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Glasgow
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23 April 2008

The Scottish Government
Climate Change Bill Consultation
Area 1-G North
Victoria Quay
Edinburgh
EH6 6QQ

Dear Sirs

Climate Change – Consultation on Proposals for a Scottish Climate Change Bill

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared by the Scots Law working party, which I convene. We are grateful to you for agreeing to accept these comments after the deadline for responses.

UKELA's current priorities include:

- Informing and actively influencing the broad law and policy debate on climate change including the measures to reduce greenhouse gas emissions and manage their impacts at the international, EU and domestic level
- Helping deliver more effective and efficient environmental regulation including enforcement at the EU and UK level, not lower standards nor less regulation unless the same or better outcomes will be achieved

UKELA works on a UK basis and seeks to ensure that best legislation and practice are achieved across the devolved jurisdictions.

The UKELA Scots Law Working Party, which I convene, focuses on environmental law in Scotland. The Working Party has the following comments on the questions raised in the consultation. Where there is no legal aspect to the question we simply note that we have no comments.

Generally, the Bill is undoubtedly to be welcomed, to the extent that the presence of targets set in legislation will encourage future governments to maintain focus on long-term goals and to keep this issue as a priority, even when the measures needed are costly and unpopular. But it will always be possible for future parliaments to repeal the Act, and if the political will to continue with the strategy is not there, no procedural obstacles will prevent adjustment of targets or measuring methodology that can undermine today's vision.

The Bill must be recognised as a starting point, with all the hard work and decisions still to come. In terms of practical significance, it is the detailed measures that are hinted at in section 8 of the consultation paper that will be important, not the symbolic setting into law of the high-level target. The Bill and reporting must not become a substitute for actually getting on with planning and introducing practical measures that can reliably deliver the scale of reductions necessary if the targets are to be reached.

Turning to the specific questions raised in the consultation paper:

TARGETS

1. *Should a Scottish target be based on carbon dioxide only or the basket of six greenhouse gases?*

UKELA believes that the targets and budgets should incorporate all greenhouse gases from the outset in accordance with international climate change policy.

Consistency of approach is valuable and given that other greenhouse gases are expressed in CO₂ equivalence in terms we do not see that this would dilute the focus from CO₂ reductions. Indeed as clean development mechanism and joint implementation mechanisms will relate to all greenhouse gases, any allowances that Scotland buys to meet its domestic target will have the potential to be non- CO₂ related.

However, inclusion of all greenhouse gases and the targets and budgets should not be a reason to delay implementation of the Bill. If absolutely necessary, the Bill could be drafted to allow for non- CO₂ targets to be set in secondary legislation within a reasonable period of the Bill coming into force.

2. *Should the Bill contain provisions to alter which gases are included, for example, if the reliability of data for a particular gas improves or if science changes in the future about which gases cause climate change?*

Yes. However these secondary legislation powers must be subject to appropriate limitation. The secondary legislation should be subject to parliamentary scrutiny via affirmative resolution. There should also be a requirement that these alterations may only be made after obtaining and taking into account the advice of the appropriate committee on climate change. UKELA also believes that the Scottish Ministers should be required to justify in writing any decision which they make to alter the gases which goes against the advice of the appropriate committee. This would assist in making the Scottish Ministers more accountable for any such decisions.

3. *The Scottish Government wishes to ensure that the Bill gives sufficient incentives to invest in energy efficiency and renewable electricity. Should the targets be based on source emissions; an end-user inventory; or on individual targets for energy efficiency and renewable electricity? Do you have any other suggestions?*

No comment.

4. *Do you agree that the bill should allow the means of measuring the target to be changed through secondary legislation to reflect international developments or unforeseen consequences of the Bill?*

Yes, subject to the limitations set out in our response on question 2.

5. *Should the emissions reduction target take account of the abatement effort made by companies under emissions trading schemes? If so, how?*

The consultation paper already sets out the significant difficulties in including emissions trading scheme installations within the emissions reduction targets. While this merits further consideration, on the face of it including these installations within Scotland's targets runs the risk of applying duplicative, inconsistent regulation to them. The simpler approach would be to accept that emissions trading scheme installations are being regulated at an international level and concentrate Scotland's emissions target on sources within its control. The annual report could account for reductions achieved from those sources as well as reporting on actual reductions achieved by emissions trading scheme installations, giving a result for (i) the sources covered within Scotland's target and (ii) Scotland as a whole, blended with the installations regulated under the emissions trading scheme.

6. *Do you agree that international credits should be counted towards Scottish targets? Should there be limits on credits counted towards Scottish targets?*

Yes. UKELA supports the principle of overseas credits counting towards Scottish targets and budgets. Climate change is a global issue and the Bill should contain flexibility to allow integration with other schemes.

However, to ensure that Scotland's net carbon count is not undermined by inappropriate use of overseas credits, the Bill should provide additional controls on the quantity and nature of eligible overseas credits. For example, the Bill should contain a reference to the principle of supplementarity (the principle that the use of the project mechanisms should be supplemental to domestic action to reduce greenhouse gas emissions).

The appropriate committee on climate change should have a duty to advise the Scottish Government on the optimal balance between domestic and overseas effort. In making any regulations on this subject, the Scottish Ministers ought to have a duty to have regard to the advice of the appropriate committee on climate change and to international law and policy on the use of carbon credits. As above, all secondary legislation on this topic ought to be subject to the affirmative resolution procedure.

7. *Should the Bill allow the level of the 2050 target to be changed through secondary legislation? If so, should this only be allowed on the basis of independent, expert advice, to reflect international developments or unforeseen consequences of the Bill? Should any changes to the target be limited to an increase in the target?*

Yes. This power should be limited as set out in our response to question 2. Provided that the power is subject to the affirmative resolution procedure, there should be no need for changes to the target to be limited to an increase in the target.

SUPPORTING FRAMEWORK

8. *What factors should be taken into account when setting the level of budgets?*

The factors ought to specifically refer to international law and policy and international best practice in budget setting.

9. *How long should interim budget periods be?*

It seems fundamental to the success of the Climate Change Bill that Scotland's arrangements for budgeting, accounting and assessing progress fit with those of the UK, Europe and the International Community. The benefits of the transparency and straightforward comparison that this ought to produce are obvious. There would therefore have to be a very good reason to not apply a period of 5 years.

10. *How many years in advance should emissions budget periods be set in order to provide sufficient time to develop infrastructure?*

No comment.

11. *What should be the limit (in terms of absolute quantity or as a percentage of the budget period) on the amount of emissions which the Government can borrow from a following budget period?*

Strictly limited borrowing enables flexibility whilst ensuring the emphasis remains on emission reduction measures, rather than relying on trading. On the other hand, extensive borrowing between budget periods would jeopardise achieving the ultimate goal of meeting the carbon targets by putting off the need to achieve the required level of reductions. In its response to the UK Climate Change Bill, UKELA has already expressed the view that limiting the amount that can be borrowed to 1% of the carbon budget for the later period appears to be sufficiently restrictive to achieve these aims. The power to borrow should be subject to the affirmative resolution procedure.

12. *Should the Bill include an interim point target? If so, what year (or years) should it be for (2020, 2025, 2030, etc)? How should the level be chosen?*

No comment.

REPORTING SCRUTINY AND FRAMEWORK

13. *Should the Scottish Ministers be required to report on any other issues related to climate change in addition to the requirements already set out? If so, what and how often?*

The annual report seems to run the risk of being a very short document. The seriousness with which the Scottish Government views this issue ought to be reflected in the level of detail and consideration of options in its annual reports, not just its longer term reports. Where matters can usefully be reported on an annual basis then they should be. Where matters are more usefully considered via the longer term reporting cycle then again this would be the appropriate place to report on them.

In terms of the factors identified at paragraph 7.7 of the consultation paper, all of these seem sensible. There is, however, no suggestion that new technology ought to be reported on, neither is there any suggestion that assessment of comparative approaches in the international community ought to be reported on. Both of these factors seem fundamental to the ongoing fine-tuning of the detailed actions being taken under the framework of the Climate Change Bill.

14. *Is a process of Parliamentary scrutiny the appropriate way of holding the Scottish Government to account if targets or budgets are not met?*

This question seems to suggest that the Bill will not include a specific duty on Scottish Ministers to achieve the targets and budgets. It would be strange if this was the case, given that this is proposed in the UK Climate Change Bill.

15. *What should be the primary source of advice to the Scottish Government for setting emissions targets or budgets and why? Options include: the proposed UK Committee on Climate Change, a new Scottish Committee on Climate Change, an existing public body in Scotland, or the Scottish Government itself.*

It is essential that an independent body with appropriate expertise, power/status and sufficient resources provides the Scottish Ministers and the public with clear transparent advice. Independence of the Committee needs to be secured in respect of the:

- Appointment of the Chair and all members of the committee; and
- Budget and governance rules.

As previously stated, the Scottish Ministers should be required to justify in writing any of their decisions which go against the advice of the committee. The committee should have a generally auditing and policing role so that the Scottish Ministers' actions are scrutinised and details of the scrutiny are fed back through the Scottish Parliament.

The policy of relying initially on the UK Committee on Climate Change seems a wise one. If a new Scottish Committee on Climate Change is to be established, it is essential that the experts engaged are of the highest quality and not chosen solely because of their presence in Scotland or Scottish backgrounds.

16. *If it were to be an existing Scottish public body, which public body is most suited to carrying out this task and why?*

The consultation paper has already identified that the current climate change functions are split up across a number of public bodies and so no existing Scottish Public Body is likely to be suited to carrying out this task. A bespoke, motivated expert body ought to be put in place for this very important task.

17. *Which organisation should be tasked with monitoring the progress of the Scottish Government on reducing emissions and why? Options include: the proposed UK Committee on Climate Change, a new Scottish Committee on Climate Change, an existing public body in Scotland, or the Scottish Government itself.*

Please see our response to question 15 above.

18. *If it were to be an existing Scottish public body, which public body is most suited to carrying out this task and why?*

Please see our response to question 16 above.

19. *Should additional independent mechanisms for scrutinising the effectiveness of the Scottish Government's policies in reducing emissions be created by the Bill (in addition to any scrutiny already provided by the Scottish Parliament)?*

Please see our response to question 15 above.

20. *If so, which organisation is best placed to carry out this function and why? Options include a new Scottish Committee on Climate Change or an existing public body in Scotland?*

Please see our response to question 15 above.

21. *If it were to be an existing Scottish public body, which public body is most suited to carrying out this task and why?*

Please see our response to question 16 above.

22. *Are there any other functions related to climate change, existing or new, which should be carried out at arm's length from the Scottish Government and why?*

We believe that all advisory, monitoring, scrutiny and accountability mechanisms ought to be carried out at a clear arm's length from the Scottish Government. The benefits of these are manifest throughout the NDPB environmental regulators throughout Great Britain.

SUPPORTING MEASURES

23. *Should the Bill contain enabling powers to introduce a duty on certain parts of the public sector (i.e. local authorities and large public bodies) to take specified actions on climate change or other specified environmental issues? Why?*

24. *What should such a duty (or duties) include?*

25. *Should the Bill contain enabling powers to introduce statutory guidance for certain public sector bodies (i.e. local authorities and large public bodies) on specified climate change or other environmental measures? Why? Are there gaps in any existing guidance?*

26. *What should this guidance include?*

27. *Should the Bill contain enabling powers to create a requirement for certain public sector bodies (i.e. local authorities and large public bodies) to make regular reports on specific measures they are taking to tackle climate change (whether mitigation or adaptation) or other environmental issues? Why? What should be included in such reports?*

Yes to the first questions posed at questions 23, 25 and 27. The size of the public sector relative to the size of the economy in Scotland means that it offers a major opportunity to establish good practice in climate change adaptation. However it is important that the public sector does not work alone in this, as the most efficient mechanisms to achieve adaptation will come from the private sector. Putting duties on the public sector will necessarily drive improvements in the private sector contracting with the public sector and this should be a major area of focus, perhaps an even more significant area of focus than the public sector's practices themselves.

It will be necessary to introduce statutory guidance for the relevant public sector bodies on the steps that are expected of them, as central coordination of effort will be fundamental to the success of those steps. Also many public bodies may not have the resources to form the policy on this themselves.

Reporting on the success of those steps again seems fundamental to their success and this should be required of appropriate public sector policies, in a manner that synchronises with and feeds into the Scottish Ministers' reporting obligations.

28. *As a potential non-legislative measure, should current Best Value guidance be amended to take specific account of climate change mitigation and adaptation? If so, how should Best Value guidance be amended?*

Obviously it will be important to ensure that any changes to Best Value guidance comply with procurement regulations. As to the detail of any amendments, we have no specific comments.

Funding will obviously be important if public sector bodies are to be able to meet their new duties. Provision will require to be made to enable them to do so.

29. *Are there any amendments to existing legislation or any enabling powers needed to allow for variable charging (for example by local authorities) to incentivise action or eliminate perverse incentives?*

See above.

30. *Are there any provisions to help Scotland adapt to the impacts of climate change which should be included in the Scottish Climate Change Bill?*

See above.

31. *Should provisions within the Environmental Assessment (Scotland) Act 2005, be amended in order to provide clearer links with emissions reduction? If so, how should this be done?*

We would expect that the reference to climactic conditions is wide enough to catch climate change in strategic environmental assessments. However if it is thought that this ought to be spelt out, presumably it could be achieved via the Climate Change Bill, given that it is primary legislation.

32. *What are the equalities implications of the measures in the proposals for the Scottish Climate Change Bill?*

No comment.

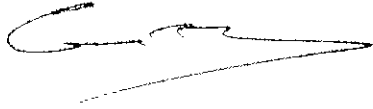
33. *Is there any existing legislation within the competence of the Scottish Parliament (developed) which needs to be amended so that appropriate action on climate change can be taken by sectors in society?*

Doubtless there are many other pieces of legislation which will require to be amended. We would expect that the public sector bodies charged with implementing or enforcing those pieces of legislation should be best placed to advise you. We look forward to reviewing proposed changes when the draft Bill is issued.

Since UKELA did not receive a copy of the consultation direct, I should be grateful if you would add my details to you and your colleagues' list of standard consultees. I should be particularly grateful if you were able to add those details to a central list for all environment consultations: thus far it has not been possible to achieve this.

Please do not hesitate to contact me if you wish to discuss any of the above or if you would like any further information about UKELA and the Scots Law Working Party.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Gordon McCreath', with a long horizontal flourish extending to the right.

Gordon McCreath

Convenor - UKELA Scots Law Working Party