UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) SUBMISSIONS TO THE CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE ON THE LEGISLATIVE CONSENT MEMORANDUM FOR THE RETAINED EU LAW (REVOCATION AND REFORM) BILL

Introduction

1. UKELA (UK Environmental Law Association) includes over 1500 academics, lawyers and consultants across the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.

2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. These submissions to the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee in relation to the Legislative Consent Memorandum for the Retained EU law (Revocation and Reform) Bill (the LCM) have been prepared by UKELA's Governance and Devolution Group, which aims to inform the debate on the development of post-Brexit environmental law and policy. It does not necessarily, and is not intended to, represent the views and opinions of all UKELA members but has been drawn together from a range of its members. Submissions on the Retained EU law (Revocation and Reform) Bill (the Bill) have recently been made by UKELA to the Senedd the Legislation, Justice and Constitution Committee of Senedd Cymru (16.11.22) and the House of Commons Public Bill Committee (21.11.22)

Preliminary comments on the approach of the Bill and implications

3. As the LCM explains the Bill aims to 'sunset' most retained EU law at the end of 2023, subject to provision for: (i) UK and devolved ministers exercising powers to exempt pieces of retained EU law from the sunsetting and (ii) the ability to 'restate, reproduce or replace' retained EU law that has been 'sunsetted'. There is also a reserve power (for UK ministers only) to delay the deadline for sunsetting until 23 June 2026.

4. The effect of the Bill is therefore to create a 'cliff-edge' situation for EU-derived

environmental law, the dominant source of domestic environmental law[1], at the end of 2023.

5. UKELA agrees with the view at paragraph 50 of the LCM that the work required to identify and consider each of the 2,400+ pieces of retained EU law prior to the sunsetting deadline would be a monumental exercise for government and the civil service in any circumstances, let alone the current stark economic climate. Implementing the Bill will require very significant administrative time and cost, unnecessarily distracting government departments from focusing on other policy priorities.

6. It should be noted that it is not wholly clear that the Bill identifies the full spectrum of retained EU law that will fall within its scope. Its published dashboard on retained EU law has been shown to be incomplete and there have been media reports that hundreds of additional pieces of individual retained EU law have recently been discovered.

7. Unless specific action is taken to the contrary, whole areas of environmental law such as waste, water and air quality, nature conservation, and the regulation of chemicals will be removed from the statute book automatically, simultaneously and without any safeguards or replacement.

8. Retained EU law that is preserved after the end of 2023 will become 'assimilated law', but will be denuded of the interpretative provisions of EU law, such as supremacy and the general principles (e.g. proportionality) which apply to the interpretation of retained EU law at present. This is not a technical change but a fundamental change in domestic law as, stripped of these interpretive provisions, assimilated law may be interpreted differently in future. This creates further uncertainty and the risk that environmental protections may be lowered in the future through altered interpretative norms.

9. The approach in the Bill stands in stark contrast to the approach taken to the European Union (Withdrawal) Act 2018, under which directly effective EU legislation was converted and incorporated into domestic law and preserved following Brexit (as

[1] It is common view that up until the 31.12.20 around 80% of UK environmental legislation derived from the EU See e.g. UK Government's Environmental Audit Committee (EAC) report The Future of the Natural Environment after the EU Referendum (HMSO, Dec 2016) and reference to evidence submitted to the EAC by the European Environment Bureau at (AEP0054) (footnote 42).

the new concept of "retained EU law"), along with EU-derived domestic legislation. The rationale for this approach was explained by the government in the following terms:

> *"This maximises certainty for individuals and businesses, avoids a cliff edge, and provides a stable basis for Parliament and, where appropriate, devolved institutions to change the law where they decide it is right to do so."*[2]

10. The proposals contained in the Bill represent a radical departure from this approach and will undermine each of those objectives:

    a. The Bill would not provide individuals and businesses with certainty, as it would not be clear at the point that it is enacted which (if any) pieces of retained EU law may be exempted from the sunsetting or possibly restated or replaced subsequently, and therefore what domestic environmental law will look like after 2023.

    b. The Bill would impose a cliff-edge for EU-derived domestic environmental law, giving rise to a wholescale change in domestic environmental law overnight.

    c. Far from providing a stable basis for Parliament and the devolved administrations to change retained EU law where they may decide that it is right to do so in the future, the Bill creates unhelpful uncertainty over its continued validity.

11. Under the Bill's proposals, none of the UK Parliament's, nor the Northern Ireland Assembly will be able to consider retained EU law in the careful and systematic way that was envisaged when the European Union (Withdrawal) Act 2018 was passed Instead of enabling a detailed consideration of whether particular pieces of retained EU law should be removed from the statue book or replaced with new legislation to reflect the objectives of government post-Brexit (in each case underpinned by a clear policy direction for each area of retained EU law, of which environmental law is only one part), under the Bill nearly all of the body of retained EU law will simply be

[2] Government factsheet on European Union Withdrawal Bill https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714373/2.pdf

removed from the statute book in thirteen months' time, unless regulations are made to preserve individual pieces of retained EU law in the interim.

The particular impact of the Bill on environmental law

12. As noted above, EU-derived environmental law is the dominant source of domestic environmental law and is embedded in domestic legal structures. It is difficult in practice to speak of 'environmental law' without acknowledging the role played by EU-derived provisions within domestic environmental law. While it is recognised that not all domestic environmental law is EU-derived, and also that many other areas of domestic law influenced by retained EU law will also be affected by the Bill, the impacts of the Bill on environmental law will be profound in Scotland as it will in England, Northern Ireland and Wales.

13. The bluntness of the Bill's central feature on revocation is compounded by a paucity of policy direction from the UK government as to how a review of all affected retained EU law (including environmental law) would be carried out within the narrow window before the end of 2023 and the policy aims and objectives that would underpin and guide that exercise.

14. The UK government has previously expressed a desire to drive improved environmental outcomes, and has taken powers to achieve this through the Environment Act 2021 which were expressly intended to build upon retained EU environmental law[3], not act as a replacement or substitute for it. It has also introduced proposed reform to environmental assessment regimes in the Levelling Up and Regeneration Bill through the concept of 'environmental outcome reports' (EORs), but that bill contains very little detail on the new approach, which is to be set out in secondary legislation[4].

15. It is therefore unclear how the government's ambitions for improved environmental outcomes can be achieved through the Bill given the deregulatory parameters that apply to the powers under clause 15 which limit the exercise of powers to revoke or

[3] See Overarching Impact Assessment for proposed Environment Act (2021) targets (Consultation Stage) 'The UK has a range of existing environmental commitments, some of which are from retained EU law, which will remain in place. Targets will complement the existing legislative landscape but there are gaps in mechanisms to drive improvements and improve the state of our environment (emphasis added)

[4] See e.g., the UKELA submissions to the Scottish Parliament's Net Zero, Energy and Transport Committee (NZET Committee) on the provisions in the Levelling Up and Regeneration Bill 2022 (the Levelling Up Bill) (18.10.22)

replace retained EU law to changes that 'do not increase the regulatory burden'. 'Burden' is defined widely and includes, in addition to financial costs and regulatory obstacles, the concept of 'administrative inconvenience' which appears to be of potentially very broad application. There is an inherent tension between the ambition to deliver a 'nature positive' future and the deregulatory ceiling that the Bill will introduce.

16. The deregulatory nature of the Bill contrasts starkly with the approach to retained EU law under other recent and emerging legislation. For example, clause 122 of the Levelling Up and Regeneration Bill expressly includes the terms 'safeguards' and 'non-regression' in the heading and limits the Secretary of State's powers to make EOR regulations that would weaken the protections secured by retained EU law on environmental assessment:

> ***122 Safeguards: non-regression, international obligations and public engagement***
> *(1) The Secretary of State may make EOR regulations only if satisfied that making the regulations will not result in environmental law providing an overall level of environmental protection that is less than that provided by environmental law at the time this Act is passed.*
> *(2) EOR regulations may not contain provision that is inconsistent with the implementation of the international obligations of the United Kingdom relating to the assessment of the environmental impact of relevant plans and relevant consents.* (underlining added)

17. It is unclear how the provisions of these two Bills are intended to interact. In the event that the Levelling Up and Regeneration Bill is enacted in its current form prior to the sunsetting deadline under the Bill at the end of 2023, this would seem to mean that regulations under the Levelling Up and Regeneration Bill to implement the EOR regime could not be made if they would provide an overall level of environmental protection that was less than the protections deriving from retained EU law (e.g. environmental impact assessment, strategic environmental assessment and the Habitats Regulations) prior to sunsetting, even though the relevant pieces of retained EU law will, absent a decision to save them, be subject to sunsetting under the Bill.

18. Similarly, powers under sections 112 & 113 of the Environment Act 2021 to make regulations amending aspects of the Habitats Regulations may only be exercised

where the Secretary of State is satisfied that '*the regulations do not reduce the level of environmental protection provided by the Habitats Regulations.*' The powers under ss. 112 & 113 were clearly designed to ensure that the environmental protections secured under the Habitats Regulations would not be weakened (and, implicitly, that the Habitats Regulations would continue to have effect). The Bill will ride roughshod over these provisions.

19. In summary, UKELA considers that the overall approach proposed under the Bill will lead to a significant risk that the substance as well as the coherence of environmental law across the UK will be undermined and weakened, and it is very difficult to reconcile this approach with the UK government's previous statements as to the future of environmental law.

Implications for devolved administrations and the nature of UK-wide environmental law post-Brexit

20. UKELA agrees with the LCM and considers that the Bill will have significant implications for devolution and UK-wide environmental law. Whilst Ministers in the devolved administrations will have powers under the Bill in relation to devolved matters, UK ministers will have co-extensive powers to change retained EU law as it applies within the devolved administrations without their consent, in contravention of the principle of the Sewel convention (albeit that the convention only applies to primary legislation which is not within the scope of the Bill).

21. Environmental policy is largely a devolved matter in the UK. When the UK was an EU Member State, environmental law across the UK remained relatively unified due to the common EU environmental law framework, without the need to draw sharp lines around devolved policy competence for environmental matters domestically. The Bill is likely to herald a divergence in environmental law across the nations of the UK, leading to a patchwork and fragmented approach, given the Scottish Parliament's intention in enacting the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021[5] to maintain alignment with EU standards on environmental protection and other matters.

22. By legislative happenstance, the impact of the Bill in devolved administrations will be

[5] And similarly in the requirements of the Northern Ireland Protocol with respect to Northern Ireland.

different to England in some respects. For example, in Scotland the strategic environmental assessment directive is implemented through primary legislation (the Environmental Assessment (Scotland) Act 2005) which is outside the scope of the Bill, whereas in England it is implemented through regulations which are subject to the Bill. Similarly, the Water Framework Directive is largely implemented in Scotland by the Water Environment and Water Services (Scotland) Act 2003, and will thus not be subject to 'sunsetting' under the Bill, whereas the equivalent regulations in England will be.

23. The tight timescales between the enactment of the Bill and the sunsetting deadline mean that there is likely to be no realistic prospect that the UK government and devolved administrations could agree where an agreed common framework with respect to a matter of retained EU environmental law would be desirable, let alone work up and implement an agreed common framework. It is difficult to see how the administrations will be able to coordinate progress within the time constraints to avoid the risk of a silo approach and uncoordinated action[6].

24. Moreover, UKELA believes that the situation for some legislative provisions may be further complicated in Scotland by two factors:

    1) That the European Communities Act 1972 (ECA 1972) allowed UK Ministers to make regulations within devolved areas, so that there did not have to be rigid separation between devolved and reserved provisions where a measure straddled the boundary. Accordingly some instruments that do contain matters within devolved competence may also contain some that are reserved, so that Scottish Ministers will not by themselves have power to determine the future (saving, replacing, etc.) in relation to all elements of the instrument. Over the 50 years that primary and secondary legislation in environmental matters was drawn up based upon EU provisions it will likely to be impossible to identify which provisions (some predating the existence of devolution) were made via 'reserved' provisions but where Scotland will wish to nevertheless retain that law.

[6] There are also particular challenges in relation to Northern Ireland, where the obligations under the Northern Ireland Protocol require that the law remains in step with many aspects of EU law. Identifying what measures need to be retained for this reason, and any incidental effects of other measures disappearing will be a major task. The passage of the Northern Ireland Protocol Bill and the outcome of the continuing negotiations between the UK and the EU may provide some answers to this challenge, but for the time being the added layers of uncertainty over these only complicate the position further. The current absence of functioning institutions of government in NI only exacerbates the situation.

2) Also, a number of statutory instruments were made under the authority of both the ECA 1972 and a domestic 'parent Act'. For instance, the Water Environment (Controlled Activities) (Scotland) Regulations 2011, SSI 2011/209 was made under the ECA 1972 and the Water Environment and Water Services (Scotland) Act 2003. In these cases, there is likely to be overlapping authority under both Acts for some provisions, but there appears to be a need to identify and separate those which are authorised only by the ECA 1972 since those will be affected by the sunset provision, whereas others will survive on the basis of their domestic authority. This need to segregate the provisions on the basis of devolved/reserved content and the specific parent authority will be a further substantial task and the differential impact on different provisions within the one set of regulations may be very disruptive.

25. Devolution is another example where the approach of the Bill contrasts with other recent legislation. For example, in the case of EORs under the Levelling Up and Regeneration Bill, the Secretary of State may only make regulations which contain provision within Scottish devolved competence after at least consulting the Scottish Ministers[7].

Impact on UK's international obligations relating to environmental law

26. It should be borne in mind that many EU-derived environmental obligations, now persisting as retained EU law, implement multilateral environmental agreements by which the UK is bound, such as the Bern Convention[8], the Ramsar Convention[9] the Aarhus Convention[10], or the Convention on Long-range Transboundary Air Pollution. Ongoing compliance with these international treaties by the UK government is an important reason for maintaining retained EU law as a baseline level of environmental protection and for being mindful of the wider legal architectures in which they are embedded.

27. In addition, the UK has made commitments under the UK-EU Trade and Cooperation Agreement (TCA), including as to non-regression on levels of environmental and climate protection and to respect recognised international principles of environmental

[7] See clause 123(1) of the Bill
[8] Convention on the conservation of European wildlife and natural habitats
[9] Convention on wetlands of international importance especially as waterfowl habitat
[10] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

policy, such as the precautionary principle and polluter pays principle. There are specific obligations under the TCA on the UK to maintain specific features of the law which are currently retained EU law but which will disappear with sunsetting, for example commitments to procedures for environmental assessment under Article 393 and access to environmental information under Article 398.

28. As contrasted with the Levelling Up and Regeneration Bill, which in the context of EORs recognises the importance of international commitments (see 16 above), the proposals in the Bill would leave a legislative vacuum which undermines confidence and certainty as to the UK's willingness and capacity in view of a changing legal framework to continue to comply with these international obligations.

Government resources and other pressures

29. The challenge of reviewing each piece of retained EU law that will be affected by the Bill prior to the sunsetting deadline will be particularly acute for the Scottish Government's Environment and Forestry Directorate with probably the largest amount of retained EU law by area to review[11]. If the UK government is unable to meet statutory obligations relating to the environment (particularly very recently enacted ones)[12], it is difficult to see how a wide-ranging review into all retained EU law that will be affected by the Bill prior to the end of 2023, including environmental law, will be undertaken. There is no reason to believe that the pressures on public resources in Scotland will be any different. This is particularly so, bearing in mind that under the UK Internal Market Act 2020 the decisions for England will in practice have a major impact on the practical effect of regulatory decisions in devolved nations.

Conclusions

30. UKELA considers that the Bill should be significantly rethought to ensure that the important environmental protections found in retained EU law are not lost by the arbitrary application of legislative guillotine at the end of 2023.

[11] As is anticipated to be the case for Defra in relation to England.:
[12] The question of resources is already a real rather than purely hypothetical one. For example, in England, the UK government has recently failed to introduce draft statutory instruments to set statutory environmental targets as required under the Environment Act 2021 by the end of October 2021, citing '*the volume of material and the significant public response'* https://www.gov.uk/government/news/update-on-progress-on-environmental-targets. This has attracted the scrutiny of the Office for Environmental Protection: https://www.theoep.org.uk/news/oep-statement-environmental-targets-deadline-being-missed

31. As already identified, the impact of the Bill on retained EU environmental law (which, as noted, is the predominant source of domestic environmental law) is not readily reconcilable with other recent and emerging legislation and government policy which provide a cogent framework within which the modification of particular pieces of retained EU environmental law should be carried out.

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