# **Centre for Law & the Environment UCC**

# **Digital Badge in Climate Law and Governance for Engaged Citizenship**

**2020/21**

**Seminar 2**

**Recommended Advance Preparation for class on 25 November 2020**

In advance of our second online class, which will take place on Wednesday, 25 November 2020 from 6-8pm, it would be helpful for you to prepare the following introductory materials:

Áine Ryall, Opening Statement to Joint Oireachtas Committee on Climate Action, 15 October 2020. Available [here](https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_climate_action/submissions/2020/2020-10-15_opening-statement-dr-aine-ryall-senior-lecturer-school-of-law-university-college-cork_en.pdf).

Selected Extracts from the Joint Oireachtas Committee Session on the [Climate Action and Low Carbon Development (Amendment) Bill 2020](https://www.gov.ie/en/publication/984d2-climate-action-and-low-carbon-development-amendment-bill-2020/), 15 October 2020.

This material includes links to the video recording of this session before the Climate Action Committee.

We recommend that you watch / listen to selected, short elements of this session and we indicate the times for these particular elements of the session so that you can find them quickly by scrolling through the video recording.

This material is selected in order to give you a sense of some of the key issues of concern in the Climate Bill and to help develop your understanding of the role of the [Joint Oireachtas Committee on Climate Action](https://www.oireachtas.ie/en/committees/33/climate-action/) in scrutinising draft legislation with a view to strengthening it.

Orla Kelleher, The Supreme Court of Ireland’s decision in *Friends of the Irish Environment v Government of Ireland* (Climate Case Ireland) *Blog of the European Journal of International Law*, 9 September 2020. Available [here.](https://www.ejiltalk.org/the-supreme-court-of-irelands-decision-in-friends-of-the-irish-environment-v-government-of-ireland-climate-case-ireland/)

There is a set of questions below to prompt you to identify some of the key points arising from these materials and to set the scene for our class discussion on Wednesday.

**Please consider the following questions in advance of class:**

What is climate litigation?

What role to you think the Courts play / should play in environmental protection / addressing the climate crisis? Explain your thinking.

What are the key points that strike you about *Climate Case Ireland*?

What role do constitutional rights and human rights play in the context of climate action?

What is the Climate Action and Low Carbon Development (Amendment) Bill 2020?

**Selected Extracts from**

**Joint Committee on Climate Action Session
15 October 2020**

**Material used for the Digital Badge in *Climate Law and Governance for Engaged Citizenship* programme at UCC Centre for Law and the Environment 2020/21.**

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**November 2020**

Below are selected extracts from the pre-legislative scrutiny at a session held by the Oireachtas Joint Committee on Climate Action on 15 October 2020.

The two witnesses who appeared before the Committee on that date were Dr Áine Ryall UCC and Dr Diarmuid Torney DCU.

Their role was to give their expert opinion on the [Climate Action and Low Carbon Development (Amendment) Bill 2020.](https://www.gov.ie/en/publication/984d2-climate-action-and-low-carbon-development-amendment-bill-2020/)

The Joint Committee is composed of TDs and Senators. The committee members were tasked with asking the expert witnesses various questions on the Bill and how it could be improved upon based on their expertise.

The reoccurring issues during this particular session included: concern over the vagueness of the language used in certain provisions of the Bill; the role of public participation; implementation, enforcement and accountability; and carbon budgets.

A recording of this session of the Joint Committee is available [here](https://www.oireachtas.ie/en/committees/33/climate-action/videos/) (scroll down; select 15 October 2020 and click on the video).

See the time signatures next to the extracts below to assist you to identify selected key points in the exchange between the Committee members and the two witnesses during this particular Committee session.

**Vague Language:**

**Senator John McGahon:** Dr Ryall stated that vague and ambiguous language could lead to complex disputes. Will she give an example of a part of the Bill that stands out to her where, as a result of vague language, a big problem will come down the tracks? To her legal knowledge, is any such vague language in the Bill a stand-out problem? *[Time signature: 0:53:00]*

**Dr Ryall:** I thank the Senator for those very good comments and questions. I can answer them in very general terms. Phrases such as "take into account" and "have regard to" will potentially generate issues into the future and potentially generate litigation as people will, inevitably, attempt to test the frontiers of what they mean. We must try to ensure that the intention is made real in practice. Those phrases, and some discretionary language about some of the public participation obligations, such as that certain persons "may" consult the public, need to be specifically identified throughout the Bill and considered closely by the Committee with a view to strengthening them where appropriate to ensure that ambiguity will be ironed out and eliminated, if possible at an early stage. Otherwise, it will just store up uncertainty and, inevitably, lead to litigation.

**Senator Alice-Mary Higgins:** I will go straight to the question of language. We heard discussion about the question of accountability to the Oireachtas. One of my concerns, as an Oireachtas Member who is unlikely ever to be in government, is that there seems to be a great deal of ministerial discretion and not simply in the context of the phrase "have regard to". When the speaker from the Government spoke yesterday, the only basis on which he guaranteed there would be targets of 7% was that that was stated in the Government's policy. That is different, however, from having it in legislation or in a system.

Dr Torney might elaborate on that question of ministerial discretion and the long-term implications of that for accountability. I was very interested when he mentioned being consistent with our obligations. The phrase "have regard to" is applied to 26 factors. Could different verbs be attached appropriately to different aspects, so there would be no suggestion of an equivalence of weighting between having regard to one small issue and to our UN targets? *[Time signature 0:57:50]*

**Dr Torney:** I thank the Cathaoirleach. On Senator Higgins's point about the list of 25 items and whether there might be different language attached with different stringency to different items, there may be merit in that. Reading through those 25 items, there are two that appear to me to be of a different character and those are the State's EU and international legal obligations. In my judgment, there is a case to be made for attaching a greater weight to the solemn commitments the State has made to its EU partners and the international community, such that those points would be put in a different category and the Government's obligations under sections 4 to 6 would be consistent with those legal obligations.

On the point about the Climate Change Advisory Council having to have regard to Government policy, this comes back to the discussion we have been having about the looseness of the legal language. The Council is required to have regard to Government policy, but it is not required to recommend carbon budgets that are consistent with policy. The Council, in my reading, is not necessarily constrained by Government policy but should have regard to it.

**Public participation:**

**Senator John McGahon:** Dr Torney stated that there should be other strong measures, alongside the Bill, to ensure active citizen participation. Will he give one or two examples of what active citizen participation would be? He went on to state that there is no obligation on the Climate Change Advisory Council or within the Government to set those targets. Without that level of oversight in the Bill, is it unrealistic that the targets will be met? *[Time signature 0:53:30]*

**Dr Torney:** On the point about active participation, a number of years ago a national dialogue on climate action was established but it is fair to say it has not, yet at least, delivered on its potential. It has held, in my understanding, relatively few meetings but has significant potential to deliver not only at a national level but also if rolled out at a local level throughout the country with the kind of active participation that has been lacking in the formation and implementation of climate policy to date.

**Senator Lynn Boylan:** Returning to the issue of public participation, while there appears to be little provision in the Bill for participation by the wider public or indeed prescribed bodies, information is key to participation. Will Dr Ryall share some of her insights into the obligations of the Aarhus Convention in respect of the proactive dissemination of information and how that helps the public to participate in the first place? *[Time signature 1:10:45]*

**Dr Ryall:** I thank the Senator for those excellent questions. On the Aarhus Convention I must declare that as vice-chair of the Aarhus Convention Compliance Committee, I speak here in a purely personal capacity. The Aarhus Convention creates important human rights for the public including, as the Senator mentioned, the right to information, the right to participate in decision-making and also the right of access to the courts to enforce environmental rights. As the Senator said, information is absolutely key and it comes back to the original point that both Dr Torney and I made about how practically impossible it is for a member of the public to try to piece together the Bill as it stands with what currently exists in the 2015 Act. It is incumbent on Government to make the effort to make the information as accessible as possible to the public and to publish information online in a timely fashion. There are some very good models of this such as the Citizens Information Board. The Environmental Protection Agency has also been a very significant advocate and educator, for want of a better expression, with the series of free, public, live-streamed lectures it has run over the years to inform the public about some of the key issues around climate change. These were not necessarily focused on law but, as Dr Torney said, the wider societal issues and making the science more accessible to the public.

On the participation point, a concern I have more generally is that there are so many public consultations often going on at the same time, whether to do with planning or the marine environment or some draft Government strategy. It is very difficult for the public who are busy working or have other commitments to find the time and get access to the expertise to make the high-quality submissions that will actually have an impact and change the direction a particular draft document or proposal might take. It really does come down to the Government putting the resources into developing websites or portals to ensure the public knows where to go to get the basic information and then of course to give the public sufficient time. Timeframes for public participation, whether on a climate action plan or one of the local authority plans or whatever, can be an issue. Is two months enough if the public needs to take expert advice? This Committee is now taking expert advice and we see how complicated it is so how is a member of the public expected to get the necessary advice to see what is important? That point came across very clearly in the Supreme Court judgment in Climate Case Ireland. A reasonable, interested member of the public reading the national mitigation plan must be able to see what the Government has in mind in terms of policy measures and be able to make his or her own judgment as to whether these policy measures are good enough to get us to the 2050 target.

**Deputy Réada Cronin:** On the wider engagement, Dr Ryall mentioned public participation, timeframes and the language of the Bill, which is very legalistic. I am worried about poverty-proofing this Bill and the impact it is going to have on poorer communities with carbon taxes and so on. The Climate Change Advisory Council are very good people but it is the usual suspects who are on most of these groups. How do the witnesses think we could best achieve a wider engagement with the people who will be impacted by this Bill? We must also consider our global responsibilities for the next 30 years to impoverished people around the world who will also be impacted by this. *[Time signature 1:16:40]*

**Dr Ryall:** It is a very good question and a difficult one to answer. One thing to mention immediately is the vital role of the media in all of this, and accurate media reporting of things such as these proceedings. It is important that this meeting is being live-streamed and that our opening statements will be published to its website. Again, the explanatory memorandum to the Bill is quite helpful as a resource but it should be ensured the public is aware there is such a memorandum. A big issue is members of the public who might not have any Internet access or any reliable Internet access as that is a fundamental requirement to even get the documents now. It is also a concern in the context of the green schools and green campus programmes and starting at an early stage to build up the information so we have active and engaged citizens from a very early stage of an individual's career. We must also ensure that is adequately resourced. I share the Deputy's concerns about poverty-proofing and, as a member of the expert advisory group to the Citizens' Assembly, this was something that surfaced on a very regular basis in the course of the debate there, as did the concerns of rural communities about transport and electric vehicles. Again, many of the recommendations from the Citizens' Assembly do attempt to address those concerns insofar as they can, in particular ring-fencing a certain element of the revenue from a carbon tax, for example. There are mechanisms for doing it but it needs to be very carefully calibrated. Poverty-proofing is a critical issue and something that the policymakers will have to make the tough calls on, ultimately in the budgetary context as well with competing demands.

**Carbon Budgets:**

**Deputy Darren O’Rourke:** I thank all the contributors. It is useful to benefit from their experience. Will Dr Torney speak to his third point and his opinion that there appears to be no obligation on the Climate Change Advisory Council to recommend that the Government approve carbon budgets that are consistent with the national 2050 climate objective. There was some discussion yesterday on these issues and the absence of interim targets. The 2050 targets seem to be the only targets. An opinion was expressed that there is enough in Government policy and the carbon budgets will provide a strong basis for those targets to be met. *[Time signature: 0:45:17]*

**Dr Torney:** My understanding is that Mr. Carroll expressed the view that it is a principle that EU and international legal obligations should not be repeated in national legislation. If that is the legal advice received by the Government, it seems it would still be possible to include an obligation that the setting of carbon budgets be consistent with both the 2050 target and the State's EU and international obligations. That would not be repeating an international obligation, specifically, in national law but merely including a requirement that setting a national target would be consistent with the State's obligations.

**Senator Alice-Mary Higgins:** I refer to the reasonable person who might want to take action and a 2050 national target. Is it difficult having a national target that is so far away? The witnesses have indicated that they believe it is not being met. Might a national interim minimum target allow for more practical action on the part of both the Legislature and interested persons if they feel targets are not in line? Human rights have been referred to. The public has a duty in respect of equality and human rights, biodiversity measures and the SDGs, which have really specific indicators. Do the witnesses believe these measures should be considered in the formulation of these carbon budgets? *[Time signature 1:46:30]*

**Dr Torney:** We need strong requirements on the Government to plan in a way that is consistent with the carbon budgets and the 2050 goal. I emphasise the need for strong requirements on the Government to plan in a measured way to develop the climate action plan and long-term strategy in a manner that is consistent with the carbon budgets and the 2050 goal. That is the kind of accountability that was demonstrated in the Supreme Court decision. It was not that the Government had failed to achieve a decarbonisation objective; it was that it had failed to plan in a way that was consistent with delivery of the objective. *[Time signature 1:55:10]*