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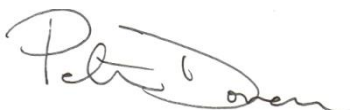
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Areas of Expertise:

I have worked in the field of sustainable development for almost twenty years. My activities have included:

- Lecturer in Environmental Law and Sustainable Development (current);
- Editor/Writer for the International Institute for Sustainable Development's *Earth Negotiations Bulletin* at UN negotiations, including UNFCCC/Kyoto Protocol negotiations in Kyoto and thereafter;
- Environmental Researcher at the Northern Ireland Assembly;
- Campaigns and Policy Director at Irish environmental Non Governmental Organisations (Earthwatch, Foyle Basin Council); and funding assessor for the Irish Environmental Network in Dublin.

My specific expertise lies in the areas of governance and the politics of sustainable development, including climate change. My current research focuses on sustainable consumption and the economics of transition.



The Climate Action and Low Carbon Development Bill (Draft Heads) – *An opinion*¹

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Summary of Key Observations

- One of the unique characteristics of climate change as a policy driver is the requirement that a new temporal horizon be established to inform near term considerations, notably investment decisions and climate justice for future generations (inter-generational justice). In the context of climate justice, economic and ecological externalities have both spatial and *temporal* dimensions. Long-term targets are entirely compatible, and perhaps necessary, to support a comprehensive and economy-wide transition to a low carbon profile.
- In departing from the scope and ambition associated with the UK Climate Change Act 2008 and earlier Oireachtas drafts, the Minister and his Department have overlooked an opportunity to build on a cross-party consensus for bold action on climate change. This cross-party consensus has been identified as a critical component³ for a country's long-term approach to mitigation.
- The departure is reflected in the overall approach indicated in the draft Heads of Bill but is most significant and far reaching in the decision not to establish an independent climate change committee that would help remove key decisions on long-term ambition from the day-to-day political ferment and special pleading by powerful sectoral interests, and in dropping evidence-based interim and 2050 emissions reduction targets. An early role for an independent, authoritative and well-resourced independent body in Ireland would be to advise on a re-calibrated approach and pathway to the realisation of an ambitious science-based 2050 target, while having regard for the Government's current assessments of prospects for realising existing EU targets for 2020. Provisions for built-in reviews can be built into the legislation, but should be triggered only on the advice of an independent committee and subject to prescribed criteria e.g. changes in EU and international climate change policy and/or new climate change science.
- The ambitious targets and carbon budgets that are a feature of the UK Climate Change Act 2008 are inseparable from the overall intention and design of the UK legislation. Setting the budgets will trigger a chain of actions required of the government including putting forward policies and proposals to meet the budgets. The CCC advises and monitors progress and parliament scrutinises the implementation of the Act. One of the consequences is the engagement of the whole government in a law-based series of policy actions, with immediate effect. This kind of approach would represent a step change in the penetration of climate change policy making within the Irish political system, at all levels.
- Reported fears within the Department of the Environment, Community and Local Government regarding the risk of being locked into the delivery of a legally binding duty that could prove to be undeliverable, have been overstated. During the scrutiny hearings in the run-up to the adoption of the UK Climate Change Act 2008 such fears, with regard to the core duty on the Secretary of State "to ensure that the net UK carbon account for the year

³ Giddens, Anthony, 2009, *The Politics of Climate Change*. London: Polity Press.

2050 is at least 80% lower than the 1990 baseline”, were authoritatively dismissed. It was concluded that the overall design of the UK legislation, with “aspirational” dimensions, would be to strengthen the hand of parliamentary scrutiny. On the *general duty* it was largely agreed that the courts would defer to parliament in the event of a Judicial Review. Moreover, the prospect of litigation has been minimized by building in opportunities to review targets, subject to prescribed criteria.

- The Minister and his Department have opted for a policy approach that treats targets as relatively passive. A feature of the science-led UK approach is a recognition that long-term targets can play an active role in creating immediate political conditions for momentum and ambition, together with a critical level of certainty for the private sector in terms of investment. Long-term, ambitious targets can become a player in establishing a national emissions reduction trajectory & play an important symbolic role in concretising a State’s leadership role in pressing for a new global climate deal. The NESC report correctly identifies a shift in our understanding of the role of multilateral climate change negotiations but does not necessarily provide evidence for delinking the relationship between national, sub-national and other sources of ambition for national mitigation and the State’s proactive role in supporting ambition at the multilateral level. The Executive Secretary of the UNFCCC has pointed out that national legislators are in the driving seat when it comes to linking early climate action and the prospects for a universal agreement in 2015.
- There is an absolute limit to the extent to which a State can appeal to the mechanics of international climate change policy in order to provide a rationale for its own ambition; the *absolute determinant for ambition is the scientific evidence base* embraced by the IPCC, the UNFCCC, the EU and the G-8. The laws of physics are non-negotiable.
- The Climate Change Act targets fall into a category of ‘aspirational legislation’ which supplements objective-oriented duties with procedural obligations owed to parliament. This kind of legislation can strengthen parliament’s hand in holding a government to account by setting benchmarks against which progress can be judged, and by requiring a government to furnish parliament with the information necessary to render such judgements. Aspirational legislation can be particularly useful where a political consensus is supportive of the ultimate objectives of the legislation.
- The UK Climate Act 2008 already applies to part of the territory of the island of Ireland (Northern Ireland). The devolved Northern Ireland Assembly will soon be invited to consider regional targets linked to the design and ambition of the UK Climate Act 2008.

“I think there are good reasons for suggesting that the modern age has ended. Today, many things indicate that we are going through a transitional period, when it seems that something is on the way out and something else is painfully being born. It is as if something were crumbling, decaying, and exhausting itself – while something else, still indistinct, were rising from the rubble.” (Vaclav Havel, playwright and former Czech President)⁴

1. Introduction

This briefing has been prompted by the Minister for Environment, Community and Local Government, Phil Hogan’s (TD) publication of the Government’s draft Climate Action and Low Carbon Development Bill 2013. The ‘Draft Heads’ of the Bill⁵ have attracted criticism for having departed from the ambition and approaches taken in several earlier Oireachtas draft climate change Bills published since 2007¹, notably in dropping headline greenhouse gas emissions reductions targets covering the period up to and including 2050. The Draft Heads also indicate that the Minister and his Department have decided on a radical departure from the innovative design and ambition of the UK Climate Change Act 2008, which is widely regarded as a world leading approach to placing evidence based climate change targets on a statutory footing.

There has been much speculation around the reasons for the Minister’s decision to drop explicit science-based targets in the range adopted in the UK legislation (80%) and recommended by the European Council (80-95%) by 2050⁶ on the basis of research produced by the Intergovernmental Panel on Climate Change (IPCC). At the outset it is important to note that the decision to drop ambitious headline targets is inseparable from the Minister’s equally significant decision to depart from the overall intention and design of the UK legislation, notably the establishment of an independent Climate Change Committee and a series of automatic triggers for on-going analysis, reporting and iteration of carbon budgets and policy adjustments. In addressing questions about targets it is essential to keep in mind that the UK legislation was designed with a specific purpose for and attitude to target setting. The UK Climate Change Act 2008 was enacted as part of the UK’s commitment to setting its domestic economy on the path to a low carbon profile by 2050 and as a

⁴ Cited in Scharmer, Otto, 2009, *Theory-U: Leading from the Future as It Emerges: The Social Technology of Presencing*. San Francisco: Berrett-Koehler Publishers..

⁵ Department of the Environment, Community and Local Government 2013, *General Scheme of a Climate Action and Low Carbon Development Bill 2013*.

⁶ One approach to arriving at the 80 percent cut in UK Kyoto GHG emissions from 1990 levels is outlined by Lord Adair Turner, Chair, UK Committee on Climate Change in a letter to the former UK Minister for Energy and Climate Change, Ed Milliband. Turner writes that it is difficult to imagine a future global climate change deal that will allow developed countries to have emissions per capita in 2050 that are significantly above a sustainable global average. In 2050 the global average, based on an estimated population of 9.2 billion, is expected to be between 2.1 and 2.6 tonnes per capita, implying an 80 percent cut in UK Kyoto GHG emissions from a 1990 baseline. The projected global average is based on an estimate that global Kyoto GHG emissions will need to fall to between 20-24 billion tonnes by 2050 – or 50-60 percent lower than current levels – and to a still lower level of 8-10 billion tonnes by the end of the century. See letter from Lord Turner, UK CCC, to the Secretary of State, Department for Energy and Climate Change, Whitehall Place, 7th October 2008.

contribution to the international effort to secure a global climate change deal. This was best summed up by Christopher Norton during an evidence session before the UK's Joint Committee on the Draft Climate Change Bill in 2007, when he said: "By passing this Bill we are saying to the rest of the world that this is what we are going to do, we will endeavour to achieve that and we want you to meet that and act in a similar fashion."

This briefing addresses three related matters raised since the publication of the Government's draft Climate Action and Low Carbon Development Bill 2013:

- What are the legal issues raised by putting a 2050 emissions reduction target into law and providing for the parliamentary adoption of interim targets on an on-going basis?
- What are the *options* for dealing with these issues in legislation?
- The efficacy of these *options*

The approach to these questions will be limited – for the most part – to an examination of the way in which these or analogous questions were raised and addressed during the preparation and scrutiny of the United Kingdom's Climate Change Act 2008. This approach has been adopted because it is generally agreed that there has been a significant read across from the UK legislation by the drafters of earlier climate change Bills prepared by Irish legislators.

A number of key questions that were raised during the preparation and scrutiny stages of the UK legislation prefigure some of those now being raised in Ireland by those with an interest in seeing ambitious headline targets reintroduced and incorporated into the Climate Action and Low Carbon Development Bill 2013. There is a working assumption that the Minister and his Department have resiled from a more ambitious approach to legislative design and targets because they wish to avoid being locked into commitments that may not be deliverable or are not supported by current 'how to' (NESC 2013) capacity. It has been reported that the Attorney General's office is concerned that the inclusion of headline targets in the Bill will result in the Government or a future administration "being hauled into Court".⁷ This has been taken to support a view that *legal issues* surrounding targets and the question of their justiciability have become a key concern for the Minister and his advisors. This assumption is disputed by the Department of Environment, Community and Local Government.⁸

The contention that legal issues raised by the incorporation of headline targets have become a key consideration must also include a recognition that the decision is ultimately a political one, based on the Government's calculation that ambitious long-range targets similar to those adopted in the UK legislation are unrealistic and/or have little merit in local circumstances where the national emissions profile, notably in the dairy/agricultural sector, are unusually challenging. Such a calculation implies a certain – technocratic – or passive understanding of the role of targets,

⁷ See White, Victoria, 2012, 'We need to put the Climate Bill back on agenda before it is too late', *The Irish Examiner*, 13 December, p. 6.

⁸ Personal correspondence 2013.

deeming them little more than the something akin to benchmarks for ‘end of term’ reports to be scrutinized by opposition parties and elements of a potentially litigious civil society. In this approach there is a tendency to lose sight of the unique character and scale of climate change as a threat. As this note will show, there is little reason to believe that legislation based on the UK model will lead to Judicial Review when it comes to the core general duty of a minister.

An alternative approach to targets is to regard them as active components or players in driving levels of ambition and innovation by sending clear long-term signals to relevant stakeholders, notably those engaged in day-to-day investment decisions and technological development. This is more akin to the UK approach and helps to explain both the overall design of the UK Climate Change Act 2008 and the considered attitude to long-term target setting. For the UK, the integrity and legitimacy of the ambitious 2050 target, for example, is integral to the design and overall political intention of the legislation. The target is substantive insofar as it is science-based, it is dynamic insofar as it is intended to stimulate the necessary and incremental policy interventions required to set the UK on an adequate low carbon pathway, and it has a powerful symbolic function for both the domestic constituencies and the international community where the UK seeks to play a leadership role in supporting a long-range multilateral agreement.

The more limited rationale for the Minister Hogan’s approach to the current Bill was flagged in a Department note, *Review of National Climate Policy* (November, 2011). It is clear from this note that the Department is preoccupied with uncertainties in the climate change policy environment and the need to ramp up its policies and measures if it is to meet even its existing and legally binding GHG mitigation challenge [shared with the UK and other EU Member States] as determined by the European Climate and Energy Package, adopted by the European Council in December 2008. The note also acknowledges that the EU’s 2050 Roadmap will – one way or the other – force Ireland to adjust its GHG emissions profile to adjust to a world where emissions cuts in the order of 80-95% (based on 1990 levels) will be demanded of developed countries. Arguably, the important difference between the Irish and UK approaches is to be found in their contrasting attitudes to a readiness to face up to the *immediate* policy implications of a severely climate constrained mid-century and the opportunity to design legislation that will facilitate a predictable pathway to 2050.

In sectors of the economy not covered by the EU’s Emissions Trading Scheme (ETS)⁹, Ireland is required to progress down an annual emissions reduction trajectory from 2013, reaching a point in 2020 where emissions are equivalent to 20% below their level in 2005. When greenhouse gas emissions from Irish installations participating in the ETS are excluded from the national profile, the mitigation agenda is dominated by emissions from the agriculture and transport sectors. Moreover, in the context of ongoing EU and UNFCCC-sponsored negotiations on a new international agreement, the EU is likely to increase its ambition for 2020¹⁰.

The Department note continues:

⁹ Approximately 72% of Irish emissions fall outside those covered by the ETS.

¹⁰ See European Commission Communication, *Analysis of options to move beyond 20% greenhouse gas emissions reductions and assessing the risk of carbon leakage*. European Commission, May, 2010.

Recent greenhouse gas emission projections from the Environmental Protection Agency (EPA) show that, even under the most optimistic scenario, Ireland cannot meet its 2020 mitigation target on the basis of existing policies and measures, and a further deepening of these measures would be required to achieve compliance domestically.¹¹

In a discussion on the range of uncertainties that characterize the Irish climate change policy environment, the Department also concedes that “a wide range of influences are pressing the case for political support to achieve a higher level of mitigation ambition both in the short term to 2020 and in the longer-term context of low-carbon transition and green growth.”¹² The note cites the EU’s *2050 Roadmap*¹³ and Intergovernmental Panel on Climate Change analyses that point to a future where developed country emissions will reduce gradually over time to a very small proportion of their current size in a context where, by mid-century, international offsets will be increasingly scarce. The *Roadmap* focuses on establishing EU policy to cut total GHG emissions by 80-95% (compared to 1990 levels) by 2050, based on the advice of the Intergovernmental Panel on Climate Change.¹⁴

The *Roadmap* communication also indicates that reductions of the order of 40% and 60% below 1990 levels would have to be achieved by 2030 and 2040, respectively, so as to reach the 80% goal proposed for 2050. The Department notes that the Commission intends to use the *Roadmap* to be used as a basis for sector specific policy initiatives and Roadmaps.

¹¹ Department of the Environment, Community and Local Government, 2011, *Review of National Climate Policy*.

¹² Ditto, p. 26.

¹³ European Commission, 2011, *A Roadmap for moving to a competitive low carbon economy in 2050*.

¹⁴ The IPCC advice calls for a global reduction of 50% by 2050, with developed countries taking on 80-95% reductions in accordance with the UNFCCC/Kyoto Protocol principle of common but differentiated responsibilities.

2. Background:

Part One: ‘Nothing is going to be agreed internationally, until enough is legislated domestically’¹⁵

It is interesting to note that the current *Climate Action and Low Carbon Development Bill* closely tracks the trajectory of policy at the European level, notably the recommendations set out in the *Roadmap*. However, having taken up the focus on sectoral roadmaps and integration of climate change policy with the drive for a ‘green economy’ and low carbon development, the Bill parts company when it comes to explicit declarations for ambition and goals for emissions reductions up to 2050. *The Government has clearly opted for a cautious approach in proposing to limit the scope of the emissions reductions ambition in the Bill to existing legally binding obligations under the EU’s 2020 targets, with provision to review these in line with any future EU decision.*

Whereas the NESC report, *Ireland and the Climate Change Challenge: Connecting ‘How much’ with How to’* (December 2012), seizes on academic debates on the shift that is taking place away from a top-down, UNFCCC-led approach to global action on climate change in order to provide a rationale for a newly calibrated and experimental approach that focuses on tailoring ambition to match ‘know how’, others have looked at current changes in climate policy and politics and come up with very different conclusions about the active synergy between national (and sub-national) actions and the prospects of a new multilateral agreement. The NESC report engages, at some length, in a plausible but partial explanation for some of the weaknesses in the delivery of international climate change policy but, in so doing, deflects attention from the central role of the IPCC’s evidence base in driving responses at all levels. There is an absolute limit to the extent to which a State can appeal to the mechanics of international climate change policy in order to provide a rationale for its own ambition; the absolute determinant for ambition is the scientific evidence base embraced by the IPCC, the UNFCCC, the EU and the G-8.

One of the observers who has arrived at very different conclusions is the Executive-Secretary of the UNFCCC, Christiana Figueres. Delivering the keynote address at the First GLOBE Climate Legislation Summit on 14 January 2013, the Executive Secretary of the UNFCCC, Christiana Figueres, described the growing raft of domestic climate change legislation across the world as an “absolutely critical, essential, linchpin between action at the national level and international agreements.”¹⁶ She went on to recall two key tasks identified at the 2012 UNFCCC Kyoto Protocol Conference of the Parties/Meeting of the Parties in Doha. These are:

- The first task is to accelerate action now, not to wait for 2015, and certainly not to wait for 2020. Accelerate action now because time is running out.

¹⁵ Christiana Figueres, speaking at the First GLOBE Climate Legislation Summit, 14 January 2013.

¹⁶ GLOBE International, Speech by Christiana Figueres, UNFCCC Executive Secretary, at the First GLOBE International Climate Legislation Summit, London, 14 January 2013.

- The second task assigned to all countries is the path toward a universal agreement to be reached by 2015.

Figueres underlined the importance of national climate change legislation and, by implication, national targets, stating¹⁷:

My friends, I hope that this does not surprise you, but it is actually not the negotiators of the international agreement who are in the driver's seat of that, it is actually you who are in the driver's seat. You are the linchpin between the first task, which is climate action now, and the second task, a universal agreement by 2015. None of that can occur without national legislation, none of it.

Figueres has repeatedly underlined the importance of meaningful domestic legislation in enabling progress at the international climate change negotiations, describing how domestic action opens up the political space for international agreement and facilitates overall ambition. The GLOBE parliamentary network has tracked progress in 33 countries where climate change legislation has now been introduced.

Part Two: Design is the first signal of human intention – The innovative design of the UK Climate Change Act 2008

In this second section, the 'legal issues' around putting a 2050 emissions reduction target into law and providing for the parliamentary adoption of interim targets, will be discussed within the context of the design and political intention of the UK Climate Change Act 2008, while drawing heavily from relevant debates during the scrutiny process¹⁸ in the run up to the adoption of the UK legislation. The parliamentary debates were characterised by high levels of cross-party support for action on climate change, with differences focusing on the details of the bill.

The United Kingdom Parliament passed the Climate Change Act on 26 November 2008 with cross party support and an explicit intention to address both the need for an enabling domestic framework and to demonstrate UK leadership in the context of international climate change negotiations. The central pillars of the legislation are legally-binding and evidence/science based targets for reducing emissions of GHGs¹⁹ by 2020 and 2050. The targets correspond with climate science and international and EU commitments, and a series of five-yearly carbon budgets which set maximum UK emissions that are intended to set the UK on a trajectory to meet the 2020 and 2050 targets. A key innovation is the creation of the independent Climate Change Committee set up to advise the UK Government and to monitor its progress. The Committee (including in shadow form)

¹⁷ Ditto, p.2.

¹⁸ The draft Climate Change Bill was examined by three parliamentary committees, which held hearings and published reports recommending changes to the draft legislation.

¹⁹ The UK Act targets the greenhouse gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride, and any other GHGs designated by the Secretary of State. The base years for GHGs other than carbon dioxide are set out in section 25 together with the power to amend base years in response to significant developments in European or international law or policy.

also played an important role in advising the UK Government on the headline 2050 target and carbon budgets²⁰, thus removing these sensitive considerations from the influences of day-to-day political decision-making and the influence of special pleading by sectors likely to be impacted by the mid- and long-term emissions pathways. The CCC has also provided detailed responses to the UK Government's plan for low carbon development, recommending that the UK will require a 'step change' in the pace of UK emissions reduction if it is to meet its carbon budgets.

The UK Act institutionalizes the unique temporal dimension of climate change by building in a long-term perspective that can provide for policy planning and implementation up to and beyond the 2050 horizon. As ClientEarth have noted:

*By putting a long-term framework into legislation the Act can help to overcome the tendency of political and electoral systems to favour short-term approaches. In the UK, specific concerns had been identified where political targets for emissions reductions were not carried through in subsequent action and policy.*²¹

In addition, the UK Act has addressed a concern among NGOs and politicians themselves that certain scientific and economic decisions related to climate change be taken away from politicians and placed in the hands of expert advisors. The Act has also begun to address a key business concern insofar as it establishes certainty in relation to climate policy and a legal framework (carbon budgets) that will match long term investment horizons in new energy infrastructure.

Commenting on the innovative design of the UK legislation, the influential environmental law consultancy, ClientEarth, said: "The statutory carbon budgets are the key policy innovation of the Act. Setting the budgets will trigger a chain of actions required of the government including putting forward policies and proposals to meet the budgets. The CCC advises and monitors progress and parliament scrutinises the implementation of the Act."²² The core philosophy of the Act, pointing to the intention, is that *a built-in series of duties, actions and reports will create the transparency, accountability and political pressure necessary to achieve the purpose of the legislation*. ClientEarth note that the UK has adopted this approach in preference to an enforcement mechanism, and bearing in mind that opportunities for enforcing legal targets and duties through judicial review are very limited.

Carbon target and budgeting: A central provision of the UK Climate Change Act is section 1(1) which states:

²⁰ In 2007, the Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report (AR4) concluded that warming of the climate system is unequivocal and that human activities (principally burning fossil fuels and land use change) are the cause of global warming by a probability of greater than 90%. The weight of the scientific evidence, confirmed by the advice of the CCC, led the UK to adopt the target of reducing emissions by at least 80% below 1990 levels by the year 2050.

²¹ ClientEarth, 2009, p.27.

²² Client Earth, 2009, *The UK Climate Change Act 2008 – Lessons for national climate laws: An independent review by ClientEarth*. London: ClientEarth.

It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline.

This provision creates a legal duty on the UK Government to reduce the UK's emissions of GHGs by at least 80% below 1990 levels by 2050.²³ *The nature and enforceability of this duty has been the subject of some detailed debate during the scrutiny process and, indeed, since the enactment of the legislation.*

The reduction in GHG emissions required to comply with the duty can be achieved through actions taken in the UK and abroad. However, the Act imposes a duty on the government to consider the need for domestic action on climate change in relation to the 2050 target and the carbon budgets.

The UK Government has the power to amend the 2050 target but this flexibility can only be exercised in certain circumstances. The Act envisages that it would be appropriate to change the target where the government considers that there have been significant developments in²⁴:

- Scientific knowledge about climate change; or
- European or international law or policy.

The Act also provides for an interim GHG emissions reduction target for 2020. The 2020 target must be set as part of the carbon budgeting process. The Act stipulates that the carbon budget must be at least 34% lower than the 1990 baseline. There are also provisions for the adjustment of the 2020 target.

The 2050 target is supported by a series of carbon budgets. The UK Government must set budgets for the net UK carbon account over consecutive five year periods. The UK Act sets out a legal duty to ensure that the net UK carbon account for a given budgetary period does not exceed the level of the carbon budget. The first three budget periods (2008-2012, 2013-2-17, and 2018-2022) had to be set by 1 June 2009. The fourth budget (2023-2027) was published in 2011.

The 2050 target is dynamic insofar as it stimulates or guides the ambition and accompanying recommendations of the Climate Change Committee when it comes to considering the anticipatory process of carbon budget setting. In other words, the carbon budgets have been drawn up with the intention of setting the trajectory for emissions reductions between 2008 and 2050. The levels of the budgets that cover the years 2020 and 2050 respectively must comply with the targets for those years. Carbon budgets are set through a statutory order, following the advice of the CCC, consultation with devolved administrations including Northern Ireland, and approval by parliament.

²³ The UK emissions are adjusted to take account of any carbon units bought from overseas ("credits") or disposed of to a third party ("debits").

²⁴ The 2050 target can also be adjusted where new GHGs are added to the list already covered by the Act, or where regulations on international aviation and shipping emissions are made. The baseline year (1990) can also be adjusted to take account of European or international law or policy changes.

An important feature of the legislative design is the wider range of factors that must be taken into account by the UK Government and the CCC in relation to drawing up the carbon budgets. These factors include:

- Scientific knowledge about climate change;
- Technology relevant to climate change;
- Economic circumstances, and in particular the likely impact of any decision on the economy and the competitiveness of particular sectors of the economy;
- Fiscal circumstances, and in particular the likely impact of the decision on taxation, public spending and public borrowing;
- Social circumstances, and in particular the impact of the decision on fuel poverty;
- Energy policy, and in particular the likely impact of the decision on energy supplies and the carbon- and energy-intensity of the economy;
- Differences in circumstances between England, Wales, Scotland and Northern Ireland;
- Circumstances at European and international level;
- The estimated amount of reportable emissions from international aviation and international shipping for the budgetary period or periods in question.

This list reflects the intention that carbon budgets relate to the detail of the pathway, and drive the downward trajectory of emissions towards meeting the 2020 and 2050 targets. The wide range of factors is intended to ensure that the budgets and the targets are achieved in the most effective way, having regard to national circumstances, options and costs as well as the scientific evidence on climate change.²⁵ It follows that the UK Government must propose policies consistent with the objectives of the carbon budgets and targets, and sustainable development.

The Act also introduces a series of reporting obligations, addresses adjustments between budgetary period, alterations of carbon budgets or period, and a relatively complex methodology for carbon accounting based on carbon units.

The Climate Change Committee²⁶ has a central role in the operation of the Act, and consists of a chair and five to eight committee members²⁷ appointed by the national authorities. The Act sets out

²⁵ ClientEarth, 2009, p.16.

²⁶ The Climate Change Committee was formally established as an independent body on 1 December 2008. The members of the CCC are experts in climate change, science, economics, energy systems and technology. It is chaired by Lord Adair Turner. The Committee has an annual budget of approximately UK£4.5 million and a secretariat of 30 staff to conduct economic, scientific and social analysis and provide corporate support.

²⁷ Members are expected to have knowledge and expertise in areas such as climate change policy, climate and environmental science, economic analysis and forecasting, emissions trading, energy supply and production, and technology development and diffusion.

a number of matters on which the UK Government is required to obtain and take into account the CCC's advice. The Committee also has a role in monitoring and reporting on the government's progress under the Act. Importantly, the CCC's annual reports are presented directly to parliament, underlining the whole government engagement with the objectives of the Act. The Government is obliged to respond to these reports each year.

The first duty of the CCC (in shadow form in advance of the adoption of the Act) was to advise the UK Government on the level of the 2050 target. The CCC's advice on carbon budgets must cover:

- The level of the budget
- The extent to which the budget should be met by the use of carbon units or by reducing the amount of net UK emissions of targeted GHG
- The contributions to be made by different sectors of the economy, whether covered by trading schemes or not
- The sectors of the economy where there are particular opportunities for contributions towards meeting the carbon budget.

ClientEarth has reported on interviews with personnel at the UK Department of the Environment and Climate Change and the CCC, indicating that interviewees believe that the Climate Change Act has already had an impact on the institutional approach to climate change and that the CCC's advice has had an impact on aspects of government policy in key areas. The presence of a legal framework and duties has marked a fundamental institutional shift, with officials implementing the legislation noting "that the legal framework has the effect of making the climate change targets the responsibility of the whole government, rather than one department, and that ministers and officials must act in a way that is consistent with the law so the legislative targets and budgets directly influence the policies adopted."²⁸ The legislation itself, however, does not achieve or incentivise any actual emissions reductions. These must come about as a result of other programmes and policies and plans to achieve the targets and budgets.

Part Three: What are the legal issues raised by putting a 2050 emissions reduction target into law and providing for the parliamentary adoption of interim targets on an on-going basis?

- i. The first point to draw from the UK experience is the linkage of the central 2050 target to three key design features of the Climate Change Act 2008: a. independent advice; b. climate science; and c. international and EU decisions about levels of emissions reductions.

The scientific basis for determining an overarching emissions reduction target for 2050 was fundamental to the design of the UK legislation. This underlines the importance of the independent and expert status of the Climate Change Committee whose advice was sought before the amending the target to 80%.

²⁸ ClientEarth, 2009, p.27.

An analysis supporting the UK's 80% 2050 target is set out in the CCC's first report, *Building a low carbon economy – the UK's contribution to tackling climate change* (2008). The report evaluates:

- *Scientific knowledge about climate change and the particular characteristics of climate science such as feedback loops within the climate system and thresholds in the climate system beyond which irreversible changes may occur;*
- *A global climate objective – based on a central expectation of limiting temperature rise to 2°C and reducing the risk of extremely dangerous climate change to very low levels.*
- *A global emissions reduction objective – with reference to three parameters: assumed year of global emissions peak; the rate of emissions reduction after that peak; and the ultimate emissions floor.*
- *An appropriate UK contribution to a global target – based on the principle of common but differentiated responsibilities and the range of reductions required under different burden-sharing models.*

An important distinction is built into the UK Act and the work of the CCC. Whereas the 2050 target is determined by evaluating scientific knowledge about the climate system, emissions of GHG and the human and environmental impacts of climate change, decisions about the carbon budgets, relating to the downward trajectory of emissions, have reference to a range of factors. Climate science is still relevant for carbon budgeting purposes but science becomes one factor among many rather than being the primary factor. The setting of carbon budgets is a more complex aspect of the legislation because budgeting must have regard to a wide range of factors such as science, economics, energy policy, technology, fiscal matters, and social implications such as fuel poverty.

The relationship between carbon budgets and the policy process is also regarded as critical. The carbon budgeting – conducted well in advance of the operative years – is designed to overcome short-term political cycles and to encourage longer-term planning.

- ii. The 2050 target (and to some extent the 2020 target) stand at the apex of the UK Climate Change Act 2008. The Act's effectiveness turns primarily on a series of internal and, to a certain extent, automatic triggers. The UK Government is under duties to set and meet carbon budgets and to obtain and consider the advice of the CCC. The Government must adopt policies and proposals for achieving the targets. The CCC monitors the progress of the government and reports to parliament. If the government declines to follow the CCC's advice, it must explain its reasons. If it fails to meet a carbon budget, it must take action and put forward proposals to compensate for the excess emissions.

Compliance with the legislation is institutional and political because the core philosophy of the Act is that a series of built-in duties, actions and reporting requirements, combined with the monitoring function of the CCC, and the scrutiny role of parliament, are intended to

create the transparency, accountability and political pressure to ensure that governments will comply.

- iii. The UK Government believes that the duties in the legislation are legally binding and enforceable because of their statutory basis.

The question of enforceability of aspects of the Act has been the subject of some debate. ClientEarth point to the fact that the opportunities for enforcing legislation through the courts are very limited in the UK. In theory, the targets and carbon budgets are legally binding and the government could be challenged if it failed to meet them. In practice, judicial review in the UK is generally restricted to challenges related to procedural issues in this kind of case, and recent case law confirms that such a challenge is likely to have little chance of success.

- iv. The Climate Change Act 2008 states that, 'It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline.' Even the British Government noted, in a consultation paper to accompany its draft bill, that the legislation would create a 'legal duty' such that 'a government which fails to meet its targets...would be open to Judicial Review'. In the course of giving evidence to the Joint Committee on the draft Climate Change Bill, Professor Christopher Forsyth²⁹ raised a number of questions about the likely attitude of the courts should Judicial Review proceedings be pursued in this context.
- v. Noting that clause 1(1) of the UK Bill imposes a general duty upon the Secretary of State "to ensure that the net UK carbon account for the year 2050 is at least [60%]³⁰ lower than the 1990 baseline", Forsyth observed that there is no indication that the duty is owed to any particular individual or class of individual or body or class of body. Such duties, notwithstanding their appearance in statutes, *should be seen as imposing 'political' and not 'legal duties'*.
- vi. Forsyth cited Wade and Forsyth³¹:

Parliament has become fond of imposing duties of a kind which, since they are of a general and indefinite character, are perhaps to be considered as political duties rather than as legal duties which a court could enforce. Many such duties may be found in statutes concerned with social services and nationalisation...Current legislation furnishes an abundance of such examples. Only in the unlikely event of its making total default would [an authority] be at risk of legal compulsion in respect of its general duties. But as soon as duties become sufficiently specific, the courts do not shrink from enforcing them.

²⁹ Professor of Public Law and Private International Law, Faculty of Law, University of Cambridge.

³⁰ This amount was later revised upwards to 80% on the advice of the CCC.

³¹ Wade and Forsyth, 2004 (9th Edition), *Administrative Law*, pp. 589-590.

In his written evidence to the Joint Committee, Professor the Lord Norton of Louth³² also queried the assertion that a court remedy would be available in the event of non-compliance with clause 1(1). Apart from the duty to lay a statement before parliament, he saw no clear grounds for a Judicial Review in respect of the duty on the Secretary of State regarding the net carbon account. He identified two problems: Firstly, is it clearly a matter for determination by the courts? He suggested that the statutory duty is one where fulfilment of that duty is to be determined by reference to data in a statement laid before Parliament, and is therefore a matter for parliament, which has the power to call the Secretary of State to account, rather than the courts. He asked if it was not the case that the courts, in this instance, should defer to the remedy available through Parliament.

- v. In his written evidence to the Joint Committee on the Draft Climate Change Bill, William Wilson³³ responded on behalf of environmental lawyers who were asked to comment on whether the long-term target based duty in clauses 1(1) and 2(1) were novel from a constitutional perspective, and to consider whether there were other similar examples on the statute book. He noted that the duties in the Bill were very wide ranging and would affect many sectors of the economy, and in that sense they were new. But it was certainly not unknown for binding targets to be agreed, particularly at the European level, and then applied by a variety of different means in national environmental laws. He cited the examples of the Water Framework Directive 2000/60/EC (Article 4) that requires that inland and coastal waters in the European Union achieve “good status” by 2015. Other examples include the Fourth Air Quality Daughter Directive 2004/107/EC, the UK Environment Act 1995, and the Landfill Directive 1999/31/EC.
- vi. Forsyth went on to consider the question of the specificity of the duty set out in clause.1(1). He noted that although the section in the Climate Bill did specify precisely the reduction in the carbon account the Secretary of State was to ensure, it was plain that this reduction is a ‘target’. Forsyth made the rather obvious point that a “target is something that one aims to achieve...but no one can guarantee a bull’s eye. Inherent in the idea of a target is an aspiration, not a guarantee of achievement. At most then this clause can be interpreted as requiring the Secretary of State to use his or her best endeavours to achieve the target. This has the consequence that a failure to achieve the target does not necessarily imply a breach of the duty.”³⁴Indeed, Forsyth concludes that the duty in clause 1(1) is a “somewhat inchoate duty to ask a court to enforce.” Unenforceable laws are sometimes described as ‘Lex Imperfecta’.
- vii. Similarly, in his written evidence to the Joint Committee on the Draft Climate Change Bill, Professor the Lord Norton of Louth, said the problem was not one of target setting, nor of embodying a target in statute, “but rather the imposition of a duty to meet a target, the

³² Memorandum by Professor The Lord Norton of Louth, Written Evidence to the Joint Committee on the Draft Climate Change (CCB 91), June 2007.

³³ Written Evidence by William Wilson (CCB 94), Supplementary memorandum to the Joint Committee on the Draft Climate Change Bill (Written Evidence), May 2007.

³⁴ Professor Christopher Forsyth, Written Evidence to Joint committee on the Draft Climate Change Bill (CCB 92), May 2007.

fulfilment of which relies on circumstances beyond the control of the body vested with that duty.” He introduced the term “target duties”, which refers to goals that may not be realistically met in full because, for instance, a Secretary of State’s capacity to deliver relies on circumstances that are beyond her control.³⁵

- viii. Where a court finds that a particular authority is in breach of a statutory duty, the usual remedy is to issue a mandatory order (mandamus) or, in appropriate cases, award damages. Such a mandatory order would order the authority (or minister) to do a particular thing on pain of being found in contempt of court. Forsyth offered the example of the UK’s Company and Business Names Act 1999 (section 1) which imposes a duty on a Secretary of State to secure that the expression “chamber of commerce” appears in regulations. In such a case it is clear what the legislation has obliged a Secretary of State to do. There is no question of him/her aiming to achieve the regulation in question. However, according to Forsyth, a court *cannot order a Secretary of State simply to “ensure” that a target is met (especially if at the time the order is sought it was impossible to meet the target)*. *A court would need to be more specific in what it ordered. English courts lack the power and the inclination to enter into the detail of government. Forsyth said it was unthinkable that, in the absence of specific legislation granting such powers, that a court would order a Minister, for example, to close a coal fired power station or make similar difficult decisions to secure a target.*
- ix. Forsyth also addresses the possibility of a court making a declaration. The essence of this public law remedy, in the form of a declaratory judgment, is that it states the rights or legal position of the parties as they stand, without changing them in any way. No individual is ordered to do anything and it is not a contempt of court to fail to act in accordance with the declaration. Referring to clause 1(1), Forsyth suggested that a declaration sought in such a case would presumably be the simple one that a Secretary of State was in breach of his or her duty under cl. 1(1). If there is doubt about the question, however, a court would simply exercise its discretion not to issue a declaration. He could only foresee the issuing of a declaration in the case of the Climate Change Act in the case of egregious unlawfulness by a Secretary of State.
- x. Forsyth concluded by noting that Judicial Review proceedings were much more likely where a Secretary of State had met a target having exercised his/her power to amend a specified percentage reduction (target). He said a court would have close regard to the restrictions on the exercise of such a power (e.g. clause 1(4)). These restrictions mean that any alteration must have regard for developments in scientific knowledge or international or European law. If a court found that a decision to alter a percentage reduction had been improper it would quash it through the issue of a quashing order (*certiorari*).
- xi. On the general question of enforceability of the duty set out in clause 1(1) and the potential undermining of the legislation, Forsyth commented that there are already legally unenforceable duties to be found in the UK statute book. He commented that the setting of a target in an Act of Parliament, even if not legally binding, *commits Parliament to that target and provides a focus*

³⁵ Professor The Lord Norton of Louth, Written Evidence to Joint Committee on the Draft Climate Change Bill (CCB 91), June 2007.

for the accountability of the Secretary of State and may be considered justified on that ground. On the other hand, the fact that the target is not legally binding may be considered to undermine the sincerity of the commitment to carbon emission reduction.

- xii. Forsyth's comments to the Joint Committee are consistent with a position set out by Mark Elliott in the publication, *Parliamentary Brief* (March, 2010)³⁶. Noting the increasing regularity with which legislation is enacted that imposes targets on government ministers, Elliott describes the "aspirational" nature of such legislation where it lays down requirements that are largely unenforceable in a legal sense.
- xiii. Elliott cites the Warm Homes and Energy Conservation Act 2000, which has been the subject of a Judicial Review in the UK. The legislation sets an 'objective' of 'ensuring that as far as reasonably practicable persons in England and Wales do not live in fuel poverty', and requires that relevant minister to 'prepare and publish...a strategy setting out policies for ensuring' that the objective is met. That strategy must 'specify a target date for achieving the objective'. Elliott notes that a minister who has failed to publish a strategy setting out the things mentioned in the Act would be clearly acting unlawfully, and a court order could be obtained to require him to publish a strategy. But on the question of whether the Act places a minister *under an enforceable legal obligation to achieve the objective of eradicating fuel poverty, as opposed to merely requiring him to set out how he intends to try to do so*, Elliott reaches much the same conclusions as Forsyth.
- xiv. Citing a decision by the UK Court of Appeal, in *Friends of the Earth v Secretary of State for Energy and Climate*, Elliott notes that the Court upheld the High Court's view that the Act requires 'effort' rather than results. The upshot being that the government's anticipated failure to meet its 2010 target concerning fuel poverty will not in itself be of any legal consequence.
- xv. On clause 1(1) of the Climate Change Act 2008, Elliott cites Rodney Austin, also writing in *Parliamentary Brief* (2007), that where an issue of immense complexity is at stake, with wide scope for political judgment, the courts would be likely to regard ministerial decisions in such an area as either non-justiciable or as ones to which courts should pay substantial deference. Elliott believes that courts are rightly unwilling to second-guess ministerial decisions with consequences for the allocation of scarce resources, given that the immense array of interlocking issues raised by such decisions make their assessment by means of the forensic process inappropriate.
- xvi. Elliott concludes that enshrining targets in law has become a useful way for politicians to convey the impression (whether or not it is an accurate one) that effective action is going to be taken. He adds: "Indeed, aspirational legislation is part of a wider tendency to legislate in order to be seen to be taking a problem seriously"³⁷

³⁶ Elliott, Mark, 2010, 'Let's kid the people that we can turn a promise into law', in *Parliamentary Brief*, March.

³⁷ Elliott, Mark, 2010, p. 15.

- xvii. Elliott concludes, with Forsyth, that a commitment, even where it is enshrined in statute, is not necessarily legally enforceable. Just because a duty is legally unenforceable, however, does not mean that it is irrelevant: people do all sorts of things not because they fear legal action if they do not, but because other forms of pressure – moral, social, political – exist. He notes: “Aspirational legislation typically supplements objective-oriented duties, for example to reduce public sector borrowing, with procedural obligations owed to parliament.” This kind of legislation can strengthen parliament’s hand in holding the government to account by setting benchmarks against which progress can be judged, and by requiring the government to furnish parliament with the information necessary to render such judgements.
- xviii. Elliott adds that aspirational legislation is only appropriate in very limited circumstances. This is because its moral authority – and hence its utility as a means by which to augment parliament’s capacity to hold a given government to account – will depend upon the existence of a high degree of consensus. The political consensus on climate change suggests that the Climate Change Act may be a case in point. It follows, according to Elliott, that aspirational legislation can serve a constitutionally useful function only where it is appropriate for politicians on all sides to lock themselves in – in a political sense, legal lock-in being impossible for as long as parliament is sovereign and thus undoing its own legislation – both to a given policy goal and a given way of measuring progress towards its achievement.
- xix. In an interesting exchange at the Joint Committee on 16 May 2007, a number of observations were made about the enforceability of the clause 1 (1) and clause 2 (1) duties in the UK Bill. While acknowledging that these duties would be difficult to enforce from a legal point of view, witnesses referred to the “declaratory” aim of the legislation “which has a much more important role than setting legally binding targets.”
- xx. The UK Climate Change Act is designed to deliver certainty of required emissions reductions and increase the accountability of the British Government. In the context of the UK’s transition to a low carbon economy, the five year budgets, combined with the independent annual review of performance and long-term targets, will give firms a clear signal to inform investment decisions over the short- and medium-term.³⁸ Long term targets are also expected to encourage technological innovation.³⁹ Similarly, in their written evidence, the UK Business Council for Sustainable Energy noted that clarifying budgets for a 15 year period would align with investment timescales. The Council referred to its call for a “long, loud and legal framework to deliver the UK’s carbon reductions: long enough to affect business investment, loud enough for markets to hear the message and react, and within a legal framework to help build market confidence.”⁴⁰

³⁸ Carbon Trust, May 2007, Evidence to the Joint Committee on the Draft Climate Bill (CCB 56).

³⁹ Association of British Insurers, May 2007, Written Evidence to the Joint Committee on the Draft Climate Bill (CCB 59).

⁴⁰ Memorandum by the UK Business Council for Sustainable Energy (CCB 80), Written Evidence to the Joint Committee on the Draft Climate Bill, August 2007.

3. Conclusions:

What are the options for dealing with these issues in legislation?

Issue #1: The inclusion of ambitious headline targets in the UK Climate Change Act 2008 is linked to three of the key innovative design features of the legislation, notably the independent Climate Change Committee. This well-resourced expert committee, formerly led by the highly respected Lord Adair Turner,⁴¹ removes, to a large extent, decision-making about the ambition and scope of targets and budgets from short-term political considerations and the influences of powerful lobby groups. A high degree of cross-party consensus in the run-up to the drafting of the UK Bill supported legislative design that will help lock in that consensus in the service of intergenerational justice. The ambitious headline targets are also linked to the central place given to climate science and the dynamic/enabling relationship conceived for the UK Act in relation to attempts to move the international community towards a new global deal.

Issue #2: The long-term framework built into the UK legislation, running up to and beyond 2050, can also help overcome the tendency of political and electoral systems to favour short-term approaches. One of the unique characteristics of climate change as a policy driver is the requirement that a new temporal horizon be established to inform near term considerations, notably investment decisions and climate justice for future generations. In the context of climate justice, economic and ecological externalities have spatial, temporal and class dimensions.

Issue #3: Another key policy innovation is the carbon budgeting process. The setting of budgets will trigger a chain of actions and engage a whole government response. The CCC's role in advising and monitoring progress and its ability to lay its reports before parliament ensures that climate change policy will benefit from a series of duties, actions and reports that create transparency, accountability and political pressure. The intention behind carbon budgets is that they must relate to the detail of the pathway, and drive the downward trajectory of emissions towards meeting the 2020 and 2050 targets. The wide range of factors to be taken into account is intended to ensure that the budgets and the targets are achieved in the most effective way, having regard to national circumstances, options and costs as well as the scientific evidence on climate change.

Issue #4: The drafting of the UK Climate Change Act is such that recourse to Judicial Review to challenge a Secretary of State with regard to the *general duty* to ensure that the net UK carbon account for the year 2050 is at least 80% lower than 1990 levels is unlikely to succeed. Such duties will, in most circumstances, be regarded by the courts as imposing 'political' and not 'legal' duties. The courts are most likely to defer to parliament when invited to consider such a duty, unless there is a clear and consistent case of default by the Secretary of State. In any case, a target, by definition, is something that one aims for; inherent in the idea of a target is aspiration.

Issue #5: The Climate Change Act targets fall into a category of 'aspirational legislation' which supplements objective-oriented duties with procedural obligations owed to parliament. This kind of legislation can strengthen parliament's hand in holding a government to account by setting

⁴¹ The Climate Change Committee is now chaired by former UK Environment Minister, John Gummer (Lord Deben).

benchmarks against which progress can be judged, and by requiring a government to furnish parliament with the information necessary to render such judgements. Aspirational legislation can be particularly useful where a political consensus is supportive of the ultimate objectives of the legislation.

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