

How far do current legal and regulatory frameworks in public utilities deliver for sustainability – and is further legislation required?

No one should 'hide' behind the law or regulation as an excuse not to deliver sustainable outcomes in public utilities.

In December 2020, [Slaughter and May](#) completed a major piece of pro bono work for Sustainability First analysing the extent to which the legal and regulatory frameworks of the energy, water and telecommunications industries create barriers (or facilitate) the pursuit of sustainability initiatives.

Defining Sustainability

To provide a framework for assessing sustainability in this work, Slaughter and May used a definition of 'sustainability' that focuses on three substantive sustainability goals relevant to utilities:

Management of long-term intergenerational issues	People-centred services and localism	Preserving the environment/ reducing emissions
--	--------------------------------------	--

And three key vehicles or means for achieving this:

Allowing short-term flexibility	Ensuring investment in innovation	Achieving collaboration
---------------------------------	-----------------------------------	-------------------------

The Slaughter and May [notes](#) assess the extent to which current legal and regulatory systems enable or act as a barrier to sustainability in these six areas.

Sustainability, Law and Regulation

Sustainability First's conclusion from this work is that there *is* scope within the current legal and regulatory arrangement for more to be done to encourage sustainability. Generally, companies have flexibility within the existing regulatory regime to pursue sustainability initiatives and regulators have flexibility within the existing legal regime to support sustainability practice. All sides need to recognise their own agency in delivering sustainability.

That being said, it might take a brave company or regulator to take initiatives that do not have implicit support from the Government and other stakeholders. And delivering sustainability often requires a difficult balancing act, trade-offs and identification of win-wins which can be complex and challenging.

Enablers

There are a number of examples identified in the Slaughter and May papers where the existing regime already recognises, and may act as an enabler of, sustainability goals. These include:

- In water, intergenerational issues are reflected through the general duties of Ofwat to secure long-term resilience and through Defra's policy statement for the water industry on meeting the needs of current and future customers.
- In energy, Ofgem is required to protect consumers' interests in the reduction of greenhouse gases with emissions as part of its 'principal objective' and Ofgem has also included net zero reopeners in the RIIO-2 price control.
- The telecoms industry benefits from significant R&D investment in innovation and collaboration has become an important element of securing rollout of key infrastructure in the industry.

Barriers

There are also a number of potential barriers to the pursuit of sustainability goals. However, where barriers exist, these aren't necessarily *legal* barriers.

The most significant barrier to change relates to funding and incentives through the regulatory framework. This is primarily a question of policy choices rather than a legal restriction. There is scope for change within the current legal framework. For example, in water and energy there are no legal barriers to introducing a longer price review.

A key tension that needs to be resolved at a policy level is balancing the trade-off between increased spend on sustainability issues leading to increased prices for consumers in the short term. Particularly (but not only) in the context of Covid, the associated issues around affordability are clearly real and pressing.

What more could be done within the existing regime to provide for sustainability?

There are a number of steps that could be taken, within the current legal regime, to increase emphasis on sustainability. These include:

- Setting sustainability-related targets and adopting sustainability metrics or reporting to monitor achievements towards these goals.
- Placing greater emphasis on building expertise on sustainability issues through appointments to regulatory and company boards.
- Ensuring transparency in regulatory decision making and governance processes.

There are also a number of industry-specific steps that could be taken, including:

- In water, using the statutory strategic policy statement to increase emphasis placed on sustainability.
- In energy, doing more to communicate how Ofgem's policy initiative fits within wider Government policy with respect to protecting the environment and tackling climate change.
- In telecommunications, Ofcom's broad duty to further the interests of 'citizens' (notably not 'consumers') could be used as a basis of taking a wider range of issues into account.

If there were desire for legislative reform, a main consideration could be whether to amend the general duties of the regulators to give greater prominence to sustainability goals.

In Sustainability First's view, although changes to duties or strategic policy statements are desirable in embedding sustainability *across* utilities industries and sending a signal to external stakeholders, including investors, they are not sufficient to make the changes we need to see to meet the challenges of the 21st century.

Looking to the Future

A number of recent government announcements have direct bearing on sustainability and utilities. There has also been significant debate around the respective roles of government, regulators and utility companies in delivering key economic, social and environmental outcomes. The [Energy White Paper](#), for example, committed to consulting on a Strategy and Policy statement for Ofgem, and the [Treasury's Response to the National Infrastructure Commission's Regulation Study: Strategic Investment and Public Confidence](#) announced a forthcoming Treasury-led review into regulators' duties and strategic statements, and how to improve collaboration between regulators.

Slaughter and May's analysis is therefore timely and presents a necessary baseline for how the current legal and regulatory regime delivers sustainability.

Sustainability First will build on Slaughter and May's analysis in our forthcoming major [Fair for the Future](#) paper on the Implications of the Purpose Agenda for Policy and Regulation. The paper will take a strategic approach and make practical recommendations for redesigning the policy and regulatory framework to deliver on outcomes for fairness and the environment. It will emphasise the need for a package of measures to deliver sustainability, including the need for cultural change within and between key parties to tackle 'wicked' issues.

The notes were produced by Slaughter and May for the sole benefit of Sustainability First. They do not reflect the views of, and may not be relied upon by, any other person. Slaughter and May are not involved in Sustainability First's Implications for Policy and Regulation paper. Slaughter and May excludes liability to anyone other than Sustainability First for loss related to the notes. The notes set the regulators' position in 2020, before the CMS provisional conclusions and RII02 final determination.