



National Infrastructure  
& Service Transformation  
Authority

# **Decarbonisation of Operational PFI Projects**

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LED lighting and Qualifying Change in Law claims

**PFI Centre of Excellence  
TOOLKITS**

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# LED lighting and Qualifying Change in Law claims

## Issue Summary

In some PFI projects, the contracting authorities have faced Change in Law claims from the contractor linked to the cost and impact of transitioning to LED lighting. These claims have referred to the impact of Relevant Legislation in contributing to the obsolescence of certain types of lighting and the consequential cost and impact of transitioning to LED lighting systems.

In this Guidance Note, Relevant Legislation refers to:

- The Eco-Design for Energy Related Products and Energy Information (Lighting Products) Regulations 2021 and
- The Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012 (as amended in 2023)

These specific instruments have been cited in Change in Law claims although the methodology set out below would apply should related or different legislation be referenced in any claim being considered.

NISTA believes that attempted Change in Law claims of this sort have been received by the public sector in a minority of projects. In its experience it is more common for private sector project partners to accept the potential obsolescence of some lighting systems as a lifecycle risk and an opportunity for reduction in maintenance activity due to potential extended operating life of replacement LED lighting.

This note proposes a methodology for assessing Qualifying Change in Law (QCIL) claims related to LED lighting installation. It does not address wider relevant issues, such as potential lifecycle benefits and energy efficiency benefits of the longer replacement cycle, reduced maintenance activity and lower energy consumption that can generally be expected to apply to LED lighting in comparison with preceding fluorescent and other lighting solutions.

It is recommended that all public and private sector contracting parties consider together the lifecycle benefits that could be derived from LED lighting and share data on a transparent basis to contribute to a shared understanding of energy saving opportunities (including their impact for energy risk sharing provisions in the PFI contracts, if relevant).

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## Recommended Approach

Where contracting authorities receive Change in Law claims that relate to LED lighting installations, they are unlikely to be valid and, therefore, contracting authorities would be expected to reject them.

Whilst the Relevant Legislation might meet some of the criteria to be a QCIL, it fundamentally fails to give rise to a claim because it addresses the design, labelling, manufacture and import of lighting equipment and not the use of existing equipment. As such it does not:

- directly impose specific obligations on the PFI project company and FM contractor
- restrict the type of lighting to be used by a PFI project
- have a direct impact on the costs of the PFI project company and FM contractor

The PFI contract will not generally mandate the type of lighting to be used by the contractor. Accordingly, the choice of lighting solution and any consequent obsolescence are for the contractor to manage.

## Contract Analysis Methodology

It is recommended that contracting authorities facing Change in Law claims should seek legal advice. The following methodology is offered as a guide to support the recommended approach.

The PFI contract structure for QCIL requires a series of hurdle tests to be assessed and passed. These have been addressed in order below.

### **A: Does the Relevant Legislation amount to Legislation?**

Contracting authorities should confirm that the legislation cited in any QCIL claim meets the definition of Legislation or Guidance set out in the PFI contract. Note that in most relevant definitions, the relevant legislation is stated to be applicable in the United Kingdom. This is relevant because any EU laws or laws in other jurisdictions relating to lighting and contributing to any perceived obsolescence may be disregarded.

The definition of Relevant Legislation is likely to include statutory instruments and regulations having legal effect. Accordingly, these should be considered in the same way as primary legislation.

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## **B: Does the enactment of the Relevant Legislation amount to a Change in Law?**

Contracting authorities should consider whether the Relevant Legislation meets the definition of a Change in Law in the PFI contract, with respect to the date of the Relevant Legislation and the date of the PFI contract. If the Relevant Legislation was in place or published in draft legislation before the date of the PFI contract (such that the contractor should have taken it into account in pricing for the project), then the definition of Change in Law would not apply.

For many PFI projects, the enactment of the Relevant Legislation would be a Change in Law for the purposes of the PFI contract. In this case further analysis is required to establish whether the Change in Law also meets the definition of a Qualifying Change in Law.

## **C: If so, does the Change in Law amount to a Qualifying Change in Law?**

Most PFI contracts include a definition of QCIL with several qualifying criteria. The applicability of these criteria is analysed in the table overleaf.

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QCIL Category	Commentary	Applies to Relevant Legislation?
Discriminatory Change in Law	Refers to Changes in Law which apply expressly and exclusively to the PFI contract, the contractor or to PFI contractors.	No
Specific Change in Law	Refers to Changes in Law which specifically refer to the provision of any services the same as or similar to services being provided under the PFI contract.	No
General Change in Law coming into effect in the Service Period involving Capex	Refers to Changes in Law that require the contractor to incur capital expenditure above thresholds defined in the PFI contract (and above which the contracting authority would share the cost).	Possibly to the extent that the contractor's claim includes capital expenditure which falls above the defined threshold (however see analysis at section E).
Best Value Change in Law	Refers to Changes in Law relating to Best Value Legislation under the Local Government Act 1999 (as amended).	No

The analysis in the table above suggests that the Relevant Legislation might amount to a QCIL as a General Change in Law and that the further hurdle tests overleaf should be considered.

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## **D: Was the Relevant Legislation “foreseeable”?**

The QCIL definition will typically exclude any Changes in Law which were foreseeable at the date the PFI contract was signed. Whether the Relevant Legislation can be disregarded on this basis is a legal question. The contracting authority will need to take advice based on the sector and the date of its contract. However, this advice should not be necessary given the recommended position is that the QCIL claim would fail to pass other hurdles as set out below.

## **E: Does any applicable Qualifying Change in Law impact on the performance or the costs of providing the Services in a way that would enable the Contractor to make a claim under the Change in Law clause?**

This hurdle requires analysis of the Change in Law clause. In PFI contracts that follow standard forms aligned with Standardisation of PFI Contracts guidance (SOPC), this is typically set out in Clause 44.

The standard clause contains a number of criteria. Each of these need to be satisfied as being a direct requirement of the Relevant Legislation to establish that there has been a QCIL. These include:

- That the Relevant Legislation gives rise to “necessary changes to the Works or the Services”. This test is not satisfied by the Relevant Legislation which imposes no mandatory requirements on the contractor (who may for instance continue to use stockpiled lightbulbs) and does not require a compulsory transition to LED lighting.
- That the Relevant Legislation gives rise to an Estimated Change in Project Costs which “directly result” from the QCIL. For the reasons above, there is no such direct impact on the costs of the contractor and accordingly this test is not met.

The fact that the Relevant Legislation does not require the contractor to follow a particular course of action or otherwise restrict the contractor means that the QCIL claim is unsustainable.

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## **F: Does the Contract specify the lighting system to be used?**

It is an important (but not necessarily decisive) element of the analysis above that the PFI contract does not specify particular lighting system types which should be used by the contractor. The normal approach would be for the PFI contract to specify light output standards for different areas which could be met by alternative lighting solutions that are specified by the contractor, so that the technical solution is chosen by the contractor at its own risk. Any subsequent obsolescence is for the contractor to manage.

We recommend that authorities should follow the hurdle analysis above by reviewing the PFI contract technical requirements to ensure that no specific lighting systems were specified which are rendered obsolete by the Relevant Legislation.

## **Conclusion**

**QCIL claims relating to the obsolescence of fluorescent and similar lighting and any related intention to switch to LED lighting are unlikely to be valid.**

**The Relevant Legislation does not mandate anything of the contractor or restrict its use of any particular lighting system.**

**Obsolescence of this sort is for the contractor to manage as part of its lifecycle program.**

**Contracting authorities facing QCIL claims of this sort should seek legal advice.**

## **Associated guidance**

Other guidance that you may find helpful:

### **Decarbonisation of Operational PFI Projects**

<https://www.gov.uk/government/publications/decarbonisation-of-operational-pfi-projects>