Detailed summary of responses

GM Liability – Who Should Carry the Can?

General

The consultation asked for views on a proposed Bill to amend the law of damages in relation to the release of genetically modified organisms by making the holder of the consent to release strictly liable as a result of contamination.

33 parties responded to the consultation. Three had no direct comment on the subject preferring to wait for the Government response to the report by the Agriculture and Environment Biotechnology Commission (AEBC). The AEBC report considered the compensation issue as part of a wider debate on GMO commercialisation.

Two responses were very much against the principles set out in the proposal and called for a redraft.

Responses were varied and in some cases very detailed. Many respondents gave detailed examples of recent experiences in the farming community.

Overall responses to the consultation were positive with 15 respondents saying the proposal would allay some concerns and would have advantages.

Responses

(1) What concerns do you have about the commercial cultivation of GMOs?

Concern was predominately expressed in the following areas: the impact on human health through the consumption of GM foods (13 respondents), the impact on bio-diversity and environmental damage (9 respondents), cross contamination limiting consumer and farmer choice (8 respondents), the economic damages of cross contamination to non-GM farmers (12 respondents) and the threat to organic producers (5 respondents). Generally concern was associated with the issue of ‘cross contamination’ and the economic impact on non-GM farming.

Four respondents said that commercial cultivation would lead to dependency on a few seed suppliers at high prices. Five respondents said that there is no actual economic incentive to grow GM maize.

Three respondents felt that commercial cultivation of GMOs is premature.

One respondent said Scottish exports would suffer.

Four respondents stated that GM crops should be able to co-exist with non-GM crops and that the economy would benefit from such a situation.
(2) Would a liability regime allay any of these concerns?

The general consensus was that a liability regime would allay some concerns with nine respondents supporting this view. Emphasis was given in the following areas: a liability regime would encourage careful farming practices, it would provide necessary compensation, it would remedy current insufficient laws and two respondents said a liability structure is needed before commercialisation begins.

Three respondents said it would not allay any of their concerns as too much irreversible damage will occur regardless of whether there is a liability regime.

Two respondents agreed saying a liability regime would not stop cross contamination.

Two respondents said that as there is currently no insurance cover a liability regime would not make any difference.

One respondent commented that the legal safeguards being provided in the proposal are already covered by current legislation (Sale of Goods Act 1979).

(3) Who should be liable?

Sixteen respondents said that the Bio-tech companies or the patent holders should be made liable. Six respondents said that the GM farmer should be made liable if they have acted carelessly or illegally.

Four respondents commented that it would be very difficult to single out or trace the liable party. In addition respondents said that it would depend on each case and there would be many factors to consider.

Two respondents commented on the need for a ‘risk assessment’.

One respondent said it should not be the farmer.

One respondent said that Bio-tech companies should not be singled out and the Scottish Executive should be liable.

(4) What would be the advantages of making the holder of consent to release a GMO into the environment strictly liable for economic damages caused by that GMO?

Fourteen respondents said that this would encourage careful farming practices and make those responsible for damage accountable. Six respondents said farmers would be protected from economic damage. Four respondents said it would protect farmers from breach of patent.

Other responses highlighting possible advantages included: a fairer market, cheaper insurance products, lower costs of litigation, better testing of GM
crops resulting in better products and an enforcement of the ‘polluter pays’ principle.

(5) Would there be any disadvantages?

Four respondents said they foresee no disadvantages. Thirteen respondents made no direct comment on the question.

Those who could see disadvantages highlighted: GM companies could get exemptions, hard to prove the liable party, possible safety net for GM farmers, no insurance cover and long periods spent in court.

Two respondents commented on the effect on the Scottish economy if GM companies moved elsewhere.

One respondent said this was unfair and that the same legislation should apply to non-GM farming.

(6) Would there be any difficulties with this proposed legislation?

Responses to this question were varied and ten respondents made no direct comment.

Five respondents felt that the legislation would mean expensive litigation with no success. The non-GM farmer, therefore, would suffer long term economic damage. Three respondents said it would be difficult to make GM companies accept liability. Three respondents said it would be difficult to identify the source of cross contamination.

Two respondents said that there would be difficulties with ‘defence’ in court. Two respondents said there may be possible legal challenges on the issue of ‘fairness’.

One respondent said that the legislation ignores the islands where isolation could be an advantage. One respondent raised the issue of ‘cross-border contamination’ between Scotland and England.

One respondent said there would be ‘fear of reprisals’. Another highlighted that it would be difficult to set a ‘level of contamination’ that was agreed upon for liability.

(7) What alternatives to the Bill as proposed should be considered?

Four respondents suggested that a compensation fund, facilitated by a levy on all GMO consent holders, be set up. Three respondents recommended a complete ban on GM farming. Three respondents preferred an insurance based approach. Two respondents said an established legal framework is needed to base liability cases. One respondent said a government compensation fund is needed and another recommended a ‘future compensation strategy’.
One insurance organisation commented on the suitability of a ‘multi-peril’ insurance system.

Several respondents suggested improvements or additions to the proposal, these included: a simplified and inexpensive method for claiming compensation, a levy on increased chemical usage, that there should be clarification of existing legislation and one respondent commented on the wording ‘duty of care’ and ‘reasonable’ in the proposal.

One respondent said there should be industry protocols that encourage co-existence. Another respondent said farming practices should change in line with the promotion of co-existence.

One respondent said there should be legislation on an EU level.

That a strict liability regime be supported by a statutory and independently policed regulatory system was suggested by one respondent.

(8) If an insurance based approach was adopted what time scale following the cultivation of GMOs should the insurance cover?

Responses to this question were uncertain with nineteen (57%) respondents making no direct comment. One insurance organisation commented on current exclusion of damage in public liability policies. This was backed up by another respondent who said that no insurers currently offer this.

Four respondents said a long time is needed. One respondent said sixteen years. Two respondents said at least twenty years. Two respondents said at least twenty five years. One respondent said thirty years (the time for one generation).

One respondent said from the moment GM seeds are ‘drilled’.

Two respondents said an insurance based approach would be unworkable.

One respondent said that insurance would need to cover potential damage in ‘perpetuity’.

(9) Are there any observations that you have on the Bill proposal?

Three respondents added that they supported the aims of the proposal.

Fourteen respondents had no more comments to add.

Two respondents were critical of the proposal. One respondent called for a redraft.

One respondent highlighted ‘Transco plc Vs Stockport MBC’ as a matter of interest.
Liability for Release of Genetically Modified Organisms

One respondent said the legislation would be difficult to work.

One respondent said that no price could be put on environmental damage.

Private gardens and GMOs grown for medicine were highlighted as areas missing from the legislation.

**Key issues arising**

The following is an analysis of some key issues raised in the consultation.

*Can contamination be narrowed down to a single party?*

There was large support for the holder of consent being the liable party however some responses conveyed confusion as to how that party could be singled out. Butterworths’ Organic Nursery said that this would be especially difficult where there are a number of Bio-tech companies involved on neighbouring farms. The Royal Institute of Chartered Surveyors in Scotland agreed with this adding further difficulties where more than one holder of consent has supplied the GM seed that has contaminated the ‘plaintiffs’ crop. Jenny Adams highlighted the issue of cross border contamination between Scotland and England and internationally through the sale and supply of seeds.

*The benefits of GM commercialisation to the Scottish economy*

Mr N Suttle argued the proposed Bill to be “…illiberal, illogical and ill-conceived”. Emphasis was given on the potential threat to job creation, advances in medicine and R & D contracts if such anti-GM legislation were to pass. PG Economics said that the quality and nutritional value of future generations of GM could be of great benefit. NFU Scotland said that the GM experience in North America has been positive and beneficial.

*Insurance*

The Scottish Food and Drink Federation (SFDF) commented that the insurance market does not like strict liabilities as, since no fault need be proven, the end result is an argument over the financial settlement. NFU Mutual responded with the following: “The UK insurance market generally excludes gradual pollution and contamination from public liability covers.” Greenpeace said that in the ‘unlikely’ event of insurance being available then it would need to cover potential damage in ‘perpetuity’. Most other responses were in agreement with this: the minimum suggested time scale being sixteen years.

*Unfair legislation*

The proposed Bill could potentially be seen as unfair or one-sided and allowing non-GM crops to have an unfair market advantage. The Agricultural
Liability for Release of Genetically Modified Organisms

Biotechnology Council (ABC) argued that no one form of agriculture should have the ‘power of veto’ over another. They added that co-existence arrangements should be made in accordance with Commissioner Fischler’s recommendations. Two respondents said that gene transfer is not a specific GM issue therefore the proposed Bill is unfair. The argument therefore that consumers and farmers have the right to choose would appear unfair if GM crops/foods are excluded from it. The SFDF commented further by saying that the issues surrounding GMOs are not unique therefore GMOs should not be taken out of context with other forms of agriculture. The other side of the debate is that if cross-contamination occurs on a large scale then GM foods could take over the organic/non-GM market. Twelve respondents expressed concern over this issue.

_Evidence presented in the proposed Bill_

Two respondents gave detailed comments over the proposed Bill’s understanding of the GM issue.

PG Economics Limited gave seven specific comments on the Bill, the major issues are summarised as follows. The paper ‘Seeds of Doubt’ used in the proposal to highlight the North American experience is “…a biased, unrepresentative piece of work”. ‘Consumer market surveys that have highlighted public hostility to GM commercialisation have been poorly designed’. ‘There is no evidence to suggest that crops derived from GMOs or non GM derived crops which have small levels of GM adventitious presence will fail to find markets’.

Mr N Suttle questioned the proposed Bill’s definition of harmful effects arguing five specific points. The main issue raised, however, was that ‘harmful effects’ should not be defined by narrow interest groups therefore ending bias on the GMO debate.

_Litigation / Legal Issues_

Six respondents commented on the potential lengthy litigation process that could leave claimants out of pocket. Considering the reluctance of the insurance market to cover liability in this case then litigation costs can be seen as a major difficulty. Mr Burnett-Hall said that no lawful cultivation of any GM crop can take place in Scotland unless its cultivation has first received consent under the Genetically Modified Organisms (Deliberate Release) (Scotland) Regulations 2002. He also said that personal injury liability is already covered by the ‘Sale of Goods Act 1979’. One respondent said that ‘strict liability’ and ‘care’ are often seen as contradictory terms in law. The proposed Bill would possibly fall short of its desired aim if a farmer or company had acted with extreme ‘care’.

_Low risk_

PG Economics said that the possibility of gene transfer to related wild and other crop species from any GM crop is ‘extremely’ low. Mr N Suttle argued
that there is no evidence to suggest that GM crops pose any bigger threat than other existing technological advances. The SFDF added that GM crops are the most carefully tested of any agricultural commodity.

**Environmental damage**

Irreversible damage to the environment was a key issue raised by many respondents especially those who supported the proposed Bill’s aim. There is therefore a common concern that the release of GMOs into the environment will have a consequence that money cannot fix.

**Making the Bio-tech companies liable**

Fifteen respondents said, directly, that the Bio-tech companies/patent holders should be made liable. Fourteen respondents stated that more careful working practices and accountability would be advantages of such a situation. These responses possibly show that the proposed Bill is alienating the GM industry when it could concentrate on co-existence measures. Although there was such a large response in favour of the Bio-tech companies being made liable many respondents were concerned over how workable this would actually be. These concerns included: how to make Bio-tech companies accept liability, the lengthy and costly litigation process and lack of insurance. Some respondents therefore commented on possible alternatives such as a compensation fund facilitated by a levy imposed on the GMO consent holders (four respondents) or simple, inexpensive methods for claiming compensation (one respondent).