before legislating – aspirational legislation**

**Abstract**

There have been several recent occasions when policy has not been thought through before legislation is enacted. There is pressure to enact legislation that requires governmental decision-making to take account of future aspirational goals and to adopt aspirational ways of working. But it is necessary to think through the implications of enacting such legislation.  Are these appropriate subjects for legislation? If so, can the legislation be drafted to make clear what should be done to achieve the aspirations set out? If such legislation is intended to be enforceable, what is the appropriate mechanism? Do courts/tribunals have a role and, if so, what should be the composition of the court/tribunal? If such legislation is not intended to be enforceable, what are the implications for the rule of law of enacting such legislation?

**Introduction**

1. It is a great privilege to have been invited to give this year’s Lord Renton Lecture[[1]](#footnote-1). I have chosen to speak about aspirational legislation not with the objective of providing a firm view, but to invite thought and debate about the issues. Let me explain.
2. **Failure to think through policy**
3. There are many examples of recent legislation where proper consideration has not been given at the policy stage to thinking through the legislation before it is introduced. This can be forgiven when the subject matter may be secondary. Where it is not, as in the case of the major constitutional legislative changes that have been made since 1998, it should be no surprise that the effect has been that which we have all witnessed over the past few months and are continuing to witness. Although we lament the current position and the evident undermining of confidence in Parliament among what must now be the greater part of the people, we all share the responsibility. With each successive change it should have been obvious that unless there was a proper and considered evaluation of the combined effect of the change the outcome was going to be bad; and bad it is.
4. What many may consider an even greater issue than constitutional change is the protection of the future of our planet and the future generations. Its significance needs no explanation. At a time of profound disillusionment with Parliament, it is a matter of passionate interest to the young. It is also self-evident that there is an immense conflict of interest between the generations – a cutback for the present older generation’s life style and standard of living to safeguard the interests of the future generations. It is becoming an area for legislative action. We therefore need to think through what this might entail, for if we do not the outcome will also be bad.
5. **The considerations for choosing this topic**
6. That is the background to my choice of aspirational legislation. There are three further considerations.
7. First, the Welsh Assembly in 2015 enacted the Wellbeing of Future Generations Act (the Future Generations Act). As presently interpreted, It should be characterised as aspirational legislation. It became apparent during the course of the work of the Commission on Justice in Wales that, although this is a very significant piece of legislation, there are real issues as to its enforceability and its impact and hence its aspirational character.
8. Although looking at Welsh legislation is clearly a subject for this Society, as it is not a Society that is London centric, the second consideration was that this was not simply a parochial subject for Wales. Not only is it addressing probably the greatest issue of the day, but some think of the Act as a precedent for Westminster legislation, as was evident from a debate in the House of Lords on 29 June 2019 on better protecting and representing the interests of future generations in policy making. Many called for similar legislation[[2]](#footnote-2). There is also a useful comparator in the Department of the Environment’s draft Environment (Principles and Governance) Bill published in December 2018[[3]](#footnote-3) when Mr Gove was the Secretary of State and the development of that draft Bill into the Environment Bill which received its second reading on 28 October 2019 when Ms Villiers was Secretary of State.
9. The third consideration relates to the rule of law. As Professor David Feldman has pointed out in his seminal paper, *Legislation which bears no law[[4]](#footnote-4)*, legislation which is not law bearing is multiplying; aspirational legislation is one such example. As he observed, such legislation

“looks as if it imposing a legal obligation, but the nature of the obligation or the language of the legislation makes it clear that the obligation could never be enforced through legal proceedings”[[5]](#footnote-5)

1. A question must arise therefore as to confidence in the rule of law, particularly among the young. If it were in truth to be the case that although a law has been enacted to protect their interests, it was unenforceable, it would be seen as simply a gesture without the necessary mechanism to resolve the conflict between the interests of the generations. Would not this diminish the law?

1. **The Well-being of Future Generations Act**
2. Before considering these issues a word about the Welsh Act is necessary. It provides, in summary, an overarching frameworkfor decision-making by all Welsh public bodies (including Welsh Ministers). As its title implies, it imposes upon public bodies a duty to carry out sustainable development for the benefit of future generations. Sustainable development is defined in broad terms as the process of improving the economic, social, environmental and cultural well-being of Wales by taking action[[6]](#footnote-6), in accordance with the sustainable development principle, aimed at achieving well-being goals. Each of those terms needs a little elaboration.
3. Seven well-being goals set out in section 4 are:
4. A prosperous Wales
5. A resilient Wales
6. A healthier Wales
7. A more equal Wales
8. A Wales of cohesive communities
9. A Wales of vibrant culture and a thriving Welsh language
10. A globally responsible Wales.

These are plainly drafted at a very high level of aspiration, but each is defined in just a little more detail; for example a prosperous Wales is defined as:

“An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.”

1. If a public body is to act in accordance with the sustainable development principle to achieve these well-being goals, the public body is required 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. This principle is amplified by requiring the public body to take account of five matters:
	1. 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;
	2. the need to take an integrated approach, by considering how the public body’s well-being objectives may impact upon each of the well-being goals;
	3. the importance of involving other persons with an interest in achieving the well-being goals and of ensuring those persons reflect the diversity of the population of⁠ Wales.
	4. how acting in collaboration with any other person could assist the public body to meet its well-being objectives;
	5. how deploying resources to prevent problems occurring or getting worse may contribute to meeting the public body’s well-being objectives.
2. The Act requires the publishing of well-being objectives, setting indicators and future targets (taking into account the 2030 UN Agenda on sustainability) and publishing annual reports on progress.
3. The Act also:
	1. creates the office of the Future Generations Commissioner which has powers to conduct reviews into the extent to which a public body is safeguarding future generations. The public body so reviewed is under a duty to follow any recommendations made by the Commissioner, unless the body is satisfied that there is good reason not to comply .
	2. places on the Auditor General for Wales a duty to examine public bodies to assess the extent to which they have acted in accordance with the Future Generations Act .
	3. but specifies no other enforcement mechanism[[7]](#footnote-7).
4. **The issues raised by the Future Generations Act**
5. The Future Generations Commissioner for Wales regards the decision not to build an M4 relief road around Newport (to alleviate the regular major traffic congestion on the existing M4) as an example of the effect the Act should have[[8]](#footnote-8). In contrast, she regards the decision not to proceed with the Swansea Bay tidal lagoon (a project to use tidal power to generate electricity) as a decision which would have been different if the UK[[9]](#footnote-9) had such legislation, as the building of the lagoon would have helped decarbonisation and the regeneration of that part of Wales, even though the short term financial projections were not favourable.
6. The Act plainly has the aspirational purpose of setting out what should be done to safeguard the position of future generations. Given the intergenerational conflict of interest and the continuing political pressure on governmental bodies to take decisions by reference to their immediate short term benefits and disadvantages, I think it is difficult to dispute the view that the protection of the interests of future generations is a subject that is certainly a very important subject for legislation.
7. However should proposed legislation which is simply aspirational be legislation that should be enacted? Although, as I will explain I have a clear view that it should not be enacted, more important is the need for debate on two key issues which need to be addressed if legislation is to be enacted which carries into effect aspirational objectives. These were raised in attempts by individuals to seek judicial review of decisions of public bodies in Wales on the basis that they did not apply the provisions of the Act to the decisions made [[10]](#footnote-10) . In each case permission to bring proceedings was refused. The court accepted in both cases the argument that the duty under the Act was too general and aspirational in nature to be directly enforceable through judicial review. In the first of the cases the court also relied, as supporting the position that judicial review was not the appropriate means for individuals or groups of individuals to enforce the duties, on the existence of what were said to be alternative enforcement regimes under the Act through the Future Generations Commissioner for Wales and the Auditor General for Wales. I do not intend to comment on the decisions as it would not be appropriate to do so, but merely would point out that a senior QC in Wales expressed the view that the Act was “virtually useless”. What is important, however, is that these cases identify the issues that need to be addressed in relation to aspirational legislation: (1) whether the duties are expressed in terms that are simply aspirational and insufficiently explicit to be enforceable and (2) what is required for enforcement.
8. In commenting on these decisions, it has been said that, although the Act may not provide a judicially enforceable remedy at the suit of individuals, it has as its objective the influence and control of administrative decision making[[11]](#footnote-11); it is not simply aspirational. There is plainly force in viewing the Act as having adopted that approach, but again it is inappropriate for me to comment on the correctness of that view. Legislation aimed at ensuring good administrative decision making in dealing with the issues such as the protection of future generations is , in my view, also a proper purpose of legislation. However legislation with such a purpose nonetheless gives rise to very similar issues to those raised in the judicial review applications for the reasons I have given. The language must be drafted in terms that are sufficiently explicit to be enforceable and there must be a mechanism for enforcing the provision when a public body has not complied with the duties.
9. These two general issues which arise in relation to legislation which may be considered simply as aspirational can be more precisely delineated. I think a way of doing this is to formulate them as conditions which need to be satisfied if proposed legislation is not simply to be aspirational, but a proper subject for legislation. These two conditions can tentatively be expressed as:
	1. Provisions should be clearly drafted so that the duties are expressed in terms which are enforceable.
	2. There should be a mechanism for effective enforcement [[12]](#footnote-12). Even if the objective is to control and influence decision making and not give rights enforceable by individuals in court, a mechanism to ensure adherence to the performance of the duties is still necessary.
10. **The Environment Bill 2019**
11. Before turning to deal in more detail with these two conditions - the language used to delineate the duties and the mechanism of enforcement-, it is necessary to say a little more about the Environment Bill 2019 .
12. The Bill seeks to deal with measures for protecting the environment in the event that the UK leaves the EU with the consequent lapse of the powerful and effective mechanisms for enforcement through the EU institutions. Part 1 (and that is the Part which is most relevant) puts in place a series of “environmental principles”. It establishes an Office for Environmental Protection (taking the place of the EU Commission) with powers to scrutinise, advise and enforce and provides for court/tribunal proceedings as an alternative venue for enforcement to the CJEU. It is said the Bill also has the political purpose of making the current generation in the UK the first generation to leave the environment in a better state than it inherited it. The political purposes of the Bill and the debate about the level of the standards to be set are not issues which it is for me to address tonight. I am interested in the two aspects I have set out – the drafting of clear and precise duties and their enforcement.
13. **The drafting of duties in terms that are enforceable**
14. As the two Welsh cases to which I have referred make clear, legislation expressed in very general terms may well not give rise to duties that can be regarded as enforceable. How is this standard to be judged? May I suggest one way - asking whether the duty has been stated with sufficient precision to enable the issue as to whether the duty had been discharged to be decided on objective evidence.
15. My suggestion for this approach is derived from the debate that arose in the 1950s in the context of legislation to transfer the decision on whether restrictive practice agreements were in the public interest from the Monopolies Commission and the Minister which it advised to a court. The legislation created the Restrictive Practices Court which made the decision on whether a restrictive agreement was in the public interest. In the debates and in some of the decisions of the Restrictive Practices Court under the Act, the position was taken that if the legislation established the general policy and gave guidance as to the test to be applied, then a court or tribunal could determine a specific dispute even if the decision required some element of economic judgment by the court. It did this by creating a presumption that a restrictive agreement between businessmen was against the public interest, but it was not if (1) it served the public interest and (2) its merits in this respect outweighed the disadvantages. The Act then set out two tests that had to be applied.
16. Can such an approach combining general policy to express the terms of the duty and specific tests be applied in determining compliance to the kind of legislation intended to protect future generations? I do not think much assistance in this respect can be obtained from the Environment Bill. First the enforcement powers of the Office for Environmental Protection are directed at circumstances where there has been a failure to comply with environmental law[[13]](#footnote-13) which is defined to mean environmental legislation[[14]](#footnote-14), not more general principles. Second, although the Bill[[15]](#footnote-15) would require Ministers to set targets in relation to what are described as priority areas in relation to the natural environment and people’s enjoyment of it (such as air quality and resource efficiency and waste reduction) and targets to specify the standard to be achieved which are capable of being objectively measured, it is by no means clear how these are to be enforced other than by reporting the failure and the steps to be taken to remedy the failure[[16]](#footnote-16) .
17. Apart from urging consideration of the approach adopted in relation to restrictive practices agreements, may I suggest two other considerations. First, the view taken on the necessary precision in the definition of the duties and the area of judgment on compliance with those duties left open to the enforcing body must depend on the type and scope of the enforcement body chosen. The more attention is given to the careful crafting of the enforcement body, the more that can be left to its decision. This is a subject I shall address when turning to the condition as to the enforcement mechanism[[17]](#footnote-17).
18. Second, should we not have a greater degree of boldness in our approach to the way in which we delineate the duties in legislation. One of several ways is a greater willingness to be bolder in finding the means through which subordinate legislation can be used to delineate the duties with greater precision and the tests by which compliance with them is to be measured. By this I do not refer to subordinate legislation that is made by Ministers alone and then subjected to the affirmative or negative resolution procedure; this would not be met with favour for many different reasons. There are, however, other ways that can be more effective. For example, significant improvement that has been made to criminal, civil and family procedure through subordinate legislation made in effect by the Rules Committees which are broadly representative of those interested. Another example is the significant powers conferred in the financial markets to regulators. Why cannot we seek, with a proper degree of Parliamentary scrutiny, to replicate this success? There are other advantages. These Committees have addressed the very significant capacity and capability issues that Ministries will increasingly face as the UK will have to do on its own what was previously shared with other states in the EU. The Committees have also provided a mechanism for greater understanding and the resolution of conflicting views. They enable changes to be made rapidly. They have removed a great deal of cynicism about the political process, a concern that is so evident in areas relating to the position of future generations, particularly on issues relating to the environment and climate change. They have remedied the deficiencies of much of the Parliamentary procedure relating to subordinate legislation, as they enable scrutiny and debate to take place in a forum where amendment to proposals can easily be made.
19. These suggestions may be controversial, but are they worth examining? If we are to have provisions that are not simply aspirational, then we need a way of achieving precision as to the duties, for the legislation should have, on the approach I have suggested to the first condition, precision or specificity on which an objective judgment in relation to compliance can be made.
20. **If we cannot draft in enforceable terms, should we legislate?**
21. But what if this cannot be done. On this, I have, as I have said, a clear view – we should not enact legislation that cannot be drafted in enforceable terms. My reason can be shortly stated.
22. We increasingly embody wide ranging aspirational principles in our law as if we are conferring legally enforceable rights in respect of them. This is in contrast to the embodying of pragmatic and enforceable principles such as “to no one will we deny or delay justice” or the right to “a fair and public hearing within a reasonable time before an independent and impartial tribunal” or the right to “freedom from arbitrary arrest”. Difficult though it may have been, effective and pragmatic enforcement of these principles was achieved. They are now accepted as the very essence of the Rule of Law[[18]](#footnote-18). It may be that in the future very broadly expressed provisions in constitutions or charters of rights will be construed to give protection against environmental damage either by direct reliance on such provisions[[19]](#footnote-19)or by use of such provisions to construe legislation so that it makes broadly expressed legislative provisions enforceable[[20]](#footnote-20).
23. However for the present and absent such development, it is essential to address the recent trend to set out principles in legislation that are aspirational but not enforceable. When it is seen that these are no more than aspirations though embodied in the guise of law, it is highly detrimental to the perception of the Rule of Law. In essence it is perceived, and probably rightly perceived, as the use of law for a purely political purpose – the very antithesis of the rule of law.
24. We should not therefore go on, particularly in areas of such importance as the position of future generations, embodying principles in legislation that cannot be expressed in terms that are enforceable either administratively or through the courts.
25. **How should the duties be made enforceable?**

*(a) Different mechanisms*

1. There can be little doubt that an independent Commission is needed to review compliance with such legislation. However, there are several options for enforcement. I would like to highlight five:
	1. A Court/tribunal where the Commissioner (or an individual) can challenge a decision of a public body and the court/ tribunal adjudicates on the merits of whether the decision complies with the duty.
	2. The court/ tribunal instead of deciding on the merits of compliance applies a judicial review test to the decision of the public body.
	3. An ombudsman or similar person with an adjudicative role who decides the same questions.
	4. A Commissioner/auditor who considers whether the decision complies with the duty and is given the power to go to court to enforce compliance or has the power to enforce itself,
	5. A Commissioner/auditor who simply reports on non-compliance or reports to an ombudsman.

(b) *Reporting non-compliance*

1. I will take the last first. There are some areas where a report by a Commissioner or auditor can in effect amount to enforcement; similarly a statement by a Minister made after such a report can have the same effect.
2. The evidence given to the Commission on Justice in Wales in March 2019[[21]](#footnote-21) in respect of the position under the Future Generations Act was clear. The Future Generations’ Commissioners evidence was that it required cultural change to bring about decision making with a view to the long term and not merely an electoral cycle[[22]](#footnote-22); she described her powers as “name and shame”; they were nothing more than a lever. Her annual budget was currently £1.4 million. The Commissioner monitored 345 well-being objectives set by 44 public bodies. Therefore because of limited resources, she needed to be quite specific in terms of what could be done. 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. The Auditor General carried out an initial review of how public bodies have responded to the Future Generations Act*[[23]](#footnote-23).* The Auditor General is required to provide a report on his examinations to the Assembly by 2020. Again it is difficult to see that this reporting mechanism or a reporting mechanism backed by Ministerial statement could amount to effective enforcement.
3. In some nations[[24]](#footnote-24), including Finland and Israel, standing Parliamentary Committees were established to examine the position of future generations. In Singapore a similar body exists within the executive government. Although important in shaping policy, they are not relevant to the enforcement of aspirational legislation. Hungary provided a different model, as between 2008 and 2011, there was a Commissioner for future generations whose task was to ensure the protection of the fundamental right to a healthy environment[[25]](#footnote-25). The Commissioner brought a number of cases to enforce this right, but the role was curtailed in 2011 by the Fidesz party of Mr Viktor Orbán when it returned to power.
4. Therefore, it is necessary to consider enforcement through the other models to which I referred and to begin with the first.

*(c) The court/tribunal making a merits based decision*

1. The first model is a court/tribunal which, either on a challenge by a person affected or by a Commissioner, decides whether the duty has been met or broken by the public body by undertaking a full consideration of the merits of the decision of the public body. It makes, in my view, no difference whether it is described as a court or tribunal. Although tribunals developed separately from the late nineteenth century onwards, they are now indistinguishable in terms of accessibility, informality, freedom from technicality, expertise, speed, and cost.[[26]](#footnote-26). When I refer to a court, I therefore include a tribunal.
2. However, what would make a difference is the model of court. In my view we should consider for this decision making role a type of court where the judge does not sit alone, but which is based on the model established by the Restrictive Practices Court created in 1956[[27]](#footnote-27). In the course of the debates on the legislation, Lord Kilmuir advanced the view in 1956 that the law should play a central role:

“I believe that the law, although deeply rooted in the history of the institutions of our country, is not an heirloom which is to be taken down, dusted, reverently considered and placed back. I believe that the law is as effective a dynamic force in modern problems as it is soundly based on these historical roots. Therefore I believe that the law should be brought in to help the solution of the great problems of a modern state. This is one of the great problems, and therefore the solution which I advance to your Lordships is one which provides for those affected the best machinery for arriving at the truth and reaching justice which the world has so far devised".

1. The Restrictive Practices Court, as established, comprised two English judges, a court of Session judges and four lay judges – two industrialists, an accountant and a trades union official. It followed ordinary court procedure. That composition was in turn partly modelled on a precedent that has largely been forgotten- the Railways and Canal Commission established in 1873 as the ordinary courts, where a judge sat alone, had not proved adept at ensuring the railways provided reasonable facilities and did not grant undue or discriminatory preferences in the tariffs charged. The President of the Commission was a High Court Judge who sat with lay members.
2. If this model is to be followed, it is necessary to have regard to some lessons that can be learnt . probably the most important is that the legislation must be properly thought through. In 1890, Wills J[[28]](#footnote-28) complained that Parliament had left to the Commission many things that would more naturally have been laid down in legislation[[29]](#footnote-29). He was highly critical of the lack of guidance or thought about the use of the phrase “in the interests of the public” when determining the preferential rates given by railways to traders could be justified under the 1888 Act. The 1956 Act plainly took this into account in the provisions that were much more specific in providing clearer principles and setting out tests that proved workable.
3. Second there is risk as to whether the judiciary would be comfortable with this role. Some judges who sat in the Railways and Canal Commission were a little reluctant to take up powers given – as for instance when it had to decide whether rates were reasonable or developing general principles. Collins J made it clear it was not within the competence of the Commission to do that:

“I cannot suppose that Parliament intended to take the management of these great trading companies [ the railways] out of the hands of the practical men who work them, and to place it in the hands of the Railway Commissioners.”[[30]](#footnote-30)

Nevertheless, it was much more in touch than the ordinary courts[[31]](#footnote-31). In  *Manchester and Sheffield Railway v Brown[[32]](#footnote-32),* Lord Bramwell expressed this conservative attitude with characteristic trenchant language:

“Here is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just and reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business… It seems to me perfectly idle, and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not. if it is a question, it is one of fact.”

On the other hand, there is usually the outstanding judge who clearly sees the merits of judicial engagement. Lord Devlin who was the first President of the Restrictive Practices Court was enthusiastic[[33]](#footnote-33). He endorsed Lord Kilmuir’s view adding[[34]](#footnote-34):

“If [the High Court] is going to play its full part in the future life of the nation, it must not barricade itself within its existing functions, even though an adaptation may contain an element of risk. At least that is what I believe, but clearly it is not at all the general view of the judges. If this experiment failed, – not necessarily a breakdown but a failure to produce convincing results, – the stand- patters will be confirmed and it will be very difficult again to use the High Court for the solution of any new problems.”

1. Third there is a risk that the judge will dominate. It was thought that this might the position in the Railway and Canal Commission, but it did not eventuate. The lay members played their part; the railway representative was scrupulous to protect the interests of the traders who used the railways[[35]](#footnote-35). I think that risk is very small these days, given a more realistic view of deference to judicial opinion.
2. Fourth there is the high expense of litigating – there was a very well paid specialist bar before the Railway and Canal Commission[[36]](#footnote-36). In only one case down to 1905 did a complainant pact in person. However this is an instance of the malaise of the court system which needs to be addressed for very many other reasons.
3. Fifth, there is a risk to the standing of the judiciary. As Professor Robert Stephens expressed the position in relation to the Restrictive Practices Court in 1965[[37]](#footnote-37):

“The main political advantage pleaded by the advocates of a wider area of judicial control are that the respect in which the judges are held gives weight to their judgments. The answer to such an argument based on judicial prestige is self-evident. When the English judges were clearly embroiled in over policy decisions and political issues they had little respect; it is only because today they decide little in civil law which is generally regarded as a major importance that they now have such high prestige. If what are commonly regarded as political decisions are to be given to the judges, then there will be a serious danger that the prestige of the judiciary will again be in jeopardy. Perhaps this is a worthwhile sacrifice; but the dangers and implications of the sacrifice should be appreciated before the constitutional changes made."

1. However the risks can be mitigated. For example, the judges of the Restrictive Practices Court, particularly under Devlin’s presidency, took great care to be seen as doing no more than applying the general principles set out in the legislation to specific case; it was not for it to determine whether matters were fair and reasonable or in the general economic interests of the state. Although the court saw a decline its business, this was due to the fact that, using its speedy and workable procedure, it established principles and made its views on restrictive agreement clear. Within a couple of years, its case load had fallen away and the judges were able to do other things. With the revival of the Monopolies and Mergers Commission and the establishment of the Office of Fair Trading, the work declined further, but the model of the Court was revived in 2003 with the Competition Appeal Tribunal which has been very successful.
2. The great advantage of such a court is that it should have the necessary expertise to build on principles which the legislature may only be able to express in broad general terms. It seems to me that the legislature in such circumstances could properly leave the development of principles in relation to the safeguarding of the position of future generations to a court which has a broader expertise and understanding than would be the case if it comprised solely of members drawn from the judiciary. The court would itself have the necessary confidence to develop principles without fearing it would be entering into political issues and the public would likewise have confidence that such a court would better balance the respective interests and safeguard the position of future generations.

*(d) The court/tribunal conducting a judicial review.*

1. The second enforcement mechanism is review on judicial review principles of the decision of the public body which is said to be in breach of the duty in question. This is the model that has been chosen in the Environment Bill to enable the Office of Environmental Protection to take enforcement action where it has issued a decision that a public body has failed to comply with environmental law and the failure is a serious one. An application is to be made to the Upper Tribunal to determine on judicial review principles whether the public body has complied with environmental law. If it so decides, then it can grant remedies. There is also provision to apply directly to the High Court for judicial review where the review procedure before the Upper Tribunal might not be completed before damage was suffered as a result of the breach. It would not be apposite to comment on the Bill further as I refer to it only as a possible model.
2. It is argued sometimes that there is little difference between a judicial review test and a review of the merits[[38]](#footnote-38) Although it is appropriate on a judicial review to vary the intensity of the review of the decisions, there is a fundamental difference between a decision on the merits and a judicial review. A choice should be made.
3. There are plainly risks in having a court that makes the decision on a merits based approach rather than a court conducting a judicial review, but this needs to be explored further for there are considerable benefits in favour of a merits based approach for the reasons I have given. Certainly whatever choice is made, there is a strong case for a court with expertise than is wider than judicial, even if it is approaching the matter on a judicial review basis.

*(e) An ombudsman*

1. As I have noted in relation to my discussion of the first of the two conditions[[39]](#footnote-39), legislation directed at good administrative decision making (as distinct from conferring rights on individuals) has an attraction, but what of the mechanism for enforcement?
2. The development of ombudsmen has by and large been a success in improving good administration, even though few ombudsmen have powers of enforcement. However, if this were the mechanism chosen, the decisions of the ombudsman would need to be legally binding at least as against the public body[[40]](#footnote-40), if the decision was to be categorised as enforceable.

*(f)*   *Direct enforcement by the Commissioner*

1. I cannot see the option of direct enforcement by the Commissioner as viable. The Commissioner is not a regulator but a person or body charged with protecting the interests such as those of the future generations that need protection. If that role is the proper role of the Commissioner, then it cannot be right that the Commissioner has an adjudicative role where the view of the Commissioner is disputed. In any event, any decision of the Commissioner would be open to challenge by judicial review.
	* 1. **Conclusion**
2. I have taken the position of future generations as my test bed for the issue of aspirational legislation, as there can be no doubt that this is an issue which is of fundamental importance and of essential interest. Many will try and see if the law can give effect to what is wanted and often promised. The issues which arise are too important to be ignored – law in this field should be used for a clear and legitimate purpose and not simply to reflect the desire of politicians to be seen as doing something. For the reasons I have given it raises false hopes and undermines the rule of law.
3. However, there is no reason to doubt that, provided there is debate and bold thinking, a good solution can be found. I believe that the solution lies in addressing the two conditions I have spelt out. They are interrelated as I have explained for the degree of precision required in drafting provisions clear enough to be enforceable is related to the ability and skill of the court that will enforce the duty to ensure it is not being required unduly to make policy and has clear guidance, whilst at the same time developing pragmatic outcomes.
4. Although as I have explained there are risks in using the judiciary and there will doubtless be some understandable judicial concern, there is much to be said for looking at a special court or an ombudsman model to provide effective enforcement of provisions to safeguard the interests of future generations. This is essential at a time when there is such conflict between the interests of those generations and the pressures of short term political decision making and such scepticism about the ability of state institutions to address the issues in an effective way.. There are of course great risks, but the greater risk in this context is not to set about thinking through a solution.
5. That is the level of risk on the great issue of the day which I have taken as my test bed for exploring the subject of aspirational legislation. But whatever the context, we must not go on passing aspirational legislation, unless it is enforceable. We should not continuing with the threat it poses to the rule of law and the belief in the rule of law.
1. I have incorporated into the footnotes some further matters which arose out of the questions at the end of the lecture. I am most grateful for the very helpful discussion. [↑](#footnote-ref-1)
2. On 21 October 2019, the first reading of the Wellbeing of Future Generations Bill, a private Bill, took place in the House of Lord; the Bill made no further progress because of the General Election. The Bill was introduced by Lord Bird who had initiated the debate on 29 June 2019.

The text of the Bill is at <https://publications.parliament.uk/pa/bills/lbill/2019-2020/0015/20015.pdf> [↑](#footnote-ref-2)
3. Cm 9751 [↑](#footnote-ref-3)
4. Statute Law Review (2016) 37 (3) 212 [↑](#footnote-ref-4)
5. At page 220 [↑](#footnote-ref-5)
6. The action a public body takes in carrying out sustainable development must include—

(a)setting and publishing objectives (“well-being objectives”) that are designed to maximise its contribution to achieving each of the well-being goals, and

(b)taking all reasonable steps (in exercising its functions) to meet those objectives. [↑](#footnote-ref-6)
7. This is perhaps not that surprising given the way in which other nations have relied on Parliamentary Committees and Commissioners to try and make public bodies take into account the interests of future generations. [↑](#footnote-ref-7)
8. Institute of Welsh Affairs, *The Welsh Agenda,* Autumn/Winter 2019 at 44. *Sophie Howe and the Art of the Possible* [↑](#footnote-ref-8)
9. This is a reserved matter. [↑](#footnote-ref-9)
10. *R(B) v Neath Port Talbot Council* CO/4740/2018*; R (the British Association for Shooting and Conservation and Others) v Natural Resources Wales*: CO/4881/2018. [↑](#footnote-ref-10)
11. The view has been expressed in more restrained terms by Dr Sarah Nathan, an eminent authority on Welsh public law that the Act“…is an example of administrative procedure law seeking to control and influence administrative decision-making, but which does not endow individuals with legally enforceable rights against public bodies” - The *New Administrative Law* *of Wales,* forthcoming Public Law article: 8 [↑](#footnote-ref-11)
12. In its report *The Legislative Process: Preparing Legislation for Parliament*  (25 October 2017) the House of Lords Constitution Committee drew attention in chapter 2 to the debate about whether legislation was needed simply to implement policy if there were other means of implementing policy. The Committee referred to the 2017 Annual Lecture of the Statute Law Society delivered by Sir Robert Rogers (now Lord Lisvane) where he argued against the idea of legislation being used to “send a message”, he stated that “the sole purpose of primary legislation” should be “to change the law only to the extent required to achieve the precise changes” sought. <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/2705.htm> [↑](#footnote-ref-12)
13. Clauses 27-36. [↑](#footnote-ref-13)
14. Clause 40. [↑](#footnote-ref-14)
15. Clause 1 [↑](#footnote-ref-15)
16. Clause 5 [↑](#footnote-ref-16)
17. See paragraph ‎45 below. [↑](#footnote-ref-17)
18. In the course of discussion after the lecture was delivered, the public sector equality duty was referred to as a duty that had been accepted to be sufficiently specific to be enforceable. S.149 (1) of the Act provides:

 A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. [↑](#footnote-ref-18)
19. The US litigation, *Juliana v US ,*  is a significant attempt (presently before the Ninth Circuit Court of Appeals where argument took place on 4 June 2019) to establish a constitutional right of young people to be protected against dangerous carbon dioxide concentrations by reliance principally on the 5th Amendment right to protection against deprivation of life liberty or property. [↑](#footnote-ref-19)
20. During the discussion after the delivery of this lecture, reference was made to provisions of the Indian Constitution which have enabled the Supreme Court to be relatively activist in environmental protection. [↑](#footnote-ref-20)
21. Oral Evidence 29 March 2019 (OE/037); <https://gov.wales/publications?keywords=oral%20evidence&All_=All&field_external_organisations%5B1880%5D=1880&publication_type%5B10%5D=10&published_after=&published_before=&_ga=2.61301932.1626034404.1575711392-1717930944.1575711392> [↑](#footnote-ref-21)
22. Her evidence was that 50% of the Welsh budget went on the NHS, but it was accessed by only 15-20% of the population; more was needed for preventative action [↑](#footnote-ref-22)
23. Wales Audit Office (2018) *Accountability for Future Generations: Sharing the learning so far.* [http://www.audit.wales/news/accountability-future-generations-sharing-learning-so-far-conference-outputs-now-online](http://www.audit.wales/news/accountability-future-generations-sharing-learning-so-far-conference-outputs-now-online%20) [↑](#footnote-ref-23)
24. See Rights and Representations of Future Generations in UK Policy Making, May 2017, Centre for the Study of Existential Risk, University of Cambridge. [↑](#footnote-ref-24)
25. Article XXI of the 2011 constitution provides that “Hungary shall recognise and give effect to the right of everyone to a healthy environment”; see also: <https://www.futurepolicy.org/guardians/hungarian-parliamentary-commissioner/> [↑](#footnote-ref-25)
26. I set out the position in a lecture given in Cardiff on 21 October 2016: *Building the best court forum for commercial dispute resolution.* [*https://www.judiciary.uk/wp-content/uploads/2016/12/lcj-single-judiciary-wales-Oct-2016.pdf*](https://www.judiciary.uk/wp-content/uploads/2016/12/lcj-single-judiciary-wales-Oct-2016.pdf) [↑](#footnote-ref-26)
27. A similar body which operates in a wide field of competition and regulatory disputes is the Competition Appeal Tribunal established in 2003 where a High Court Judge or senior lawyer presides and sits with 2 others – normally persons experienced in accountancy, economics or business. [↑](#footnote-ref-27)
28. He was President of the Commission from 1888-93; the greater part of his entry in the DNB is devoted to his activities as a mountaineer and President of the Alpine Club [↑](#footnote-ref-28)
29. *Liverpool Corn Traders Assn v LNWR* 7 Ry and Canal Traffic Cases 125 at 137. [↑](#footnote-ref-29)
30. Cited in SJ McLean The English Railway and Canal Commission of 1888, Quarterly Journal of Economics vol 20 1-58 (1905) at page 32. [↑](#footnote-ref-30)
31. Ibid page 51 [↑](#footnote-ref-31)
32. (1883) 8 App Cas 703 at [↑](#footnote-ref-32)
33. Devlin was prone to have too high an opinion of the judiciary once saying in *The Judge* (1979) “the English judiciary is properly treated as a national institution …and tends to be admired to excess.” quoted in Pannick: *Judges* (Oxford, 1987) page 137 [↑](#footnote-ref-33)
34. Devlin J to Lord Kilmuir 7 March 1956 LCO/2/6242, cited by Robert Stevens: *The Independence of the Judiciary* at p. 107. [↑](#footnote-ref-34)
35. Ibid page 35-36. The lay members sometimes dissented. One such case was *Sowerby v GNR* (1891) 7 Ry and Canal Traffic cases 156, where Sir Frederick Peel dissented. The dissent got short shrift in the Court of Appeal where Lord Halsbury said: “I confess if I had any difficulty in this case, it would be to understand how it could ever have been contested.” [↑](#footnote-ref-35)
36. Ibid pages 38-39 [↑](#footnote-ref-36)
37. *The Restrictive Practices Court: a study of the judicial process and economic policy.* RB Stephes and BS Yamey (Weidenfeld and Nicolson, 1965 at page 152. [↑](#footnote-ref-37)
38. See for example the speech of Peter Freeman QC on the role of the Specialised Tribunal by reference to the Competition Appeal Tribunal (June 2103). <https://www.catribunal.org.uk/sites/default/files/2018-01/Competition_Decision_Making_and_Judicial_Control-The_Role_of_the_Specialised_Tribunal_06-070613.pdf>. [↑](#footnote-ref-38)
39. See paragraph ‎17, [↑](#footnote-ref-39)
40. The Financial Ombudsman’s decisions are binding on the financial institution if accepted by the consumer. [↑](#footnote-ref-40)