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Response to the consultation on the Adaptation Reporting Power in the Climate Change Act 2008

The City of London Law Society ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response relates to Defra's consultation on the Adaptation Reporting Power in the Climate Change Act 2008 and has been prepared by the CLLS Planning and Environment Committee.

1. RESPONSES TO QUESTIONS 1-4 OF THE CONSULTATION

1.1 Generally

1.1.1 There are no sectors which we feel should be included in the list of priority reporting authorities that are not already included in the list at paragraph 4.13 of the Consultation.

1.1.2 We agree that in the main, the criteria for identifying eligible authorities are reasonable. However, we have reviewed in detail, the provisions relating to sectors in which we feel we have some expertise and experience and suggest that the provisions regarding statutory undertakers require some further consideration and clarity of explanation.

1.2 Water Sector

1.2.1 The Consultation makes a distinction between 'relatively small' and 'larger' water and sewerage undertakers (at paragraph 4.41(c)). In the interests of clarity and transparency, we suggest that Defra provides some explanation as to how it will be determined whether an undertaker is small or large.

1.2.2 This is particularly important in light of the proposal that some smaller sewerage/water undertakers (e.g. inset appointees and supply licensees) will be asked to report in conjunction with larger undertakers in their operating area. We consider that this will place an unfair burden upon the larger undertakers who will have the quite significant additional task of collecting data from and liaising with these smaller undertakers and ultimately compiling a more detailed adaptation report. We consider this to be an unreasonable burden to place on what is essentially a private entity, especially where there is no indication as to which undertakers are likely to be affected.

1.3 Energy Sector

1.3.1 We support the recognition by Defra that asking independent electricity distribution network owners to report would place them under a disproportionate administrative burden. However, by asking distribution network owners to report 'in consultation with' these independent distribution networks, the administrative and financial burden merely shifts to distribution network owners who already have the quite significant task of compiling an adaptation report on their own activities.

1.3.2 In addition, it is likely that certain geographical areas will have a greater number of independent distribution networks and thus, this significant additional burden will not be equally distributed between distribution network owners. For example, Scottish Power Energy Networks are responsible for North Wales, Merseyside and Cheshire, which are far more sparsely populated than the areas covered by EDF Energy Networks (London, East England and South East England).

1.4 Ports and Harbour Authorities

1.4.1 The Consultation notes that 15 of the 400 harbour authorities in the UK cover ports handling over 10m tonnes per annum. However, the Consultation indicates that harbour authorities covering only 11 ports will be directed to report on adaptation. No explanation is given for this selection. In the interests of clarity and transparency, we suggest that Defra explains why only 11 of the 15 harbour authorities which handle over 10m tonnes per annum will be required to report and the rationale behind selecting which 11 should report.

2. RESPONSES TO QUESTIONS 7 & 8 OF THE CONSULTATION

2.1 We feel that the Template Direction contained in Annex A of the consultation has been adequately drafted and agree with the majority of its content. We would however suggest that the following (self-explanatory) specific amendments be made to the Template Direction:

2.1.1 The words "for Environment, Food and Rural Affairs" should be added to the first paragraph following the words "The Secretary of State";

2.1.2 The sentence in paragraph 6 should be amended to read, "The report must be submitted to the Secretary of State for Environment, Food and Rural Affairs by [insert date]"; and

2.1.3 In paragraph 9, the word "must" in the first sentence should be replaced with "may" and the word "must" in the second sentence should be replaced with "will need to".

2.2 We consider that once made, all Directions should be published on Defra's website in the interests of transparency.

2.3 We note that the Explanatory Note is not part of the Direction however we feel that this should also be published along with the Direction. In addition, the Explanatory Note does not cover the issue of enforcement (please see our comments in section 5, below), however we feel that it would be appropriate for enforcement issues to be

given a mention in the Explanatory Note given that the Direction and Explanatory Note are likely to be sent to non-lawyers and its significance may be lost.

2.4 There exists a potential for a Direction, once sent to a reporting authority to become 'lost', especially given the scale of many of the authorities to whom the reporting obligation will apply. Defra may consider asking reporting authorities to acknowledge safe receipt of the Direction once made to ensure that the relevant authority is aware of its duties and sanctions for failure to report. Publishing each Direction on Defra's website will assist in this regard.

3. RESPONSE TO QUESTION 13 OF THE CONSULTATION

3.1 The draft Guidance is adequate insofar as it expands upon each of the matters contained in sections 62(1)(a) to (c) of the Climate Change Act 2008 (CCA) which the Secretary of State may direct reporting authorities to report on in chapters 3 to 5 of the Guidance respectively. We note that the Guidance is planned to be updated progressively as new, relevant information comes to light.

3.2 Given the varying functions of reporting authorities within a range of different sectors, and the fact that most, if not all reporting authorities will already have established industry-standard environmental and risk assessment systems, we agree that the Guidance should not prescribe any particular methodology of either assessing risk or of developing a programme of measures.

3.3 However, the Guidance should perhaps clarify what is meant by the requirement in section 63(3)(c) of the CCA and paragraph 1 in Annex A of the draft Guidance to "have regard" to the Guidance in developing risk assessments and programmes for adapting. In particular, will a reporting authority be deemed not to have had regard to the Guidance where it does not specifically address one of the various "Questions to ask yourself" in circumstances where the Secretary of State considers that it should have done?

4. RESPONSE TO QUESTION 14 OF THE CONSULTATION

4.1 We do not have examples of case studies that could be used to support the Guidance. However, we agree that examples or case studies should span all key sectors in which reporting authorities operate.

4.2 Ideally, the Guidance should reiterate that in relation to examples in the web-based directory of case studies from time to time that are specific to a particular industry or type of organisation, that it remains open to each reporting authority to determine the approach it takes in delivering against the Guidance. Such a approach should be based not only on sector-specific issues, but also organisational-specific matters and existing internal practices even if it does belong to that particular industry group, or is an organisation of a similar size or with similar functions as the example given.

5. ENFORCEMENT ISSUES

5.1 We note that section 11 of the draft impact assessment of the use of the reporting power discusses enforcement arrangements (see Annex C, page 116).

5.1.1 Section 11.1 states that “bodies asked to produce reports will have to submit these reports to the Secretary of State within a given time frame, expected to be on average 12 months”; see also sections 62 and 63 of the CCA;

5.1.2 Section 11.4 states that if reports by reporting authorities are of an "insufficient standard", the following steps may be taken:

(a) the Secretary of State will publish a list of reporting authorities who are not providing satisfactory reports;

(b) the Secretary of State will direct reporting authorities to report again; and

(c) "the reporting authority may be taken to court".

5.2 We note that although, as indicated above, a reporting authority may be taken to court if it produces an unsatisfactory report, there is no provision stating that it may be taken to court if it fails to produce a report by the deadline.

5.3 We suggest, therefore, that a provision stating that a reporting authority may be taken to court if it fails to produce a report by the deadline should be added on the basis that it would seem to be a more serious infraction entirely to fail to produce a report than to produce an unsatisfactory one.

5.4 In addition, we question whether the draft impact assessment is the appropriate place in which to specify that a reporting authority may be taken to court. A more appropriate place would seem to be the Direction.

6. CONCLUSION

6.1 In conclusion, we suggest Defra considers:

6.2 providing an explanation as to what will constitute a 'larger' and a 'smaller' water/sewerage undertaker;

6.3 whether asking smaller sewerage/water undertakers to report in conjunction with larger undertakers places an unfair additional burden on larger undertakers;

6.4 whether asking independent electricity distribution network owners to report in consultation with distribution network owners places an unfair additional burden on distribution network owners;

6.5 explaining why only 11 of the 15 harbour authorities identified as handling over 10m tonnes per annum will be required to report and the rationale behind selecting the 11 which will be directed report;

6.6 whether similar considerations to those detailed above should be given in relation to other sectors (e.g. the emergency services) to ensure that they are as clear, transparent and fair as possible;

6.7 various minor amendments to the draft Direction and accompanying note – to include specific reference to the possibility of enforcement proceedings for both failure to report and producing an unsatisfactory report;

6.8 clarifying what is meant by the requirement in section 63(3)(c) of the CCA and paragraph 1 in Annex A of the draft Guidance to "have regard" to the Guidance in developing risk assessments and programmes for adapting; and

6.9 reiterate in the Guidance that it remains open to each reporting authority to determine the approach it takes in delivering against the Guidance.

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