

Chapter 22

Climate Law in the United Kingdom

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Abstract There is no single legislative source for the United Kingdom's legal response to climate change. Initial measures to tax large energy users, enable participation in the European Union Emissions Trading Scheme and encourage renewable electricity generation have subsequently been joined by the Climate Change Acts operating at UK and Scottish levels. These Acts set demanding targets for reductions in greenhouse gas emissions and break new and uncertain legal ground in making these legally binding on Ministers. The targets are supported by detailed reporting mechanisms, to Parliament and the public, that are intended to be the main route to enforcement and by provisions enabling many detailed changes to the law to allow progress towards the targets. The separate legislation in Scotland highlights the difficulties that dealing with pervasive issues, especially those with an European Union and international dimension, pose for by sub-national governments with distinct political ambitions but limited jurisdiction.

22.1 Introduction

The Climate Change Acts¹ passed by the United Kingdom and Scottish Parliaments in 2008 and 2009 are the most obvious feature of the response to climate change in the United Kingdom, but this legislation came several years after the first substantial legal measures endeavouring to achieve a reduction in greenhouse gas emissions. The Acts are innovative in establishing legally bind-

¹ Climate Change Act 2008; Climate Change (Scotland) Act 2009.

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ing targets for emissions reductions, but the full legal impact of these provisions is uncertain. More important in practical terms are the substantial framework that the Acts create for ensuring that progress towards the targets is reported, to Parliament and the public, and the policy measures that contribute to their achievement. The role of the devolved administrations in Scotland, Wales and Northern Ireland, each with distinct legal powers and policy goals, adds further complexity to the picture.

In 1989, Mrs. Thatcher's speech at the United Nations² placed the United Kingdom at the forefront of raising the issue of climate change. The following years produced significant policy documents,³ and significant reductions in emissions, although these were the result much less of environmental concerns than of the economic tides that led to the decline of energy-intensive heavy industry and the 'dash for gas' as the newly privatised electricity industry built new gas-powered generating stations, able to out-compete the ageing coal-fired plants.⁴ Electricity generation was the focus of the strongest initial measures, aimed at encouraging the use of renewable sources, whilst the United Kingdom was a pioneer in emissions taxation and trading, introducing a domestic scheme in advance of the European Union (EU) Emissions Trading Scheme (ETS).

The growing international pressure on climate change during the first decade of this century, supported by the Stern Review's⁵ conclusions on the economic case for action, led to the proposal for a Climate Change Bill which was thoroughly scrutinised in the UK Parliament⁶ before its enactment in 2008. A separate Climate Change (Scotland) Act followed in 2009, called for both by the division of legal responsibilities following the devolution settlement at the very end of last century and by the political importance of the issue for Scotland. The comparatively high profile of climate issues in Scotland is driven largely by the existing wealth of fossil fuel resources, the exploitation of which is a major industrial activity, and the outstanding potential for renewable energy generation: wind, wave and tidal, in addition to some hydro-electric potential beyond that already utilised.⁷ Such factors

² Margaret Thatcher, Prime Minister, speech at the United Nations General Assembly on 8 November 1989, available at: <http://www.margaretthatcher.org/document/107817> (last accessed on 1 May 2012).

³ Climate Change – The UK Programme: United Kingdom's First Report under the Framework Convention on Climate Change (Cm 2427, 1994).

⁴ Emissions figures going back to 1990 are available through the UK Emissions Statistics, Department of Energy and Climate Change, "UK Emissions Statistics", 29 March 2012, available at: http://www.decc.gov.uk/en/content/cms/statistics/climate_stats/gg_emissions/uk_emissions/uk_emissions.aspx (last accessed on 1 May 2012).

⁵ Nicholas Stern, "The Economics of Climate Change: The Stern Review", 2007, available at: http://www.hm-treasury.gov.uk/stern_review_report.htm (last accessed on 8 May 2012).

⁶ See, for example the First Report of the Joint Committee on the Draft Climate Change Bill (2006–2007 HL 170-I/HC 542-I), which sets out the policy background in paras. 7–14.

⁷ Garrad Hassan et al., "Scotland's Renewable Resource 2001", 28 June 2005, available at: <http://www.scotland.gov.uk/Publications/2003/09/18270/27258> (last accessed on 8 May 2012).

have made responding to climate change, and the economic opportunities this presents, an important area of policy and achieving a 'greener Scotland'⁸ was one of the strategic objectives set out by the Scottish National Party government that took office after the Scottish election in 2007.⁹ In Northern Ireland there has been much less support for policy initiatives in this area, whilst in Wales the focus has been on a more all-encompassing approach to sustainability.

22.2 Tax, Trading and Turbines

Substantial legal measures were introduced in relation to energy generation and use prior to the more general climate change legislation.¹⁰ These fall into three categories: taxation, emissions trading and measures to promote the use of renewable sources for electricity generation. Nevertheless, these are just the main elements among a large number of ever-changing other initiatives, including incentives for improved insulation of homes and the fitting of carbon-efficient heating systems,¹¹ higher building standards¹² and support for private and public sector bodies to review and reduce their emissions.¹³ The changing regulation of the energy industry has also had a significant impact on how such issues are addressed.¹⁴ The overwhelming impression is of the sheer volume and complexity of the financial measures seeking to encourage reduced emissions and to ensure that the various schemes and the EU ETS work together.

⁸ Defined as "improv[ing] Scotland's natural and built environment and the sustainable use and enjoyment of it"; *Scottish Government, Principles and Priorities: The Government's Programme for Scotland* (2007).

⁹ Initially as a minority government but winning an overall majority in the 2011 election, an outcome that was a surprise in view of a system of proportional representation that was thought unlikely ever to return a single party majority.

¹⁰ For a useful chronology and summary, see Alex Bowen and James Rydge, "Climate-Change Policy in the United Kingdom", OECD Economics Department Working Papers, No. 886, 2011, available at: <http://dx.doi.org/10.1787/5kg6qdx6b5q6-en> (last accessed on 8 May 2012), at 16–18.

¹¹ This area has been marked by a continuous revision of often fairly short-lived schemes. A current overview is available at: <http://www.direct.gov.uk/en/Environmentandgreenerliving/Energyandwatersaving/index.htm> (last accessed on 8 May 2012).

¹² See, for example, Scottish Government, "Progress Report on the Low Carbon Building Standards Strategy for Scotland", 2011, available at: <http://www.scotland.gov.uk/Resource/Doc/217736/0113638.pdf> (last accessed on 8 May 2012).

¹³ For example through the Carbon Trust; see <http://www.carbontrust.co.uk> (last accessed on 8 May 2012).

¹⁴ See Department of Energy and Climate Change, "Ofgem Final Report", 2011, available at: <http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/energy-markets/2151-ofgem-review-final-report.pdf> (last accessed on 8 May 2012), part 1.

The most significant tax measure¹⁵ is the Climate Change Levy, introduced in 2001.¹⁶ This is a tax on energy use in industry, commerce and the public sector, charged on the supplier.¹⁷ The detailed exemptions and reliefs include exemptions for fuel supplied to approved combined heat and power plants and more significantly for those who enter a Climate Change Agreement.¹⁸ These are agreements reached with operators in certain energy-intensive industries, either on a sectoral or individual basis, whereby a discount on the climate change levy¹⁹ is granted in exchange for agreeing to and meeting energy efficiency or carbon saving targets. A further tax measure is the CRC Energy Efficiency Scheme, initially introduced as predominantly a trading scheme for operators at a level below that captured by the EU ETS, but now with revenues being directed to the Treasury rather than being returned to participants on the basis of their performance.²⁰ A feature of the scheme is a published league table of performance by participants.²¹

In relation to trading, the UK introduced a voluntary scheme in advance of the EU ETS coming into effect, the first national scheme to apply across all sectors of industry. This scheme began with the first auction of allowances in 2002 and although closed to new participants in 2006 some trading can still continue. Giving industry and government experience of a trading approach was as much part of the purpose of the scheme as achieving direct emissions reductions and some success was achieved on both counts, although it was considered that some of the emission targets were undemanding.²² Trading is an element of the CRC Energy Efficiency Scheme, but for large users of energy it is now the EU ETS that provides the regulatory framework. The potentially distinctive UK contribution is the proposal for a

¹⁵ The duty on petrol is a further relevant tax, but plans to increase this at a rate higher than inflation have proved very vulnerable to public opposition at times of high prices and economic gloom (*Budget 2011*, (HM Treasury, 2011; 2010–2011 HC 836), para. 2.131). Even the already postponed increase in line with inflation was deferred from January to August 2012 (*Autumn Statement 2011* (HM Treasury, 2011; Cm 8231), para. 1.132).

¹⁶ Finance Act 2000, s.30 and Scheds 6 & 7.

¹⁷ For an overview see HM Revenue and Customs, “A general guide to Climate Change Levy”, November 2011, Notice CCL1, available at: http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageExcise_ShowContent&id=HMCE_CL_000290&propertyType=document#downloadopt (last accessed on 8 May 2012).

¹⁸ An overview is available at: <http://www.decc.gov.uk/en/content/cms/emissions/ccas/ccas.aspx> (last accessed on 8 May 2012).

¹⁹ Over time this has varied between 65 and 80%.

²⁰ This scheme has been undergoing considerable change since its inception as the Carbon Reduction Commitment and its precise future shape remains unclear; see: http://www.decc.gov.uk/en/content/cms/emissions/crc_efficiency/crc_efficiency.aspx (last accessed on 8 May 2012).

²¹ The 2010/2011 CRC Performance League Table is available at: <http://crc.environment-agency.gov.uk/ppit/web/plt/public/2010-11/CRCPerformanceLeagueTable20102011> (last accessed on 8 May 2012).

²² National Audit Office, *The UK Emissions Trading Scheme: A New Way to Combat Climate Change* (2003–2004 HC 517).

carbon price floor starting in 2013, imposing additional charges if the price of EU allowances is below the set level (as at the time of writing in January 2012). This has proved a controversial proposal.²³

The third major area of activity has been in relation to the promotion of renewable sources of energy, particularly for electricity generation. Central to this has been the Renewables Obligation, a requirement on electricity generators to produce a certain proportion of their supply from renewable sources, a proportion that increased over the years.²⁴ The operation of the scheme, which operates separately in Scotland and Northern Ireland,²⁵ has more recently been used to give specific encouragement to particular generating methods by varying the amount of credit given to electricity from different sources, especially since the early response has been dominated by on-shore wind turbines, as the most mature, readily accessible and cost-effective technology. The scheme again involves an element of trading for generators who cannot provide from their own activity a sufficient number of certificates.²⁶ As the background to the recent litigation over the withdrawal of some support for small-scale solar generation has shown,²⁷ in a field that is developing rapidly in technology and in the commercial and customer response to opportunities it presents, it has proved difficult to find the level and duration of support that provides effective incentives for low-carbon generation without incurring disproportionate costs for the state or distorting the market too much in undesired ways.

22.3 Climate Change Acts

The host of detailed measures noted above (and others) are not directly affected by the Climate Change Acts passed by the UK and Scottish Parliaments which focus on the issue of national targets. The two Acts, the Climate Change Act 2008 (“2008 Act”) and the Climate Change (Scotland) Act 2009 (“Scottish Act”) share many features but also have some significant differences in their mechanisms and in the targets set. At the core of both Acts is the setting of targets for reductions in greenhouse gas emissions,²⁸ targets which are expressed in the form of a legal duty on

²³ Energy and Climate Change Select Committee, *The EU Emissions Trading System* (10th Report of 2010–2012 HC 1476).

²⁴ Rising from 3% in 2002 to over 15% for 2015–2016 (the Northern Ireland figure is lower at just over 6%).

²⁵ Renewables Obligation Order 2009, SI 2009/785; Renewables Obligation (Scotland) Order 2009, SSI 2009/140; Renewables Obligation Order (Northern Ireland) 2009, SR 2009/154.

²⁶ Ofgem, *Renewables Obligation: Guidance for licensed electricity suppliers (GB and NI)* (63/11, 2011).

²⁷ *Secretary of State for Energy and Climate Change v. Friends of the Earth* [2012] EWCA Civ 28.

²⁸ The Acts cover six gases: carbon dioxide, methane and nitrous oxide with baselines in 1990 and hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride with baselines in 1995; 2008 Act, ss.24–25; Scottish Act, ss.10–11.

Ministers to achieve the specified reductions. These targets are set at an 80% reduction from the 1990 baseline by 2050,²⁹ with interim targets for 2020 of 34% for the UK and 42% for Scotland.³⁰ The more demanding target for Scotland must be reviewed and made no lower if the EU increases its commitment by adopting measures to reduce emissions by 2020 by at least 30%.³¹ The targets are based on the net level of emissions produced, taking account of the removal of emissions from the atmosphere, by land-use, forestry, etc., as well as any international credits permitted.³²

There are no specific sanctions provided for a failure to meet these targets and their precise legal status is unclear. The imposition of explicit duties on Ministers to achieve a specific target is an innovation in British law and there are arguments that these provisions should be interpreted in line with previous target-setting legislation which merely requires Ministers to make reasonable endeavours to see that they are achieved. On the other hand the distinctive and absolute way in which the duties are expressed³³ can be viewed as demanding that the duties are given full legal force, so that any failure to achieve them does amount to a breach of duty, although who might be able to enforce this, and how, remains open to argument.³⁴ In any event, the embedding of such long-term goals in legislation, determining policy priorities for decades to come, is remarkable and has led to suggestions that the climate change legislation should be seen as having “constitutional significance”.³⁵

The key targets for 2020 and 2050 are supported by shorter-term targets, set well in advance, but there is no legal obligation on Ministers to ensure that these are met. In the 2008 Act these operate on the basis of 5-year budgets,³⁶ whereas for Scotland the targets are set on an annual basis.³⁷ Both Acts specify the schedule for setting the targets and parameters within which they must be determined, aiming to ensure that

²⁹ 2008 Act, s.1; Scottish Act, s.1; for some gases the baseline is 1995 (see previous note).

³⁰ 2008 Act, s.5(1)(a), as amended by Climate Change Act 2008 (2020 Target, Credit Limit and Definitions) Order 2009, SI 2009/1258, art.2; Scottish Act, s.2.

³¹ Scottish Act, s.2(9)–(14).

³² 2008 Act, ss.11, 26–31; Scottish Act, ss.13–23. In both cases there is provision to limit the amount of credits under international trading schemes that can be used in calculating the net emissions.

³³ “It is the duty of the Secretary of State to ensure...” (2008 Act, s.1(1)); “The Scottish Ministers must ensure...” (Scottish Act s.1(1)).

³⁴ Colin T. Reid, “A New Sort of Duty? The Significance of ‘Outcome’ Duties in the Climate Change and Child Poverty Acts”, *Public Law* (2012), 748.

³⁵ Lord Rooker in the House of Lords during the passage of the 2008 Act; HL Deb vol.696 col.1209 (27 November 2007); Aileen McHarg, “Climate Change Constitutionalism? Lessons from the United Kingdom”, 2 *Climate Law* (2011), 469.

³⁶ 2008 Act, s.4; Carbon Budgets Order 2009, SI 2009/1259; Carbon Budget Order 2011, SI 2011/1603. Limited amounts can be carried forward and back between budgets; 2009 Act, s.17.

³⁷ Scottish Act, s.3; Climate Change (Annual Targets) (Scotland) Order 2010, SSI 2010/359; Climate Change (Annual Targets) (Scotland) Order 2011, SSI 2011/353.

the legal targets for 2020 and 2050 are achieved.³⁸ The setting of the initial series of targets for Scotland was disputed, with the relevant parliamentary committee and the Parliament itself rejecting the initial proposals as being insufficiently demanding during the first few years and considerable adjustments being required before the targets were finally approved.³⁹

The main mechanism for securing that all the targets are met, and the only one for the targets other than the legally binding ones set for 2020 and 2050, is a detailed scheme of reporting obligations. Under the UK Act, the Secretary of State must prepare proposals and policies to meet the carbon budgets,⁴⁰ and report to Parliament each year on the level of emissions.⁴¹ At the end of each budgetary period, a report must be prepared on the total net emissions, providing an explanation of the reasons if the budget has not been met and proposals to compensate in future budget periods for any excess emissions.⁴² The Scottish Ministers must report to Parliament their proposals and policies for meeting the annual targets⁴³ and each year must report on the level of emissions. If a target has not been met, then a report setting out proposals and policies to compensate in future years for the excess emissions must be made. Further reports are required in relation to the 2020 and 2050 targets.⁴⁴ Additional reports in Scotland are required on how the exercise of ministerial functions relating to electricity generation has affected net emissions⁴⁵ and on the impact of budget proposals on emissions.⁴⁶ This latter analysis is recognised as being in part experimental and endeavours to take account of direct, indirect and induced emissions.⁴⁷

These reporting obligations are supported by a major role for the independent Committee on Climate Change.⁴⁸ This body serves a range of advisory functions, most notably being required to advise on the setting of targets and to make its own

³⁸ 2008 Act, ss.4–10; Scottish Act, ss.3–7.

³⁹ Climate Change (Annual Targets) (Scotland) Order 2010, SSI 2010/359. See the Official Report of the Transport, Infrastructure and Climate Change Committee for 18 May and 5 October 2010 and of the Parliament for 27 May and 7 October 2010.

⁴⁰ 2008 Act, ss.13–14.

⁴¹ *Ibid.*, s.16.

⁴² *Ibid.*, ss.16, 18–20. A final statement is required after 2050.

⁴³ The first report was published in March 2011: *Low Carbon Scotland: Meeting the Emissions Reduction Targets 2010–2022: The Report on Proposals and Policies* (Scottish Government, 2011).

⁴⁴ Scottish Act, ss.33–43.

⁴⁵ *Ibid.*, s.38.

⁴⁶ *Ibid.*, s.94.

⁴⁷ I.e. those generated by direct recipients of government funding (21% of the total in 2009), those arising from supplying goods and services to such recipients (51%) and those resulting from the spending of employees engaged in the previous activities (28%); *Carbon assessment of the 2010–2011 Draft Budget* (Scottish Government, 2009).

⁴⁸ 2008 Act, s.32 and Sched.1. The Scottish Act makes provision for a separate Scottish Committee, but at present the one body operates under both Acts; Scottish Act, ss.24–25.

annual reports on progress towards the targets,⁴⁹ and what further efforts might be necessary to ensure that they are met.⁵⁰ The Ministers must respond to these reports and provide reasons for departing from the advice given on some issues.⁵¹ The various reports produced by the Committee, not just the national progress reports but further papers on adaptation and particular sectors,⁵² provide a wealth of well-researched and closely argued material on the issue of climate change, providing thorough scrutiny of the governments' progress and keeping the issue in the public eye and on the political agenda, so that it is impossible for the obligations set under the Acts to fall out of sight, even as other political concerns and goals emerge as competing priorities.

The main structures created by the Climate Change Acts are supported by a number of other measures. The UK Act requires reports on the impact of and adaptation to climate change, again with advice from the Committee on Climate Change, and confers powers to require such reports from a wide range of public authorities.⁵³ Further reports are required on improving the efficiency and sustainability of government buildings⁵⁴ and Ministers are bound to ensure that information on greenhouse gas emissions are included in annual company reports, or to explain why they have decided not to.⁵⁵ The Act also provides powers to introduce trading schemes relating to greenhouse gas emissions⁵⁶ and charging schemes for single use carrier bags.⁵⁷

The Scottish Act contains a wider range of provisions to assist in turning the Act's targets from goals into achievements. One of the most significant of these is the duty imposed on all public authorities to act in the way 'best calculated' to contribute to the delivery of the climate change targets and to deliver the adaptation strategy, as well as to act in the way they consider most sustainable. These duties are supported by the issue of guidance, the imposition of reporting requirements and the establishment of

⁴⁹The latest Reports are not wholly encouraging, concluding for the UK that "A step change in the pace of emissions reduction is still required." Committee on Climate Change, *Meeting Carbon Budgets – 3rd Progress Report to Parliament* (2011), at 39. For Scotland, the 2020 target is likely to be missed without a tightening of the EU ETS cap or further measures beyond existing proposals; Committee on Climate Change, *Reducing Emissions in Scotland: 1st Progress Report* (2012), at 35.

⁵⁰2008 Act, ss.33–36; Scottish Act, ss.24–32

⁵¹2008 Act, s.37; Scottish Act, s.29.

⁵²Reports by the Committee on Climate Change are available at: <http://www.theccc.org.uk/reports> (last accessed on 8 May 2012).

⁵³2008 Act ss.56–70.

⁵⁴*Ibid.*, s.86.

⁵⁵*Ibid.*, s.85

⁵⁶2008 Act, ss.44–55; these provisions provide the authority for the CRC Energy Efficiency Scheme (see above; CRC Energy Efficiency Scheme Order 2010, SI 2010/768).

⁵⁷2008 Act, s.77; a scheme has been introduced in Wales (Single Use Carrier Bags Charge (Wales) Regulations 2010, SI 2010/2880) and separate legislation for this exists in Northern Ireland (Single Use Carrier Bags Act (Northern Ireland) 2011).

monitoring mechanisms with powers of investigation.⁵⁸ A high level of energy performance is also demanded of government buildings.⁵⁹ Ministers must publish a plan for the promotion of energy efficiency, including the use of renewable sources of energy, and are also required to promote the use of renewable heat and to require the assessment of energy performance of buildings.⁶⁰ Other requirements include the preparation of adaptation programmes in response to the reports on the impact and risks of climate change prepared by the UK government.⁶¹ A public engagement strategy is also required,⁶² reflecting the importance of engaging wider society in the changes needed to meet the ambitious targets that have been set.

Net emissions can be considerably affected by land use and the Scottish Act requires Ministers to produce a land use strategy,⁶³ setting out objectives for sustainable land use that contribute to achieving the emission reduction targets set in the Act, the objectives set out in the adaptation programme and sustainable development. The legal duties of the Forestry Commission (the body responsible for regulating forestry and directly in charge of large areas of woodland) may be altered in order to assist in the reduction of net emissions or for other purposes in relation to climate change⁶⁴ and there is also power to alter the dates when muirburn (the burning of heather and grass on moorland to rejuvenate the vegetation) can lawfully take place to ensure that this land management tool can be used in a way that is beneficial in terms of net emissions.⁶⁵ Further measures adjust the rules of land law to enable obligations aimed at reducing greenhouse gas emissions to become “real burdens”, adding them to the limited class of obligations that automatically bind successive owners of the land.⁶⁶ The installation of insulation is included within the range of maintenance activities which can go ahead in tenement buildings even without all owners’ consent,⁶⁷ and planning rules are relaxed to permit micro-generation equipment to be installed without the need for express planning permission.⁶⁸ Discounts will also be available on local taxes where premises have undergone energy efficiency improvements.⁶⁹

⁵⁸ Scottish Act, ss.44–52; *Public Bodies Climate Change Duties: Putting Them Into Practice – Guidance Required by Part 4 of the Climate Change (Scotland) Act 2009* (Scottish Government, 2011).

⁵⁹ Scottish Act, s.75.

⁶⁰ *Ibid.*, ss.60–64.

⁶¹ *Ibid.*, ss.53–56; *Scotland’s Climate Change Adaptation Framework* (Scottish Government, 2009). The UK reports are required under the Climate Change Act 2008, s.56.

⁶² Scottish Act 2009, s.91; *Low Carbon Scotland: Public Engagement Strategy* (Scottish Government, 2010).

⁶³ Scottish Act, s.57; *Getting the best from our land – A land use strategy for Scotland* (Scottish Government, 2011).

⁶⁴ Scottish Act, s.59.

⁶⁵ *Ibid.*, s.58.

⁶⁶ *Ibid.*, s.68, adding s.46A to the Title Conditions (Scotland) Act 2003.

⁶⁷ Scottish Act, s.69, amending the Tenements (Scotland) Act 2004.

⁶⁸ *Ibid.*, ss.70–71, requiring the making of regulations under the Town and Country Planning (Scotland) Act 1997, ss.30–31.

⁶⁹ Scottish Act, ss.65–67.

Waste is a further issue addressed in the Act, encouraging the reduction of waste and the promotion of reuse and recycling which in turn should reduce emissions.⁷⁰ These measures all depend on the introduction of further regulations which may never be made if the voluntary measures which are already evident in some of these areas show adequate progress. The matters covered include requiring specified people to prepare and comply with plans for the prevention, reduction, management, recycling, use and disposal of waste, for example, construction site waste management plans, and to report on the waste produced.⁷¹ Further regulations may require the provision of recycling facilities at certain sites, such as supermarkets and events, for instance, sporting or cultural events, and the use of certain percentages of recycled materials, as well as setting targets for the reduction of packaging, establishing deposit and return schemes and charging for the supply of carrier bags.⁷²

The listing of these detailed requirements serves to emphasise the fact that the legislative response to climate change is far-reaching and complex. The national targets and reporting requirements under the Climate Change Acts may attract the most attention, but they are only part of the overall picture. Much of the hard work of effecting emission reductions is done through the energy-related measures noted earlier, most of which pre-date the Climate Change Acts, rather than under the Acts themselves. Moreover, a host of other provisions, including minor adjustments to the legal regimes from land law to waste is also needed if a comprehensive policy is to be delivered. It remains to be seen how effective the statutory targets and reporting requirements are in achieving the significant reductions in emissions that are required, and in forcing greater efforts if⁷³ it appears that the targets might be missed, whilst there will doubtless be many other detailed measures needed to ensure that other legal frameworks contribute to, or at least do not obstruct, the steps required to meet the targets.

22.4 Impact of Devolution

For the UK, the complexities of tackling such a pervasive issue as climate change have been exacerbated by the impact of devolution. The Scotland Act 1998 created a Scottish Parliament and Government⁷⁴ that have control over all matters that have

⁷⁰ A comprehensive approach to waste has been put forward in *Scotland's Zero Waste Plan* (Scottish Government, 2010).

⁷¹ Waste Information (Scotland) Regulations 2010, SSI 2010 No.435.

⁷² Scottish Act, ss.78–90.

⁷³ Perhaps not “if” but “when”; see *supra*, note 49.

⁷⁴ The Scotland Act 1998 refers to the “Scottish Executive” but when the Scottish National Party won power in 2007, it started to refer to the “Scottish Government” and this usage is now virtually universal and is granted legal recognition in the Scotland Act 2012, s.12.

not been reserved to the UK.⁷⁵ There are devolved assemblies and governments in Wales and Northern Ireland, but the details of their structures and the extent of powers devolved are different in each case,⁷⁶ and in all cases the original settlement has been or is being significantly changed.⁷⁷ No new arrangements have been made for England, so that the UK Parliament and Government on some matters act for the UK as a whole, on others for England only⁷⁸ and where the extent of devolved powers do not coincide, for England and varying combinations of the other constituent nations. Ultimately, though, the UK Parliament retains its authority to legislate on any matter, even those within devolved competence, as well as to amend, or even repeal, the legislation creating the devolved structures.

The division of powers leaves the devolved administrations in a position where they have significant constraints on their ability to respond to climate change. In the first place, it is the UK authorities alone which operate on the international field, including any matters relating to the EU. Therefore the devolved administrations have no direct role in negotiating the successor to or prolongation of the Kyoto Protocol, nor in any matter of EU policy. Yet such issues will have a massive impact on what is happening, particularly for Scotland where if the major sources of greenhouse gases under the EU ETS achieve only a limited reduction in emissions because the EU target remains modest, the burden of achieving the statutory target of 42% reductions by 2020 will fall even more heavily on those areas of activity outwith that trading scheme.⁷⁹

A second constraint is imposed by the extent of the powers reserved to the UK authorities. Many of the potential levers for implementing climate policy are in the hands of the UK, not the devolved, authorities. The tax and trading measures described above are matters for the UK government alone. Even for Scotland, which has the most devolved power, energy is a reserved matter – although significant

⁷⁵ See generally, Alan Page, Colin Reid and Andrea Ross, *A Guide to the Scotland Act 1998* (Edinburgh: Butterworths, 1999); Chris M.G. Himsforth and Colin R. Munro, *The Scotland Act 1998*, 2nd edition (Edinburgh: W. Green, 2000); Jean McFadden and Mark Lazarowicz, *The Scottish Parliament: An Introduction*, 4th edition (London: Bloomsbury Professional, 2010).

⁷⁶ Government of Wales Act 1998, as significantly amended by Government of Wales Act 2006; Northern Ireland Acts 1998, 2000, 2006 and 2009, Northern Ireland (St. Andrews Agreement Act) 2006.

⁷⁷ See previous note and the Scotland Act 2012, to say nothing of the contested plans for a referendum on Scottish independence; *Your Scotland – Your Referendum – A Consultation Document* (Scottish Government, 2012).

⁷⁸ The anomaly that in the UK Parliament Members of Parliament from outside England can still vote on matters affecting England alone, even when for their own constituencies the matter is the responsibility of the devolved authorities, generates considerable debate, and is known as the “West Lothian question” after the constituency of Tam Dalyell MP who raised it tenaciously during the debates on the earlier attempts at devolution legislation in the late 1970s.

⁷⁹ Committee on Climate Change, *Reducing Emissions in Scotland: 1st Progress Report* (2012), at 35.

powers in this area have been transferred to the Scottish Ministers through “executive devolution,”⁸⁰ – limiting the scope for action on this central issue. Other less obvious constraints stand in the way of possible measures to reduce emissions. Transport is a large contributor to greenhouse gas emissions and reducing speed limits is one measure that could be introduced to reduce these, but this is also a reserved matter outwith Scotland’s control,⁸¹ although the Scotland Act 2012 does transfer to Scotland control over some speed limits.⁸² Further reservations in the devolution legislation may constrain other initiatives that seek to take effect by influencing consumer and commercial behaviour, e.g. the reservation of ‘consumer affairs’, including advertising, and ‘competition’.⁸³

Nevertheless, as shown by the account of the Climate Change (Scotland) Act 2009 given above, there is plenty of scope within devolved competence for legislative initiative and the development of distinct policies. Indeed, there have been marked differences between the devolved administrations in their response to climate change, driven by their different factual and economic situations and political aims. In Northern Ireland, which is disproportionately reliant on comparatively high-carbon electricity generation, the authorities have been opposed to taking strong climate change measures,⁸⁴ and the current target is for an emissions reduction of only 25% from 1990 levels by 2025.⁸⁵ By contrast, Scotland has set very ambitious targets – requiring a 42% reduction by 2020 as opposed to the 34% reduction for the UK as a whole⁸⁶ – and sees the combination of the existing industrial expertise in the energy industry and Scotland’s exceptional potential for renewable energy gen-

⁸⁰ Under the Scotland Act 1998, s.63 the UK Government can authorise Scottish Ministers to act on their behalf in exercising powers within reserved areas. For example, the Scottish Ministers decide on approval for new electricity generating stations and transmission lines and on the renewables obligation. Nevertheless an amendment to the devolution legislation was needed even to give the Scottish Environment Protection Agency the competence to impose conditions in relation to energy efficiency which is a required element in authorisations under the Pollution Prevention and Control regime introduced by EU legislation; Scotland Act 1998 (Transfer of Functions to the Scottish Ministers, etc.) Order 2008, SI 2008/1776; Pollution Prevention and Control (Scotland) Amendment Regulations 2009, SSI 2009/336.

⁸¹ Scotland Act 1998, Sched.5 Part II Section E1.

⁸² Scotland Act 2012, ss.21–22.

⁸³ Scotland Act 1998, Sched.5 Part II Sections C3 and C7.

⁸⁴ One Minister blocked an advertising campaign encouraging energy conservation; *BBC News*, “Quit Call Over Blocked Green Act”, 9 February 2009, available at: http://news.bbc.co.uk/1/hi/northern_ireland/7878399.stm (last accessed on 8 May 2012).

⁸⁵ Cross-Departmental Working Group on Greenhouse Gas Emissions, *Northern Ireland Greenhouse Gas Emissions Reduction Action Plan* (2011), available at: http://www.doeni.gov.uk/northern_ireland_action_plan_on_greenhouse_gas_emissions_reductions.pdf (last accessed on 8 May 2012). The Committee on Climate Change has reported on the potential for greater reductions and for specific climate change legislation; *The Appropriateness of a Northern Ireland Climate Change Act* (2011).

⁸⁶ See *supra*, note 30.

eration as offering both environmental and economic gains on a substantial scale.⁸⁷ In Wales, which until recently has had more limited legislative competence, again there is a strong commitment to emissions reduction,⁸⁸ but the focus has been on a more holistic approach to sustainability rather than concentrating specifically on climate change.⁸⁹

22.5 Conclusion

The introduction of legally binding targets for reductions in greenhouse gas emissions is the highlight of the UK's legal response to climate change. Yet their precise status is unclear and the emphasis will be on reporting requirements and political and public pressure rather than the law in order to ensure that the targets are met. At the same time, much of the work of achieving these targets is achieved through energy legislation which does not directly derive from the Climate Change Acts, whilst a host of other lesser measures contribute to the overall goal. That fragmentation is exacerbated by the effects of devolution, which both enables the development and implementation of distinct policies, but can obstruct the adoption of a holistic approach. As the decade continues, the emergence from economic recession and the approach of the 2020 target date will put increasing pressure on meeting the targets, and it is then that we shall see how powerful and effective the legislation really is.

⁸⁷ See, for example, the *10 Energy Pledges* announced in 2009 as part of the *Greener Deal for Scotland*, available at: <http://www.scotland.gov.uk/Topics/Business-Industry/Energy/Action/economic-recovery> (last accessed on 8 May 2012).

⁸⁸ *Energy Wales: A Low Carbon Transition* (2012), available at <http://wales.gov.uk/docs/desh/publications/120314energywalesen.pdf> (last accessed on 24 May 2012). The aim is for a 40% reduction from 1990 levels by 2020 from areas within devolved responsibility (by contrast, the Scottish target is for all emissions in Scotland). The Welsh Government, "Our Targets", 17 January 2012, available at: <http://wales.gov.uk/topics/environmentcountryside/climatechange/emissions/targets/?lang=en> (last accessed on 8 May 2012).

⁸⁹ *One Wales: One Planet – A Welsh Government Discussion Paper – Sustainable Development Bill* (2011), also available at: <http://wales.gov.uk/docs/desh/publications/111201susdevdiscussionen.pdf> (last accessed on 8 May 2012).