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# European Lessons for Ireland's Climate Law

Critical weaknesses of the Climate Action and Low Carbon  
Development Bill

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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## 1 Executive Summary

An effective climate law must provide real certainty and demonstrate long-term commitment to inspire investor confidence if it is to drive decarbonisation. In the view of ClientEarth the Climate Action and Low Carbon Development Bill (the "Bill") as drafted falls short of the required standard in two important respects: it fails to put in place long-term nationally binding targets, and it establishes an expert body – the Expert Advisory Council – which is not truly independent.

EU targets alone are unlikely to be sufficient to drive the progress Ireland needs. The existence of binding national targets agreed at EU level creates a strong impetus for Irish progress on emission reductions and serious penalties for failure, both financial and reputational. However, the replication of binding EU-agreed national targets beyond 2030 is seriously in doubt. EU-level targets are also inherently short term because they treat 2030 as an end-point rather than a staging post. There is no binding 2050 target at EU level. This can lead to a damaging failure to plan over the long term, particularly where compliance with a single target can be 'bought off' by buying credits; something Ireland is expected to do to meet its 2020 targets.

Far from interfering with EU targets, setting long-term national targets would allow Ireland to play a leadership role in tackling climate change, enhance its status in climate negotiations and, most importantly, provide the certainty to attract needed investment. Other European countries are beginning to acknowledge this, by legislating for binding 2050 targets. In the UK, binding targets are also set every five years. The Bill represents a real opportunity for Ireland to likewise overcome some of the deficiencies of the EU approach.

The UK experience has also shown the significant value of an independent Committee on Climate Change. The Committee's impact has been clear and positive, and its authority has been enhanced as a result. Other European countries, in drafting and implementing their national climate laws, also place emphasis on the independence of advisory bodies.

Likewise, if Ireland's Expert Advisory Council is to be truly effective, it must be truly independent. Effective climate law requires that short-term political pressures are resisted, which in turn demands a body which operates at arm's length from Government. Yet the EAC's composition (including, for example, the director of Teagasc as one of its members) suggests it will not be independent. Whatever the good intentions of EAC's membership, the validity and impact of its work will be undermined from the start by this lack of independence; whether real or perceived. Within the framework of the Irish Bill, it will be extremely difficult for the EAC to challenge such perceptions and develop a reputation for genuine independence. The EAC's effectiveness – and the effectiveness of the Bill as a whole – can be expected to suffer as a result.

Finally, the Irish Government has expressed concern that targets might render Ireland subject to legal action. In fact, a binding law can still leave Government with wide discretion – and can direct accountability towards Parliament, as the UK law does. If there were substantive breaches of genuinely binding targets in the Irish Bill, the courts would surely tread cautiously. But it is only right that more procedural breaches should in all events be remedied. Fundamentally, effective judicial oversight is a key aspect of the rule of law. A law cannot be truly effective if there are no consequences of a breach. One certain way to avoid legal action is to act in accordance with the targets that are set.

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## 2 Introduction

ClientEarth has been commissioned by Stop Climate Chaos to provide a legal analysis of Ireland's Climate Action and Low Carbon Development Bill 2015. ClientEarth believes that the creation of a national climate law can, in the right form, be a valuable asset in Ireland's response to climate change. In its current form, however, the Bill is much weaker than that required to ensure effective governance of Ireland's low carbon transition. A Bill which establishes a framework lacking the necessary levers of good governance will not create arrangements which will deliver low-carbon outcomes. In seeking to ensure that Ireland's climate law has the required credibility, this paper argues that two aspects of the Bill in particular need strengthening: the climate targets and the independence of the proposed Expert Advisory Council.

## 3 The Importance of Binding Long-term Targets

Certainty is a key hallmark of effective climate governance. It is universally accepted that effective action to mitigate climate change will require profound economic and social transition spanning at least the next half century. By definition, an effective governance regime must demonstrate a strong commitment to act over a sustained period of time to achieve the necessary outcomes.

The EU's 2020 Climate & Energy Package was generally welcomed as a pioneering commitment to effective action on climate change. In particular the package reflected a willingness to translate political commitment into a legally binding and enforceable form.

However, the EU 2020 package does not contain a sufficiently long-term perspective to create the certainty needed for investors. In fact, the EU process is best described as being short-term in perspective - and the current negotiations around the EU 2030 proposals represent a continuation of the EU's short-term approach to climate governance. There is also a real danger that the existing EU system of binding targets for renewable energy as well as GHG reduction will not be replicated in the 2030 targets. This is likely to prove problematic for Ireland as the existence of binding EU-generated national targets created a strong impetus for Irish progress on emission reductions and serious penalties for failure, both financial and reputational. Similarly, the one target that is not on track to be met, EU-wide - energy efficiency - is the one target that is not currently legally binding. The existence of binding laws makes a difference. The Irish Bill should be seen as an opportunity for Ireland to ensure its efforts will not be undermined by a retreat from the use of the rule of law at EU level. In its current form, however, this opportunity will not be taken.

Although the EU has repeatedly emphasised the need to induce greater certainty in order to stimulate investment, the European Commission's Communication on a 2030 Framework<sup>1</sup> does not include proposals designed to address the fundamental causes of uncertainty. There is no proposal to create a binding long-term climate governance regime explicitly designed to deliver the EU's 2050 objective. Instead the architecture of the 2030 Climate & Energy Framework views 2030 as an end in itself rather than an interim staging post embedded in a stable long-term governance pathway. This must be rectified - if not at EU level, then at national level: investors

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A policy framework for climate and energy in the period from 2020 to 2030, COM/2014/015 final

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require long-term certainty and the Irish Bill provides an opportunity for Ireland to adopt such a long-term perspective as has been provided in the UK<sup>2</sup> and Finland,<sup>3</sup> with France<sup>4</sup> and Norway<sup>5</sup> currently developing binding 2050 targets to supplement those at EU level.

As investments in low-carbon technologies, energy assets, and in the wider supply chain are undertaken on a long-term basis, investors need long-term visibility on the potential opportunity that the Irish market might offer. This was pointed out in the European Commission's original communication on renewable energy: "targets are used to provide clarity and stability to industry, to allow them to plan and invest with a higher degree of certainty."<sup>6</sup> A Bill without a 2050 reduction target will leave Ireland behind those countries which have enacted one and so fail to induce investment in low-carbon technology in Ireland.

The importance of creating such a long-term view is a key challenge for Ireland as can be seen by Ireland's history with its two National Climate Change Strategies (2000 and 2007). A full assessment of the proposals in those strategies and the resulting outcomes is beyond the scope of this paper but essentially the ambition and enthusiasm of the proposed policies was not matched by action. This experience suggests that solely medium-term targets, especially those that are non-binding and lacking in a transparent review process to monitor and course-correct where necessary, will not be an adequate means of ensuring action.

The current Bill leaves Ireland in danger of re-enacting this experience. **A climate law which looks solely to 2020 targets (which Ireland is not on track to meet) without adequately focussing on the long-term outcome - e.g. by introducing a binding 2050 commitment - will leave Ireland on the path to high carbon 'lock-in'.** Such an outcome can already be seen with regard to Ireland's target under the Effort Sharing Decision<sup>7</sup> ("ESD"). Ireland will be able to buy its way out of missing its GHG reduction target using carbon credits, but this does nothing to ensure Ireland is on track for the necessary 2050 emissions reductions, or even those of 2030. National targets could limit the scope for the use of credits which can give a false impression of progress. Framing the Bill with 2050 as the ultimate landing point would ensure long-term policy coherence and much needed certainty for investors. If a weak climate law is enacted, investors will not be inspired by Ireland's commitment and will continue to question whether Ireland is the best place to invest. Regulatory stability, long-term political commitment as well as decarbonisation targets will provide strong signals for opportunities through the early 2020s and subsequent decades.

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<sup>2</sup> The UK has committed to reducing its emissions by at least 80% from 1990 levels by 2050.

<sup>3</sup> The Finnish law, passed by parliament on 6 March 2015, sets a legally binding target to cut greenhouse gas emissions by at least 80% by 2050 (compared to 1990) and creates an independent expert committee to advise the Government on climate change strategy. See section 4.2.2.

<sup>4</sup> In its proposed transition climate law, France has committed to an ambitious GHG reduction objective of 75% to be achieved by 2050. However, the enactment is still pending: the bill has been transferred from the Senate to the National Assembly.

<sup>5</sup> Norway will have a new climate change law as the Norwegian Parliament voted in favour of proposals to draft legislation by 2017. Norway will create binding greenhouse gas emission targets for 2020, 2030 and 2050, and set a series of carbon budgets for the government. The exact design of the law is still unknown.

<sup>6</sup> Communication from the Commission to the Council and the European Parliament: Renewable Energy Road Map Renewable energies in the 21st century: building a more sustainable future COM(2006) 848 final

<sup>7</sup> The Effort Sharing Decision, Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020. The evidence is that Ireland is not going to meet its target under the ESD, see Ireland's Greenhouse Gas Emission Projections 2013-2030, the Irish Environmental Protection Agency (2014), available at: [http://www.epa.ie/pubs/reports/air/airemissions/GHG\\_Emiss\\_Project\\_publication\\_2014\\_finalv2.pdf](http://www.epa.ie/pubs/reports/air/airemissions/GHG_Emiss_Project_publication_2014_finalv2.pdf)

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## 4 Importance of an Independent Advisory Council

### 4.1 Independence as a condition of effectiveness

The Irish Bill establishes an Expert Advisory Council ("EAC") to "advise and make recommendations" to Ministers and the Government, primarily in the preparation of a national mitigation plan and adaptation framework. The establishment of bodies of this type in national climate laws is in general to be warmly welcomed: the value of a distinct entity devoted to providing long-term expert advice and guidance to Government to ensure adequate progress is potentially very great, as the experience of other states - and the UK in particular - shows. **Unfortunately, the EAC, in the form currently proposed, can be expected to fall very far short of the necessary standard, and its value to Irish efforts to decarbonise will be significantly diminished as a result.**

Much of the attention on the UK Climate Change Act (the "UK Act") understandably focuses on its emissions targets - the long-term (2050) target; the 'rolling' mechanism of five-yearly carbon budgets; and the legally binding nature of both. However, the establishment of the independent Committee on Climate Change ("CCC") has been described as "perhaps the most influential feature" of the UK Act and "likely to have a pivotal influence" over time.<sup>8</sup> As discussed below (at section 4.2.1), the CCC is already having an important practical impact.

The CCC is an expert body established by the UK Act to provide independent advice to Government on a wide range of matters under the Act, and to carry out and publish independent and thorough annual assessments of Government progress towards carbon targets. For the purposes of this paper, it is particularly important that the CCC is widely understood to be genuinely independent.

This independence is guaranteed by the CCC's composition. Its current Chair, Lord Deben, is a Conservative former Member of Parliament, now sitting in the House of Lords. A former Environment Secretary (until 1997), Lord Deben was instrumental in the campaign for a UK Climate Change Act. The seven other members of the CCC are all leading experts in the fields of science, policy and economics, and all are independent of Government and party politics.<sup>9</sup> It is no accident that the CCC's work is understood to be "scientifically rigorous and free from what could be interpreted as competing agendas."<sup>10</sup>

The composition of the EAC is far more problematic. Four of the eight to ten "ordinary members" of the EAC will be drawn, ex officio, from state/semi-state bodies with aims which differ from – or even contrast with – those of the EAC. For example, it will be particularly hard, if not impossible,

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<sup>8</sup> 'Prospects for the UK's national approach to climate law-making', Mark Stallworthy, in 'Climate Law in EU Member States', p.124

<sup>9</sup><http://www.theccc.org.uk/about/structure-and-governance/committee-on-climate-change/> ; <http://www.theccc.org.uk/about/structure-and-governance/>

<sup>10</sup> <http://www.iieta.com/publications/why-legislate-designing-a-climate-law-for-ireland>, p.14

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for the Director of Teagasc to act in the interests of both bodies. At the least, he or she will be subject to starkly competing agendas.<sup>11</sup>

**Whatever the good faith and commitment of the EAC's members, the EAC is bound to find that its authority, its impact – and therefore its utility – is undermined by the perception that it is not truly or sufficiently separate from the Irish Government or competing interests.**

Perception is everything. As Mark Stallworthy, a Professor of Environmental Law and expert on the UK Climate Change Act has noted, “the validity and impact of expert contributions depend on the context in which they are required to operate, including such matters as remit, membership, levels of independence and transparency”.<sup>12</sup>

The validity and impact of the EAC's work will be undermined by the serious questions surrounding its membership and independence. It will also suffer as a consequence of its relatively narrow remit. As compared with the CCC, the more limited range of duties falling to the EAC, and the limited legal weight they will carry<sup>13</sup>, will give the EAC little opportunity to assert itself – or indeed to develop a reputation for practical independence. In other words, even an EAC seeking to clearly and publicly assert its independence would find it hard to do so given the limited powers at its disposal. There is no provision in the Bill which the EAC (or any of its members) could rely on if it wished to stress its independence from Government: such a commitment is absent in spite of the recommendations of the Joint Committee on the Environment, Culture and the Gaeltacht.<sup>14</sup>

Perhaps the most serious risk inherent in a lack of independence is that the EAC comes to be perceived as having been ‘captured’ by a particular political stance or affiliation. This could seriously undermine broad political support for the role of the EAC – and potentially, therefore, the Bill as a whole.

In the context of climate change law, the need for independent expert input is especially important, for concrete and practical reasons. Fundamental to the effectiveness of climate law is the creation in wider society of ‘credible commitment’: a trust that inevitable short-term political pressures to stray from the course will, as and when they arise, be resisted. Without this, certainty – particularly investor certainty – is drastically undermined (as discussed above). This in turn can create a serious barrier to the development and implementation of effective policy. Addressing the problem of credible commitment requires an independent expert body to help guide policy.<sup>15</sup>

The EAC will be hamstrung from the start. Independence is not a characteristic that an expert advisory body might or might not have; it is something that such a body must have if it is to be

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<sup>11</sup> The Board of Teagasc consists of a chairman and 10 ordinary members, five of whom are drawn from organisations “representative of persons engaged in agriculture or the promotion or development of the agricultural industry” - Agriculture (Research, Training and Advice) Act 1988, First Schedule, paras 2, 3(7)(b).

<sup>12</sup> Ibid.8, p.125

<sup>13</sup> For example, unlike under the Bill, the UK Government must in certain circumstances justify to Parliament, with reasons, why it has acted contrary to the advice of the CCC.

<sup>14</sup><http://www.oireachtas.ie/parliament/media/committees/environmenttransportcultureandthegaeltacht/Report-on-the-Outline-Heads-of-the-Climate-Action-and-Low-Carbon-Development-Bill-2013.pdf>

<sup>15</sup> ‘The political sustainability of climate policy: The case of the UK Climate Change Act’, Matthew Lockwood, Global Environmental Change 23 (2013) 1339 at 1343.

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truly effective. A lack of independence will also have damaging implications for good governance of the Bill's legal regime as a whole; undermining transparency and democratic accountability.<sup>16</sup>

An EAC constituted along the lines of the current Bill would not be seen as truly independent. This would have serious practical consequences for the effectiveness of its work and, by extension, undermine national efforts to transition effectively to a "low carbon" economy.

## 4.2 European experience

### 4.2.1 The UK

A number of European states have recently enacted, or are in the process of drafting, national climate change laws. And the model of the CCC – an expert advisory body which is independent of Government – is being emulated, just as the UK Act is. This should not be surprising: in its relatively short life, the CCC has had a critical influence on UK efforts to work towards GHG emission reductions.

Most notably, each of the first four carbon budgets (2008 - 2027) has been set by the Government at the level recommended by the CCC on the basis of their expert analysis. And even where, on other matters, the Government has not followed the CCC's recommendations, the CCC has maintained an important independent voice and compelled the Government to justify its positions.

The CCC has had a significant and positive influence in the face of Government opposition; something seen most clearly in the setting of the fourth carbon budget.<sup>17</sup> In December 2010 the CCC recommended, on the basis of its analysis of climate science, the international policy context, and a cost-effective decarbonisation trajectory, that the fourth carbon budget (relating to 2023-2027) should be set at 50% below 1990 levels. The Government accepted this at the time, but subject to revisiting it in 2014 "to ensure consistency with the EU Emissions Trading System"<sup>18</sup>. Through 2013 and into 2014, the CCC proactively resisted any relaxation of the fourth carbon budget. This led eventually to the Government deciding to retain the fourth carbon budget at the level originally agreed.

That the CCC felt confident to take a robust position in the face of Government pressure was a reflection of its independence – something strengthened by the public disclosure of correspondence with Government<sup>19</sup> and the legal safeguards in the Act itself. The CCC's forthright stance proved sufficient to allow the Department of Energy and Climate Change (a small department, with a Liberal Democrat Secretary of State) to resist "reportedly substantial opposition within the coalition, particularly from the [relatively powerful] Treasury and the business departments".<sup>20</sup>

<sup>16</sup> <http://www.iiea.com/publications/why-legislate-designing-a-climate-law-for-ireland>, p.14

<sup>17</sup> 'Climate Change Constitutionalism? Lessons from the United Kingdom', Aileen McHarg, *Climate Law* 2 (2011) 469 at 480.

<sup>18</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/48081/1683-4th-carbon-budget-policy-statement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/48081/1683-4th-carbon-budget-policy-statement.pdf)

<sup>19</sup> For example: <http://www.theccc.org.uk/wp-content/uploads/2013/10/Ed-Davey-October13-final.pdf>

<sup>20</sup> *Ibid.* 17

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It is safe to assume that the CCC was pivotal in keeping the UK on a cost-effective emissions reductions trajectory to 2050 (and thereby protecting the long-term effectiveness of the Act as a whole); a hugely important intervention which was only possible because of its independent status, and which further boosted the CCC's authority.<sup>21</sup> The Government has also followed the CCC's recommendations in other respects; for example that a 'shortfall' in emissions for the first carbon budget should not be 'rolled over' in order to allow a relaxation of the second budget.

The CCC's recommendations are by no means always adopted by Government. For example, the CCC recommended an extra tightening of the second and third carbon budgets, as well as a commitment that the second budget would be met without the use of international credits; both were rejected by the Government.

However, even when they are not followed, the robust stances adopted by the CCC – backed up by independent expert analysis – serve to underline the CCC's authority and reputation. Its influence is enhanced as a consequence.<sup>22</sup> It seems clear that the EAC, as currently proposed, will not be able to have such a positive influence on the Irish political space.

#### 4.2.2 Finland

Finland has had a Climate Panel since December 2011; an "independent, interdisciplinary think tank of top-level" scientists and scholars.<sup>23</sup> The Panel has operated until now in the absence of long-term domestic emissions targets, informing policy through the production of numerous studies. While "ministries and working groups can give assignments to the Panel" it is important to note that they "cannot influence the outcome or opinions of the Panel."<sup>24</sup>

The Finnish parliament recently passed a national climate change law<sup>25</sup> which imposes binding long-term domestic emissions cuts. According to this law, the independent Climate Panel will take on new duties under this new law "in support of the planning of climate policy",<sup>26</sup> again following the general approach of the UK Act.

#### 4.2.3 Denmark

The Danish Climate Change Act became law on 12 January 2015, in accordance with which "a permanent and independent Climate Council will be established consisting of highly skilled experts specialising in energy, transport, buildings, agriculture, environment, nature and economics. ...

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<sup>21</sup> "the headline victory was an important boost to the authority of ... the CCC." (Ibid. 17)

<sup>22</sup> "The Committee on Climate Change ... has influence based on reputation and authority rather than formal powers." (Ibid. 9).

<sup>23</sup> <https://www2.uef.fi/documents/1336630/1336643/Utter+2013.pdf/8707f1b9-1401-4af1-8377-6714997e3184> ; <http://www.ilmastopaneeli.fi/fi/in-english/>

<sup>24</sup> <http://www.ilmastopaneeli.fi/> (translated from the Finnish)

<sup>25</sup> <http://www.businessgreen.com/bg/news/2398882/finland-passes-long-awaited-climate-act>

<sup>26</sup> [http://www.ym.fi/en-US/Latest\\_news/Press\\_releases/Government\\_approves\\_proposal\\_for\\_a\\_clima\(29845\)](http://www.ym.fi/en-US/Latest_news/Press_releases/Government_approves_proposal_for_a_clima(29845))

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The Council will be appointed for one 4-year period at a time and will comprise a chairman and six expert members<sup>27</sup>, served by an “independent secretariat”.<sup>28</sup>

The reputation of the Danish Climate Council will, of course, be formed over time. But the fact that it is comprised of independent experts affords it the opportunity to develop an independent voice and, if necessary, to present a robust alternative to Government perspectives.

#### 4.2.4 Norway

Norway, though not an EU member state, is also in the process of legislating a law modelled on the UK Act. It is reported that the final law “could also see the creation of an independent body, modelled loosely on the UK’s Committee for Climate Change that would oversee government policy.”<sup>29</sup>

## 5 Issues raised in the Oireachtas debate

### 5.1 Target Setting

The Irish Minister of State at the Department of Environment, Community and Local Government stated during the debate on the Bill in the Oireachtas on 25th March 2015 that: *“Putting in place our own targets would cut across and interfere with the EU’s target-setting process and could lead to potentially adverse outcomes.”*

In addition, the Irish Minister for Environment, Community and Local Government, in introducing the Bill at the second stage in the Oireachtas on 11 February 2015 stated that it would be redundant to set Irish climate targets: *“Were we to institute our own targets that were less demanding than those set at EU level, then the latter would take precedence and our legislative targets would be rendered redundant. Alternatively, were our mitigation targets more demanding than those determined at EU level, we would run the risk of putting Ireland at a competitive disadvantage compared to our EU partners which would not be a desirable outcome.”*

In fact, the setting of national targets for Ireland would in no way interfere with the EU target setting process. Firstly, as noted above, there is currently no process at EU level to set binding 2050 targets. Further, the current discussion surrounding the 2030 process indicates that the renewable energy and energy efficiency targets will not be disaggregated at a national level. Instead, Member States will make voluntary pledges as to their appropriate target levels, thereby necessitating the setting of targets on a national level *in order to comply with the EU process* - so there is no EU target-setting process here with which Ireland could interfere. **The default position in Ireland in the past has been inaction, as evidenced by the failure to implement the policies set out in the two previous National Climate Strategies. The current Bill should be seen as an**

<sup>27</sup> <http://www.kebmin.dk/en/news/helveg-denmark-is-taking-responsibility-the-climate>

<sup>28</sup> [http://www.kebmin.dk/sites/kebmin.dk/files/climate-energy-and-building-policy/denmark/Climate-Change-Act/fact\\_sheet\\_climate\\_change\\_act.pdf](http://www.kebmin.dk/sites/kebmin.dk/files/climate-energy-and-building-policy/denmark/Climate-Change-Act/fact_sheet_climate_change_act.pdf)

<sup>29</sup> <http://www.rtcc.org/2015/03/23/norwegian-parliament-votes-on-new-climate-change-law/>

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**opportunity to set Ireland's long-term trajectory in a binding national law and thereby ensure the necessary action to reduce emissions will follow.**

Importantly, it is to be noted that the Treaty on the Functioning of the European Union explicitly acknowledges in Article 193 that EU environmental measures "shall not prevent any Member State from maintaining or introducing more stringent protective measures." If Ireland set measures beyond those set out at EU level, this would allow Ireland to be in a leadership position in negotiating future targets and result in Ireland becoming an attractive destination for renewable energy and energy efficiency investment ahead of other EU countries. If Ireland agreed targets which were below those later agreed at EU level, the Irish targets could always be revised to ensure consistency with future EU targets.

A key consequence of a short-term approach to climate governance is that it sends a fundamentally ambivalent signal to investors, international partners and citizens concerning the strength of commitment to effective climate mitigation. Setting a binding 2050 target for Ireland would help ensure that Ireland meets all its interim targets with an appropriately long-term view. Ireland would not just institute policies to ensure that 2020 targets are met but that 2020 targets are met in a way that places Ireland on the right track to 2050.

As noted above, the danger of having 2020 targets without a longer timeframe can clearly be seen through Ireland's ESD target: Ireland can simply meet this target with the extensive use of carbon credits. However, 'buying its way out' of meeting such targets ceases to be a sustainable solution if there are longer-term targets which also need to be achieved.

In addition, a short-term perspective will not provide sufficient clarity and stability to industry to ensure stakeholders can plan and invest with a high degree of certainty. For these reasons, setting binding 2050 targets would not be redundant but a necessary and valuable exercise to ensure Ireland enacts a meaningful climate law.

## 5.2 Leaving the government open to legal action

In proposing the Bill, the Irish Government clearly understands that domestic climate change law can offer a number of real advantages over mere policy commitments. For one thing, laws may persist in a way that policies do not. However, laws can be repealed (or watered-down by amendment) just as easily as they can be enacted. This fact underlines the importance of legislating in a way which builds in long-term and broad support for the law in question. (The point has been made above that an EAC that is not truly independent may undermine the long-term sustainability of the Bill). For a law to persist over the long term it needs, first and foremost, to be successful. This note has highlighted that the Bill in its current form may not meet that standard.

The other reason for proposing a commitment in legal form is more fundamental: law has a special value in itself. Parliaments commit rules to law so they have greater normative weight than mere policy statements. Much of the inherent authority of law comes from the fact that breaching a law has real legal consequences. The Irish Government cannot expect to make a law without there being legal consequences.

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Yet there are hints that avoiding enforcement of the Bill in the courts is what is desired. The omission of binding targets may be one indication of such an intention. The Irish Minister for Environment, Community and Local Government, introducing the Bill at the second stage in the Oireachtas on 11 February 2015, stated:

*"Setting our own targets, even on a long-term basis, would not only interfere with the European process, but importantly may render the state subject to legal action. Do we really want the state to be focussed on legal proceedings within the courts, or would our resources be more usefully employed in assessing new technologies, new efficient energy production mechanisms, sustainable planning and transport policy or information technology aimed at decarbonising production processes?"*

It should be remembered that the fact that the UK's Climate Change Act is "legally binding" is what gives that law much of its value and influence. To deny, from the start, that the Irish Bill is genuinely legally binding will undermine its effectiveness.

The above being so, the real consequences of a breach of a law will depend on the nature of that law, as well as the constitutional circumstances. A law can be binding without threatening a Government's freedom to act. If the Irish Bill contained long-term legally binding targets then, in the event that they were breached, the Irish courts would do all they could to avoid being accused of usurping the role of Government. At the very most, it can be imagined that the courts might 'work with' Government to try to rectify a substantive breach of the Bill. There is surely very little cause for concern.

Furthermore, the UK experience makes clear that a binding climate law can be designed to channel accountability away from the courts and leave Government answerable to Parliament in appropriate circumstances. If the UK Government deviates from the recommendations of the CCC, the Act directs accountability away from the law courts: instead, Government must justify its actions to Parliament - and face the political consequences. It is absolutely right that national legislatures plays a key role in scrutinising and helping to chart the course to a lower-carbon future - and a well designed climate law can and should build in such a role to the institutional structure it establishes. Legal rules can help define these important relationships, in which case judicial oversight need be little more than a safeguard to ensure these rules are not ignored.

Omitting to include long-term, legally-binding obligations in the Bill could suggest a lack of real commitment to the Bill or its wider purpose. Similarly, overblown concerns about a vulnerability to legal action may lead to suspicion that the Government wants to 'have its cake and eat it' by creating a law for public effect, without accepting the full and proper implications. Either it is law or it is not. In all events, one way of absolutely guaranteeing that the Government would not be open to legal action is to act in accordance with the law.

Finally, it is also the case that, as currently drafted, the Bill does not place many truly substantive obligations on the Irish Government. The Government not only has great control over the form of

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the plans and frameworks implemented under the Bill;<sup>30</sup> there is little constraint on it revising those plans and frameworks,<sup>31</sup> and similarly Government Ministers need only “have regard to”<sup>32</sup> them once they are in place.

These relatively soft obligations, alongside the procedural requirements of the Bill,<sup>33</sup> do not impose any substantive burden on the Government. There is no need to produce any defined outcome. The Government will still be susceptible to legal action, but no more than it is in relation to existing laws; that is the nature of the rule of law. As currently drafted, there is no prospect of a legal case being brought pursuant to the Bill which might be legally unusual or challenging to Government. That may in itself be a reflection of the Bill’s underlying weakness.

## 6 Conclusion

The purpose of enacting a national climate law is to help ensure that an optimal policy mix is consistently pursued to bring about cost-effective long-term decarbonisation. A poorly designed law can 'lock in' a high carbon society and thereby increase the costs when a country does make the inevitable transition to a low carbon future.

The analysis presented in this paper makes clear that there is a strong case for the revision of the Bill to ensure the independence of the Expert Advisory Council and the creation of certainty via the introduction of binding, long-term national climate targets. In its present form, the Bill does not create a governance structure that will adequately or cost-effectively drive Ireland's climate transition. Ireland is already struggling to meet its climate commitments; if not revised, this Bill will do little to change that.

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<sup>30</sup> For example, in “considering” the plans and frameworks, the Government need only “endeavour” to achieve the “national transition objective” – something which, as discussed, is not precisely defined (ss 3(1), 3(2)).

<sup>31</sup> For example, the Irish Government needs only “have regard to” certain considerations in doing so: a very low bar (ss 4,(6), 4(7)).

<sup>32</sup> Ss 4(12), 5(8).

<sup>33</sup> For example, ss 4(8), 5(3).

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Jonathan Church  
Lawyer, Climate & Energy  
ClientEarth  
The Hothouse  
274 Richmond Road  
London  
E8 3QW  
t 020 3030 5978  
e [jchurch@clientearth.org](mailto:jchurch@clientearth.org)  
[www.clientearth.org](http://www.clientearth.org)

Aoife O'Leary  
Lawyer, Climate & Energy  
ClientEarth  
The Hothouse  
274 Richmond Road  
London  
E8 3QW  
t 020 2020 5978  
e [aoleary@clientearth.org](mailto:aoleary@clientearth.org)  
[www.clientearth.org](http://www.clientearth.org)

**Brussels**

4ème Etage  
36 Avenue de Tervueren  
1040 Bruxelles  
Belgium

**London**

274 Richmond Road  
London  
E8 3QW  
UK

**Warsaw**

Aleje Ujazdowskie 39/4  
00-540 Warszawa  
Poland

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