peba The Planning & Environment Bar Association

THE RETAINED EU LAW (REVOCATION AND REFORM) BILL

RESPONSE BY THE PLANNING & ENVIRONMENT BAR ASSOCIATION TO THE HOUSE OF COMMONS PUBLIC BILL COMMITTEE CALL FOR WRITTEN EVIDENCE

14 November 2022

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ABOUT PEBA

1. The Planning & Environment Bar Association (PEBA) is a specialist bar association comprising practising barristers who specialise in the areas of planning, the environment, local government, and related matters in England and Wales. PEBA members advise and act for clients in all of these areas of law, including landowners, developers, local authorities, Government departments, statutory agencies, non-governmental organisations, charities, and private individuals. PEBA members appear as advocates in all levels of the courts and tribunals, and at planning inquiries and hearings, local plan examinations, and development consent order examinations. Membership of PEBA is open to all barristers who have a significant part of their practice in the fields of planning, the environment, and local government law.

2. PEBA is a non-political entity. It is regularly consulted by Government departments (notably the Department for Levelling Up, Housing & Communities) and by the Planning Inspectorate in relation to proposals for reform of either policy or legislation within its specialist areas. PEBA sees its role as seeking to inform decision makers as to the practical implications of proposed reforms to regulatory regimes or relevant guidance, based on the experience of its membership within its areas of practice, with a view to facilitating reforms that will enable better and more effective regulatory regimes or guidance and (hopefully) discouraging or modifying reforms that would work against such outcomes.

PURPOSE OF THIS SUBMISSION

3. In response to an invitation from the Chair of PEBA, a working party of PEBA members has reviewed the Retained EU Law (Revocation and Reform) Bill (REULB) to assess its implications for the areas of law of relevance to PEBA. The primary focus has been on areas of environmental law because this field is most strongly influenced by current Retained EU Law (REUL).

4. The PEBA review has identified some key areas of concern with the proposals of REULB in its current form, and the purpose of this submission is to draw those concerns to the attention of the Public Bill Committee examining REULB, together with suggestions as to how the concerns could be sensibly addressed.

KEY CONCERN 1: NO DUTY TO ACT

5. PEBA acknowledges Parliament's right to remove, retain, revise, or replace any law, and accepts that it is the role of the Executive to bring forward such proposals (including via a process that leaves the question of whether specific laws should be removed, retained, revised, or replaced to subsequent secondary legislation).

6. In that context, PEBA has no issue with the principle of clause 1 of REULB setting a date (or dates) for when a change in the law is to occur. However, PEBA considers that the current approach of setting a date when all REUL

will cease to have effect (unless the Executive takes action to 'save' any particular provision (in existing or modified form) or takes action to replace it), **but without imposing any Duty on the Executive to take any such action or to determine that no action is appropriate**, is contrary to the interests of legal certainty.

7. Legal certainty is obviously important to the Rule of Law but is also of direct and practical importance to businesses, organisations, and individuals, who may need to make decisions today about matters that will not come to fruition until some time in the future. That is a particular issue for the areas of work in which PEBA members are engaged, which are generally forward-looking (including the planning of major infrastructure projects, the bringing forward of large-scale developments, and the formulation of development plans to meet needs over a 15-20 year time frame). All such entities should be able to ascertain, without undue difficulty, whether any particular REUL provision which is relevant to their affairs will be part of the applicable legal landscape in little more than 12 months' time.

8. A considerable body of environmental law falls within the definitions of REUL (as currently set out in s.6(7) of the European Union (Withdrawal) Act 2018). This includes the various sets of Environmental Impact Assessment Regulations 2017 (there are different Regulations for different activities, such as town and country planning, infrastructure planning, forestry, agriculture, marine works, electricity works, pipeline works, etc), the Environmental Assessment of Plans and Programmes Regulations 2004, and the Conservation of Habitats and Species Regulations 2017.

9. If REULB is enacted in its current form, it will be known that the default position for any regulatory provision of REUL that constitutes either *"EU-derived subordinate legislation"* or *"retained direct EU legislation"* is that that provision is revoked at the end of 2023 (see clause 1(1) REULB). However, unless some action is taken by the Executive, it will not be known (and will not be knowable) whether the provision in question is to be revoked without more on 31 December 2023 (the statutory default), given an interim extension, potentially to the end of 23 June 2026 (see clause 2 REULB), restated (see clauses 12 and 13 REULB), revised (see clause 14 REULB), expressly revoked (see clause 15(1) REULB), replaced in similar or alternative form (see clauses 15(2) and 15(3) REULB) or updated (see clause 16 REULB). None of those actions is expressed as a Duty. All are Powers for the Executive to exercise (or not) as it sees fit.

10. If the Executive takes no action as regards any particular provision, that would constitute no breach of REULB. Inaction might be a deliberate administrative choice or it might be inadvertent due to the Executive being unaware of the provision. Neither would be unlawful under the terms of REULB and nothing could be done to require the Executive to take action. Parliament can oversee what the Executive does, it cannot oversee what it does not do.

11. In relation to inadvertent inaction, the breadth of REUL covering environmental protection is now very extensive. PEBA notes that the

REUL Dashboard, as compiled by the Executive, indicates that it is *"authoritative"* but does not claim to be comprehensive and is intended to be updated on a quarterly basis to add further REUL. PEBA has only recently been examining the issue of REUL and is not at present in a position to provide a comprehensive list of REUL relating to environmental protection. However, it notes with some concern, and simply as examples to illustrate that concern, that neither the Electricity Works (Environmental Impact Assessment) (England and Wales) Regulations 2017 (SI 2017/580) nor the Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003 (SI 2003/164) are listed in the REUL Dashboard. Both sets of Regulations were made under s.2(2) European Communities Act 1972, remain in force, and constitute REUL. The reason for their omission from the REUL Dashboard is not apparent and may be an indication of inadvertence on the part of the Executive.

12. PEBA notes that in the Explanatory Notes on REULB the Executive has stated (at paragraph 18) that *"The sunset [of clause 1] will also **increase business certainty** by setting a date by which a new domestic statute book, **tailored to the UK's needs and regulatory regimes will come into effect**."*

13. That is not the effect of REULB in its current form because after the end of December 2023 the *"domestic statute book"* could resemble a Swiss cheese, with holes in it which are simply the result of inaction. There would be no certainty as to whether or when the Executive would take any action

to address any of those holes. However, if it is the Executive's intention to achieve a domestic statute book *"tailored to the UK's needs and regulatory regimes"* the Executive should not oppose being made subject to a duty to act to achieve that outcome.

14. PEBA therefore suggests that the Executive is placed under a Duty to Act in relation to any particular REUL **before** that REUL is subject to clause 1 of REULB. This could be achieved in various ways, and PEBA has no strong preferences in that regard, but one simple method would be to insert a requirement into clause 1 of REULB that:

"(1A) Subsection (1) does not apply to an instrument, or a provision of an instrument, unless six months prior to the end of 2023 the relevant national authority has certified in relation to that instrument or provision which of the powers in this Act will be exercised and has specified the date (or the latest date) for the exercise of those powers.

KEY CONCERN 2: THE ABSENCE OF TRANSITIONAL PROVISIONS

15. Plans or projects that affect the environment tend to have substantial lead-in times, especially if they are large-scale plans and projects (such as a new road or new rail station, an urban extension or garden village, or a 15-20 year development plan for a local authority area or joint plan for combined areas). Those plans or projects have to be evidence-based if they are to secure regulatory approval or adoption (for example the grant of planning permission, the making of a development consent order, or the

adoption of a local plan). Large-scale projects (or smaller scale projects affecting sensitive areas) are likely to require, as part of their evidence base, the carrying out of Environmental Impact Assessment, and many will also require Habitats Regulation Assessment and European Protected Species licensing. All development plans (with minimal exceptions) will require the carrying out of Strategic Environmental Assessment and many will require Habitats Regulation Assessment. At present all of the regulatory requirements for these assessments and licensing procedures are set out in REUL.

16. Whether any such assessment (or shadow licensing in the case of European Protected Species) is compliant with the applicable regulatory requirements can be currently ascertained by reference to REUL. However, for many current larger scale projects and plans, the decision point for regulatory approval or adoption is likely to be after the end of December 2023. If the REUL which currently regulates the assessments is revised or replaced by a different regulatory regime prior to the decision point, the promoter of the project or plan has no means of establishing whether the assessment work will continue to be compliant with the new regulatory regime. This gives rise to considerable business uncertainty and regulatory risk for the promoters of such projects and plans.

17. There is no provision in REULB to require the Executive to include transitional provisions when exercising the powers in Clauses 12, 13, 14, 15, or 16 of REULB.

18. To address this issue, PEBA suggests that the Executive is made subject to a Duty, when exercising any of the powers in Clauses 12 to 16 of REULB, to include transitional provisions for all plans and projects that have been subject to environmental assessment, strategic environmental assessment, habitats regulations assessment, or shadow EPS licensing prior to the coming into force of REULB, such that they can continue to be regulated by REUL as it was immediately prior to that date, notwithstanding the revocation, revision, or replacement of REUL. A useful precedent could be to follow the approach in Clause 129(2) of the Levelling Up and Regeneration Bill, which sets clear parameters for transitional provisions to be included in the proposed Environmental Outcomes Report Regulations, save that PEBA would suggest that the inclusion of such provisions should be a Duty and not merely a Power.

KEY CONCERN 3: THE STRAIT-JACKET OF CLAUSE 15(5)

19. PEBA does not start from the premise that REUL in relation to environmental law is inevitably fit for purpose or that it provides suitable or adequate environmental protections. PEBA considers there is a genuine debate to be had as to whether REUL in relation to environmental law provides a suitable regulatory framework. Thus, PEBA takes no issue with the principle that such REUL should be considered by the Executive, in accordance with the provisions of REULB (modified as appropriate in the light of PEBA's other concerns), to see whether it should be revoked, revised, or replaced.

20. However, clause 15(5) of REULB imposes an undue constraint on that process. The essence of Clause 15(5) is that no new provision can come forward to revise or replace REUL unless the Executive considers that the *"overall effect"* for the subject area *"does not increase the regulatory burden".* Clause 15(10) of REULB then defines *"burden"* very broadly so that it could include provisions which carry *"a financial cost"* or constitute *"an administrative inconvenience"* or which impose *"a sanction (criminal or otherwise) which affects the carrying on of any lawful activity."*

21. Thus, if the Executive concludes that REUL is currently deficient in terms of providing environmental protection, the Executive cannot address that deficiency by any provision which adds to costs, or administrative inconvenience, or which secures better protection by introducing sanctions on lawful activity (such as undertaking development affecting an environmental asset).

22. PEBA considers that the restriction in clause 15(5) of REULB imposes an undue strait-jacket and that there may well be instances where regulatory burdens should be justifiably increased (in comparison to REUL) to achieve an adequate level of environmental protection. PEBA suggests that the simplest solution is that restriction in clause 15(5) of REULB is removed. A less preferable alternative would be to qualify clause 15(5) by the introduction of an evaluative term such as *"disproportionately"* or *"significantly"* before the word *"increase".*

KEY CONCERN 4: THE INTERACTION WITH THE ENVIRONMENT ACT 2021

23. The REULB proposes only one minor amendment to the Environment Act 2021 (in paragraph 7 of Schedule 1 to REULB). That amendment is not of concern to PEBA.

24. S.20 of the Environment Act 2021 imposes certain duties on the Executive when introducing Bills which contain provisions which, if enacted, would be "environmental law". That term is defined by s.46(1) EA 2021 to apply to *"any legislative provision to the extent that it is mainly concerned with environmental protection"* (and is not concerned with the excluded matters of access to information, national security, or taxation and spending matters).

25. The duties in s.20 EA 2021 include that where a Bill does constitute environmental law, the Executive must state either that the Bill will not have the effect of reducing environmental protection or, if such a statement cannot be made, that the Executive nonetheless wishes to proceed with the Bill: see s.20(3) and s.20(4) EA 2021.

26. The duties in s.20 EA 2021 do not apply to the making of secondary legislation.

27. No statement under s.20 EA 2021 has been made in relation to any of the provisions of REULB. Because the provisions of REULB apply non-specifically to all REUL, regardless of the subject matter of the particular REUL, it would be difficult to form the view that any of those provisions is *"mainly concerned with environmental protection".* The powers granted by REULB to the Executive to make secondary legislation would not be subject to s.20 EA 2021.

28. REULB therefore provides a means for the Executive to side-step the protections provided by s.20 EA 2021. PEBA is concerned that there is no mention of this consequence of REUL in the Executive's Explanatory Memorandum and PEBA has seen no justification for allowing the Executive to side-step an environmental protection that Parliament has recently enacted. In the absence of there being a justification for the removal of this protection, PEBA suggests that the duties in s.20 EA 2021 are transposed so that they apply to the Executive's exercise of the powers in clauses 12 to 16 of REULB.

29. This concern is reinforced by consideration of s.112 and s.113 EA 2021. These provisions apply to the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations). They allow the Executive to make regulations amending the Habitats Regulations but subject to the safeguard that the Executive has to be satisfied that any such new regulations *"do not reduce the level of environmental protection provided by the Habitats Regulations"*: see s.112(7) and s.113(3) EA 2021.

30. The Habitats Regulations are REUL and so could be revoked by Clause 1 of REULB or could be revised or replaced by the exercise of any of the other powers in REUL. If those powers were exercised, they would not be subject to the safeguards of s.112(7) or s.113(3) EA 2021.

31. PEBA acknowledges that there is a genuine debate to be had over the degree of protection provided by the Habitats Regulations and whether there may be better ways of securing an appropriate level of environmental protection. PEBA does not, therefore, suggest that the specific safeguards of s.112(7) or s.113(3) EA 2021 should necessarily be reflected in REULB. However, in the absence of any justification for the removal of the protection provided by s.20 EA 2021, PEBA sees the scope provided by REULB to revoke or revise the Habitats Regulations as a further reason why the duties of s.20 EA 2021 should be transposed to the exercise of the powers of REULB.

KEY CONCERN 5: THE INTERACTION WITH THE LEVELLING UP AND REGENERATION BILL

32. Clause 129(3) of the Levelling Up and Regeneration Bill (LURB), which is currently before Parliament, empowers the Executive to make regulations (termed 'EOR regulations') which amend, repeal or revoke "existing environmental assessment legislation". That term is defined by clause 132(1) of LURB by specifying particular statutory provisions. Most if not all

of those statutory provisions are REUL. They include the various EIA Regulations, including those applicable to town and country planning and infrastructure planning.

33. There is to be a safeguard in clause 122(1) of LURB that the Executive can only make EOR Regulations (including those revoking, revising or replacing existing environmental assessment legislation) if the Executive is *"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 [i.e. LURB] is passed."*

34. If the Executive removes or revises environmental assessment legislation which comprises REUL via any of the provisions of REULB, there is no similar safeguard. There is nothing in the Explanatory Memorandum to explain why a similar safeguard is not required for such environmental protection legislation.

35. In the absence of any justification for the removal of this protection, PEBA recommends that the safeguard in clause 122(1) of LURB should also apply to the exercise of any of the powers in REULB.

CONCLUSION

36. PEBA invites the Public Bill Committee to consider the key concerns set out above and to recommend that the REULB should be modified to address those concerns in the manner outlined in this submission.

14 November 2022

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*the PEBA Working Party comprises Michael Bedford KC, Martin Carter, Odette Chalaby, Rowan Clapp, Stephanie Hall, John Hunter, and Nina Pindham.

This submission has been seen by and is endorsed by Paul Tucker KC, Chair of PEBA, by Tom Cosgrove KC, Vice-Chair of PEBA, and by the PEBA Committee.

In relation to any questions or queries, in the first instance contact should be made with Michael Bedford KC (mbedford@cornerstonebarristers.com).