



# Government Legal Department

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Your ref: 265422.1/JDP/BG  
Our ref: Z1724358/SRW/B5

24 October 2017

Dear Sirs

## **Pre-Action Protocol for Judicial Review: Response to Letter Before Claim Plan B. Earth v Secretary of State for Business, Energy and Industrial Strategy**

We refer to your Letter Before Claim dated 26 September 2017. On 4 October 2017, you agreed that the time for the Secretary of State's response should be extended to 24 October 2017. This is the Secretary of State's response.

### **The principal parties**

1. The proposed claimant is Plan B. Earth ("**Plan B**"), represented by Bindmans LLP. You have indicated that there may also be other claimants, although you do not suggest that the addition of any such claimants makes any difference to the substance of the proposed challenge.
2. This Response is sent on behalf of the Secretary of State for Business, Energy and Industrial Strategy.
3. The matter is being dealt with on behalf of the Secretary of State by Sarah Wise and James Barry of the Government Legal Department, under reference number Z1724358.

### **The decision proposed to be challenged**

4. You state that Plan B proposes to challenge the "*ongoing failure to revise the 2050 carbon target ('**the 2050 Target**') under the UK Climate Change Act 2008 ('**the 2008 Act**') both generally and specifically in response to the report of the Committee on Climate Change ('**the CC Committee**'), UK climate action following the Paris Agreement dated 13 October 2016 ('**the 2016 Committee Recommendation**')"*)" (§2).
5. You state that you require the Secretary of State "*to review the 2050 Target to determine an appropriate amended 2050 Target*" (§123).
6. Although you do not explicitly state what the amended 2050 Target should be, the thrust of your letter appears to indicate that you consider that a net zero emissions target is required to be set, and you contend that the Secretary of State is under an obligation in law to amend the 2050 Target now.

Lee John-Charles - Head of Division  
Gary Howard - Deputy Director, Team Leader Litigation B5



## **Response to the proposed challenge**

7. The Secretary of State does not accept that he is under a legal obligation to amend the 2050 Target now, whether “generally” or “specifically in response to” the 2016 Committee Recommendation. In particular, the Recommendation was that (for the reasons summarised below) the Secretary of State should not set a new 2050 Target now. We do not agree with your assertion that the Secretary of State’s decision to accept that Recommendation was inconsistent with the purpose of the 2008 Act, or irrational, or unlawful under the Human Rights Act 1998.

### ***The United Kingdom is a world leader in reducing carbon emissions***

8. The Government is fully committed to tackling climate change. It has taken a prominent role in advancing the climate change agenda both domestically and internationally. In particular:
  - a. Both the adoption of the Climate Change Act 2008 and of the existing target of at least 80% reductions by 2050 against a 1990 baseline remain world leading. The UK not only met but exceeded the average 25% reduction on the 1990 baseline required in the first carbon budget period (2008 to 2012). The UK is currently in the second carbon budget (2013 to 2017), and is on track to outperform the average 31% reduction required. The UK is also on track to outperform the third carbon budget (2018 to 2022), which requires an average 37% reduction.
  - b. Current targets require an average 51% reduction over 2023-2027 against the 1990 baseline, and an average 57% reduction over 2028-2032. These targets are designed to help meet the current target of an at least 80% reduction by 2050. These targets are stretching and are already relatively ambitious compared to pledges from other countries. In particular, these domestic targets are more ambitious than the EU target for 2021 to 2030, which was communicated to the UNFCCC in the joint EU/Member State Nationally Determined Contributions under the Paris Agreement for that period, which specifies an EU target of a 40% reduction by 2030.
  - c. The UK played an important role in pushing for ambitious aims to be set in the Paris Agreement. That success is testament to the progress that has been made in gaining international consensus on what needs to be achieved.
  - d. Under the Paris Agreement, as well as seeking to limit warming to well below 2°C, and to pursue efforts to limit the temperature increase to 1.5°C, the UK is committed to working with other countries to achieve the aim of global net zero emissions in the second half of the century.
9. The setting of such ambitious domestic targets – and the global leadership that the UK has shown in setting new international aims – reflects the Government’s focus on the importance of tackling climate change. Importantly, although the 2050 Target is ambitious, it is also designed to be achievable.

### ***The existing 2050 Target remains stretching and achievable***

10. We cannot predict the exact technological changes that will help us deliver on the fourth and fifth carbon budgets (and beyond). However, we can and do analyse plausible pathways to meeting them, reflecting the huge uncertainties. Some technologies will develop faster than expected, making it easier to reduce emissions in particular sectors, others less so.
11. The Government’s *Clean Growth Strategy*, published on 12 October 2017, sets out in detail a possible pathway for meeting the fifth carbon budget (to 2032) through domestic action.
12. We estimate that the combination of existing policies and a subset of the new measures in the *Clean Growth Strategy* that can be quantified could deliver 93% of the required level of emissions savings for the fifth carbon budget to 2032, against our 1990 baseline. The Strategy also identifies further areas where we will need to drive further progress through future consultations, innovation spending and policy design: we refer you to the decision pathways in Annex A to the *Clean Growth Strategy*.
13. There is even greater uncertainty about which technologies will help us reduce emissions by at least 80% by 2050. Again, we cannot predict every technological breakthrough that will help us meet our target 2050 Target. However, exploring the plausible potential pathways to 2050 helps us to identify low-regrets steps we can take in the next few years common to many versions of the future, as well as key technologies and uncertainties. To that end, the *Clean Growth Strategy* presents three illustrative long-term pathways (the Electricity pathway, the Hydrogen pathway, and the Emissions removal pathway: see page 56 of the Strategy). We are continuing to build our understanding of the best approach. The

ultimate way forward might in fact be some combination of the three, or another approach that builds on further innovation.

14. As the UK approaches 2050, its remaining emissions will likely be in the sectors where it is most difficult to cut them – in industry, agriculture, aviation and shipping. As highlighted by the Committee on Climate Change, greenhouse gas removal (“GGR”) technologies are likely to have an important role to play in offsetting difficult-to-cut emissions, by removing greenhouse gases from the air. There is a diverse set of GGR technologies with varying potential scale and at varying stages of development. These include afforestation, bio-energy with carbon capture and storage (BECCS), direct air capture (capturing carbon dioxide from the air and storing it), enhanced weathering (crushing suitable rocks that react with carbon dioxide and spreading over land), and methods for storing carbon in the oceans, such as ocean liming.
15. We are therefore taking active steps to strengthen our understanding of these technologies and, where appropriate, move forward with deployment. We will develop our strategic approach for GGR technologies in light of the research and development work we are doing to improve our understanding of GGR technologies, and to consider the scope for removing barriers and strengthening incentives to support the deployment of GGR, to position the UK at the leading edge of GGR development: see further our *Clean Growth Strategy* at page 57.

***The Paris Agreement does not give rise to a legal duty to set a new 2050 emissions target now***

16. The argument that you set out in your Letter Before Claim is premised to a significant extent upon an assertion that the current 2050 Target is “*inconsistent with international law*”, by which you mean with the Paris Agreement.
17. Your argument misstates the legal effect of the Paris Agreement. In particular, it misrepresents the aims and objectives of the Agreement as amounting to legally binding targets in their own right. That is incorrect. We draw attention in particular to the following:

- a. Article 2(1) sets out the overarching aim of the Agreement:

*“This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, including by*

*(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial limits, recognising that this would significantly reduce the risks and impacts of climate change.”*

- b. Article 3 provides:

*“As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, [and others]... with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, ...”*

- c. Article 4 provides:

*“1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognising that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, ....*

*2. Each party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.*

*3. Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.*

4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. ...

...

9. Each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement and be informed by the outcomes of the global stocktake referred to in Article 14.

...

11. A Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition, ...

d. Article 14 provides for the “global stocktake” referred to in Article 4(9), being a meeting of the Conference of the Parties “to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals” in 2023 and every five years thereafter. Article 14(1) makes clear that the Conference shall make that assessment “in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.”

18. Three points come out of the above.

19. First, while the Government is fully committed to the objectives of the Paris Agreement, the legal obligation upon the Parties is to prepare, communicate and maintain national mitigation plans (nationally determined contributions) to reduce net emissions, with a view to achieving the purpose of holding global average temperature increases to “well below 2°C” above pre-industrial levels, and pursuing efforts to limit them to 1.5°C. This is not the same as a legal duty or obligation for the Parties, individually or collectively, to achieve this aim. There is also a collective long term goal for near net zero emissions “in the second half of this century” (not by 2050) which all countries will work together to achieve. The approach is, therefore, a “bottom up” one by which each Party will determine their own contribution, and – notwithstanding the common objective to which Parties are committed as a matter of shared aim – there is no legal obligation on any one Party (or all Parties collectively) to achieve a “top down” target. In particular, it certainly does not require the adoption of a binding domestic target to ensure that a target of 1.5°C is met by 2050 (let alone by 2040).

20. Secondly, the level of those contributions are to be set having regard to what is “possible” and to best “available” science and each Party’s respective “capabilities”. This reflects the approach adopted by the earlier UN Framework Convention on Climate Change (“UNFCCC”), upon which the Paris Agreement builds, which recognised that the specific commitments to be made by developed country Parties and other Parties included in Annex I (which included the United Kingdom) – both in terms of their national policies and of the corresponding measures on the mitigation of climate change by limiting emissions of greenhouse gases – needed to take into account “the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding [the] objective [of] the Convention”: Article 4(2)(a) (which you only selectively cite in your pre-action letter).<sup>1</sup>

21. Thirdly, parties are bound to pursue domestic mitigation measures with the aim of achieving their contributions and must revisit their contributions every five years (with effect from 2020) with a view to raising ambition in the future. It is recognised that a Party’s committed contributions may change over time in light of developments (including developments in the best available science and hence each Party’s capabilities), so as to meet the ultimate aim, and so introduces a “ratchet” effect by which commitments can only increase. This gives a clear sense of direction to drive investment and to help reduce the cost of climate action through cheaper technology and greater innovation, subject to best available science and to what is (at any given time) possible.

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<sup>1</sup> In line with this approach, the 2008 Act requires the Secretary of State in coming to any decision relating to carbon budgets to take into account not only scientific knowledge about climate change, but also “technology relevant to climate change” (amongst other matters): section 10(2) of the 2008 Act. The CCC is also required to take such matters into account in considering its advice in relation to any such decision.

22. As appears from the above, the Government does not agree that it is legally obliged by the Paris Agreement to fix a target. In particular, when deciding what emissions targets to set, it is wholly lawful when setting any target to take into account what can realistically be expected to be achieved within the relevant timeframe, having regard amongst other matters to available technologies (including technologies which are realistically expected to become available early enough to assist in meeting the target).

***The need for a realistic and internationally credible path to a net zero emissions target***

23. The Government's obligations under the Climate Change Act only take us to 2050. The Government is fully committed to enshrining the goal of net zero emissions in domestic law in due course. Thus:

- a. On 14 March 2016, the Rt. Hon. Andrea Leadsom MP, the then Minister of State for Energy, said in a debate in the House of Commons during the Report stage of the Energy Bill:

*"The Government believe we will need to take the step of enshrining the Paris goal of net zero emissions in UK law—the question is not whether, but how we do it, and there is an important set of questions to be answered before we do. The Committee on Climate Change is looking at the implications of the commitments made in Paris and has said it will report in the autumn. We will want to consider carefully its recommendations, and I am happy to give the right hon. Gentleman the undertaking that we will also discuss with him and others across the House how best to approach this matter, once we have undertaken that consideration."*

- b. That position was further confirmed on 24 March 2016 by the Rt. Hon. Amber Rudd MP, the then Secretary of State for Energy and Climate Change, in answer to an Oral Question as to "*What steps her Department is taking to enshrine the commitment to net zero emissions made at the Paris climate change conference of December 2015 in UK law*". She replied:

*"As confirmed last Monday during the Report stage of the Energy Bill, the Government will take the step of enshrining into UK law the long-term goal of net zero emissions, which I agreed in Paris last December. The question is not whether we do it but how we do it."*

- c. In its *Clean Growth Strategy*, the Government expressly stated that it believes that the UK will need to legislate for a net zero emissions target ("**the net zero emissions target**") at an appropriate point in the future, to provide legal certainty on where the UK is heading, and reflecting the UK's commitment to working with other countries to achieve the aim of global net zero emissions in the second half of the century.

24. However, the Government agrees with the Committee on Climate Change that now is not the right time to set a post-2050 net zero emissions target: we need first to understand more about the global path to net zero emissions. The Committee on Climate Change's advice in October 2016 was that "*We currently have no scenarios for how the UK can achieve net zero domestic emissions.*" Achieving net zero emissions of all greenhouse gases by 2050 – at the very outset of the aim set in the Paris Agreement of the second half of the century – would require a combination of further greenhouse gas removals and further breakthroughs in hard-to-treat sectors going beyond those already in both the Government's and the Committee on Climate Change's scenarios. The Government shares the view of the Committee given current uncertainties around domestic feasibility, inclusion of non-CO<sub>2</sub> emissions and ambition of other countries to reach net zero, it makes sense at present to remain flexible on how best to reflect the aim of global net zero emissions in a UK target.

25. The Government does not agree that it would be good policy to set a new target (or any consequential revised carbon budget) which was not capable of being met on a plausible scenario (by reference to known and expected technology). In particular, so far as the 2050 Target under the 2008 Act is concerned, it would be wrong to place a statutory duty on the Secretary of State to "*ensure*" that an amended 2050 target was met, in circumstances where there were no known means by which he could comply with that duty.

26. The Government considers that the result of setting a steeper target too early would be a loss of credibility in the climate change programme both nationally and internationally – sacrificing the UK's hard won reputation as a leader in the ongoing and important effort to tackle climate change effectively at a global level. The Government judges that it will achieve most progress in encouraging other countries to set similarly challenging carbon budgets if it can demonstrate that there are plausible and affordable means of achieving it. We agree with you that future international talks including, most immediately, the

Facilitative Dialogue to take place in late 2018, are of great importance in plotting a course for global emission reductions. But we do not agree with you, as you assert at §65 of your letter, that by deciding not to set a 2050 target yet, the UK Government would be entering those talks “as part of the problem”, rather than “as part of the solution”, or that “it will be in no position to influence others to increase their ambition.” To the contrary, we judge that the closer we link evidence of actual and expected progress in technological innovation and economically efficient strategies of emissions reductions to the setting of nationally determined contributions, the more likely we are to influence other countries to follow the UK’s ambitious lead.

27. None of this should be understood as conflicting with the Government’s announced intent to introduce a net zero emissions target in due course, and that “*the question is not whether we do it but how we do it*”.
28. One option as to the question of “*how we do it*” would be for the Secretary of State to exercise his discretion under section 2(1) of the 2008 Act to amend the 2050 Target. Before exercising that power, the Secretary of State must obtain and take into account the advice of the CC Committee: section 3(1)(a) of the 2008 Act. Another option would be to set a further target for net zero emissions for some point later in the second half of this century (requiring primary legislation). Consistent with the 2016 Committee Recommendation, the Secretary of State decided neither to exercise his discretion to amend the 2050 Target for the time being, nor to seek to introduce any other new UK emission targets as yet.
29. The 2016 Committee Recommendation was specifically produced in order to consider the domestic actions which the UK Government should take as part of a fair contribution to the aims of the Agreement. In particular, the CC Committee’s conclusions, as set out in the Executive Summary of the report, include the following:
  - a. **“Do not set new UK emissions targets now.** *The UK already has stretching targets to reduce greenhouse gas emissions. Achieving them will be a positive contribution to global climate action. In line with the Paris Agreement, the Government has indicated it intends at some point to set a UK target for reducing domestic net emissions to net zero. We have concluded it is too early to do so now, but setting such a target should be kept under review. The five-yearly cycle of pledges and reviews created by the Paris Agreement provides regular opportunities to consider increasing UK ambition*” (page 7);
  - b. *“We agree with the Government’s intention to set a new target in future that reflects the global need to reach net zero emissions. However, to be credible it needs to be evidence-based, accompanied by strong policies to deliver existing targets and a strategy to develop greenhouse gas removals. Early action will allow the UK to fulfil its commitment under the Paris Agreement and position it to take competitive advantage in the global shift to a zero-carbon world”* (page 7);
  - c. “We currently have no scenarios for how the UK can achieve net zero domestic emissions. Alongside widespread efficiency improvements and deployment of zero-carbon energy sources, net zero would require greenhouse gas removals of over 100 MtCO<sub>2</sub>e per year (UK emissions were around 500 MtCO<sub>2</sub>e per year in 2015):
    - *The UK’s 2050 target to reduce emissions at least 80% from 1990 (i.e. to around 160 MtCO<sub>2</sub>e per year) is challenging but can be met in various ways using currently known technologies. Scenarios generally involve deep reductions in emissions from power, heating and transport, where zero-carbon options already exist. More challenging sectors (especially agriculture, aviation and industry) are currently not expected to reach zero emissions on this timescale.*
    - *A full and successful roll-out of all options identified in our published scenarios to 2050 would lead to greenhouse gas emissions just over 90% lower than 1990, and CO<sub>2</sub> emissions close to zero.*
    - *These options include greenhouse gas removals from afforestation, bioenergy with carbon capture and storage (BECCS) and wood in construction. Together they remove up to 70 MtCO<sub>2</sub> per year within the limits to sustainable bioenergy supply we have identified.*
    - *Achieving net zero emissions of all greenhouse gases on these timescales would require a combination of further greenhouse gas removals and further breakthroughs in hard-to-treat sectors, going beyond those already in our scenarios. Without further breakthroughs in emissions sources, UK removals would need to be over 100 MtCO<sub>2</sub>e per year”* (page 10);

- d. *“Reaching net zero emissions will be a global necessity in order to limit climate change. Achieving it on the timescales necessary to meet the aims of the Paris Agreement will be very challenging for all nations. Given current uncertainties around domestic feasibility, inclusion of non-CO<sub>2</sub> emissions and ambition of other countries to reach zero, it makes sense at this point to remain flexible on how best to reflect the aim of global net zero emissions in a UK target. Addressing these uncertainties will help in setting a robust target which provides the right incentives.”* (page 10)
- e. *“Current policy in the UK is not enough to deliver the existing carbon budgets that Parliament has set. The Committee’s assessment in our 2016 Progress Report was that current policies would at best deliver around half of the emissions reductions required to 2030, with no current policies to address the other half. This carbon policy gap must be closed to meet the existing carbon budgets, and to prepare for the 2050 target and net zero emissions in the longer term.*

*The existing carbon budgets are designed to prepare for the UK’s 2050 target in the lowest cost way as a contribution to a global path aimed at keeping global average temperature to around 2°C. Global paths to keep close to 1.5°C, at the upper end of the ambition in the Paris Agreement, imply UK reductions of at least 90% below 1990 levels by 2050 and potentially more ambitious efforts over the timescale of existing carbon budgets.*

*However, we recommend the Government does not alter the level of existing carbon budgets or the 2050 target now. They are already stretching and relatively ambitious compared to pledges from other countries. Meeting them cost-effectively will require deployment to begin at scale by 2030 for some key measures that enable net zero emissions (e.g. carbon capture and storage, electric vehicles, low-carbon heat). In theory these measures could allow deeper reductions by 2050 (on the order of 90% below 1990 levels) if action were ramped up quickly.*

*The priority for now should be robust near-term action to close the gap to existing targets and open up options to reach net zero emissions:*

- *The Government should publish a robust plan of measures to meet the legislated UK carbon budgets, and deliver policies in line with the plan.*
- *If all measures deliver fully and emissions are reduced further, this would help support the aim in the Paris Agreement of pursuing efforts to limit global temperature rise to 1.5°C.*
- *The Government should additionally develop strategies for greenhouse gas removal technologies and reducing emissions from the hardest-to-treat sectors (aviation, agriculture and parts of industry).*

*There will be several opportunities to revisit the UK’s targets in future as low-carbon technologies and options for greenhouse gas removals are developed, and as more is learnt about ambition in other countries and potential global paths to well below 2°C and 1.5°C:*

- *2018: the Intergovernmental Panel on Climate Change (IPCC) will publish a Special Report on 1.5°C, and there will be an international dialogue to take stock of national actions.*
- *2020: the Committee will provide its advice on the UK’s sixth carbon budget, including a review of progress to date, and nations will publish mid-century greenhouse gas development plans.*
- *2023: the first formal global stocktake of submitted pledges will take place.*

*We will advise on whether to set a new long-term target, or to tighten UK carbon budgets, as and when these events or any others give rise to significant developments.”*

30. You will appreciate that those conclusions are no more than an executive summary of the CC Committee’s reasoning. Its full reasons were set out in the body of its report, and in particular (regarding the setting of UK policy to reflect Paris ambition) in Chapter 4. We refer you to the detail of that report, with which your letter before claim (despite its length) does not fully engage.
31. As to the timing of the adoption of a new target, the CC Committee refers to several future opportunities. It refers in particular to the Special Report of the IPCC, the facilitative dialogue in 2018 (as provided for in paragraph 20 of the Decision 1/CP.21 by the Conference of the Parties), other nations’ mid-century

greenhouse gas development plans (made by each Party in 2020, pursuant to Article 4(9) of the Paris Agreement) and the global stocktake (pursuant to Article 14 of the Paris Agreement). The success of the aim to hold temperature rises to well below 2°C or even to 1.5°C will depend on ambition not only in the United Kingdom but also in other countries. The priority is to identify a credible global path to those levels, to which all Parties to the Paris Agreement can be expected to subscribe. The most appropriate means of achieving that credible path will only become apparent as further progress in those international discussions is made.

**Response to ground (a): *Ultra vires*, including frustration of the legislative purpose**

32. You acknowledge at §83 of your letter before claim that the 2008 Act “*confers a statutory discretion on the Secretary of State as to the amendment of the 2050 Target*”. You are plainly correct to refer to it as a discretion and not a duty. Section 2(1) confers a power upon the Secretary of State to amend the 2050 Target, which may only be exercised in the circumstances set out in section 2(2).
33. The circumstances in section 2(2) which must be satisfied before the power arises are not simply that there have been significant developments in scientific knowledge about climate change or in European or international law or policy. It must also “*appear to the Secretary of State*” that such developments make it “*appropriate*” to amend the 2050 Target.
34. For the reasons set out above, and as recommended by the CC Committee, the Secretary of State does not yet consider it appropriate to amend the 2050 Target.
35. The exercise of the Secretary of State’s discretion not to amend the 2050 Target at this time is fully consistent with the purposes of the Act. While you assert that the purpose of the Act was “*to ensure the United Kingdom is making a full and proper contribution to the fight against climate change, taking into account its international obligations and the relevant scientific evidence*”, the discretion conferred upon the Secretary of State fully recognises that there are considerable matters of judgment to be made as to what, at any given time, amounts to the most *appropriate* means of pursuing the fight against climate change, including by most effectively building international consensus.
36. Further, while you argue that it is “well established” that “delay can be *ultra vires*”, the authority you cite concerns delay in the performance of a statutory *duty*. Indeed, your argument under Ground (a) as a whole seeks to convert a clear statutory discretion into a binding duty – which would in itself be contrary to Parliament’s intention.
37. It follows that we do not agree with you that the Secretary of State’s decision not to amend the 2050 Target at this time frustrates the legislative purpose of the 2008 Act. To the contrary, such a contention is plainly unarguable.

**Response to ground (b): *irrationality / irrelevant considerations***

38. For the reasons set out above, we do not agree that it is irrational not to amend the 2050 Target at this time. The priority is to focus on the practical steps that can be taken to meet our existing (and world-leading) targets, while simultaneously seeking better understanding of the practical means by which the ultimate aim of reaching net zero emissions may be met.
39. The lynchpin of your argument appears at §60 of your letter, where you assert that “*the rational approach is to determine what is necessary to ensure compliance, and to plan accordingly. The plan must drive technological innovation and not vice versa.*”
40. We do not agree with you that that is the only rational approach that may be taken, if (as you appear to assert) your suggestion is that emissions targets should be set without regard to the availability of the actual or anticipated practical means of achieving it.
41. Your argument assumes that the setting of a new 2050 Target at this time would “*drive technological innovation*” to a greater extent than such innovation is capable of being driven under the present target, and pursuant to all the measures which we have set out in the *Clean Growth Strategy*. With respect, that is a matter of pure assertion on your part. We do not accept it. Rather, we consider that the *Clean Growth Strategy* provides a clear drive to technological innovation, as does the public commitment to legislate for a net zero emissions target in due course.
42. Our approach is consistent not only with a correct understanding of the legal effect of the Paris Agreement, but also with current scientific knowledge. The UK’s current 2050 Target was based on the



IPCC's 4<sup>th</sup> Assessment Report, and was designed to keep the UK on a path consistent with a global 2°C pathway. The CC Committee examined whether the Target remained consistent with that 2°C goal, in light of the more recent 5<sup>th</sup> Assessment Report, and found that it did. The Government looks forward to the publication of the IPCC's 6<sup>th</sup> Assessment report (due in 2021-22) and its three special reports (to be published in 2018 and 2019) which will provide updated information on scientific, technical and socio-economic evidence on climate change.

43. Furthermore, it fully takes into account (insofar as it is necessary to do so):
  - a. the fact that the Paris Agreement aims to limit warming to well below 2°C in order to avoid the adverse effects of climate change, and in line with the precautionary principle;
  - b. the fact that there is not yet any international consensus on what "equity" requires in terms of future NDCs – that being one of the matters to be considered in future international discussions; and
  - c. the UK's continued leadership role (and in particular the need for credibility of that leadership position).
44. We do not agree that the Secretary of State's decision not to amend the 2050 Target at this time is in breach of international law, or of any person's human rights (see Ground (c) below), or in conflict with any finance obligations under Article 4(7) UNFCCC.
45. Finally, we do not agree with your argument that the Secretary of State had regard to an "irrelevant consideration" in accepting the expert advice of the CC Committee. You do not acknowledge that the Secretary of State is bound to take account of such advice before taking any decision to amend the 2050 Target pursuant to section 3(1) of the Act. Although no specific request was made for advice on the 2050 target, that was because it was already apparent that the CC Committee would give advice following the Paris Agreement, not least because it had been bound to report on the fifth carbon budget immediately before the completion of the Paris Agreement. It was therefore wholly appropriate for the CC Committee to update its advice, and to include in its advice consideration of the very question which – on your own argument – the Secretary of State was bound to consider: namely, whether in view of the Paris Agreement, it was appropriate to amend the 2050 Target. The Secretary of State was entitled to consider that advice and to take it into account. In the event, he agreed with it that the 2050 Target should not be amended at this time.
46. Nor was the CC Committee's own report irrational. Your attempt to impugn it now (over a year since it was published) is wholly misconceived. In particular:
  - a. There was no obligation on the CC Committee to refer back to its 2008 report. It reported on the basis of matters as they stood in October 2016.
  - b. It is correct that it is not yet clear what an appropriate limit on carbon emissions should be in order to limit the temperature increase to 1.5°C. The IPCC is due to report on that issue next year, and the Secretary of State will consider that report with care when it is available. However, we note that there is no legal obligation at this time to amend the 2050 Target so as to be consistent with a 1.5°C limit in any event.
  - c. The report was not premised on a current lack of technical ability to reach net zero emissions: at all times, the CC Committee and the Secretary of State have sought to take into account both current and expected technological capabilities (consistently with both the UNFCCC and the Paris Agreement). The position remains that the Secretary of State (like the CC Committee) considers that there should nonetheless be a credible pathway to the achievement of any target, particularly where the effect of an amendment to the 2050 Target would be to place a legal duty on the Secretary of State to achieve it. We do not agree that the development of future technological innovation cannot be sufficiently incentivised absent such an amendment of the 2050 Target, and refer you to the *Clean Growth Strategy* for further details of the action that is being taken to incentivise the development of future technologies.
47. Ground (b) is accordingly unarguable.

**Response to ground (c): Human Rights Act 1998**

48. We disagree with both the factual and the legal premise upon which your proposed Ground (c) is based.

49. First, on the facts, we do not agree that the Secretary of State has failed to take any required step to safeguard present or future generations. The fight against climate change is a global one. The Secretary of State's approach to the specific issue of the 2050 Target is informed by the need to ensure that targets remain credible and are capable of being achieved, amongst other things to ensure that other countries can be persuaded to set similar targets.
50. Secondly, we do not agree that the decision not to amend the 2050 Target at this time amounts to an interference with any identifiable victim's rights, whether under Article 2, Article 8 or Article 1 Protocol 1, whether taken alone or in combination with Article 14 ECHR. You do not identify any interference to which *that decision* gives rise, but only to the effects of *climate change generally* (now and in the future). We do not agree that those two matters can be conflated.
51. Thirdly, you do not identify any jurisprudence of the Strasbourg Court which supports the conclusion that a failure to amend a target for emissions in 2050 – least of all where justified on the grounds set out above – can give rise to an interference with a person's rights under the ECHR. There is none.
52. Fourthly and finally, even if such a decision was capable of giving rise to any interference with protected rights (which it is not), your suggestion that this is not an area where a state would have a wide margin of appreciation is wholly unrealistic. This is quintessentially an area where states, and not courts, must assess the advantages and disadvantages of any particular course of action, not only domestically but as part of an evolving international discussion. There is no basis upon which the court could or would decide that the decision not to amend the 2050 Target at this time is disproportionate.
53. Ground (c) is also unarguable.

### **Conclusion**

54. In the circumstances, we do not consider it necessary or appropriate to take the action you identify at §123 of your letter before claim. Should your clients proceed to bring the proposed claim, it will be vigorously resisted.

### **ADR Proposals**

55. We note that you are open to alternative dispute resolution. We do not currently see any realistic basis upon which such a resolution would be achieved, given your client's stance, but remain open to hearing your proposals.

### **Details of any other Interested Parties**

56. We have not identified any further interested parties.

### **Response to requests for information and documents**

57. Your request for information and documents is disproportionate and is refused. The Secretary of State's position is adequately set out above. We refer you also to the UK Climate Change Risk Assessment 2017 (January 2017) and the *Clean Growth Strategy* (October 2017) for further details of the Government's published position.
58. We further note that at §137 of your letter before claim, you invite the Secretary of State to indicate agreement to a series of generally expressed propositions, many of which are tendentious, and few if any of which are capable of meaningful agreement without significant qualification or contextualisation. We do not consider it is helpful to engage in such an exercise, and refer you to our position as set out above.

### **Aarhus Convention**

59. We agree that any claim you choose to bring would fall within the scope of the Aarhus Convention. We reserve our position as to the appropriate cost caps which would be applicable pending review of the details of your client's financial position which you would be required to provide.

### **Address for further correspondence and service of court documents**

60. Please mark correspondence or court documents for the attention of Sarah Wise and James Barry, Team B5, General Public Law and Planning Litigation, Litigation Group, Government Legal Department, One Kemble Street, London WC2B 4TS. Please ensure you include our reference when writing to us.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'James Barry', written in a cursive style.

**James Barry**  
**For the Treasury Solicitor**

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