WRITTEN EVIDENCE SUBMITTED BY UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) IN RESPONSE TO CALL FOR EVIDENCE BY THE HOUSE OF COMMONS PUBLIC BILL COMMITTEE ON THE RETAINED EU LAW (REVOCATION AND REFORM) BILL (REULB77)

Introduction

1. UKELA (UK Environmental Law Association) comprises over 1,500 academics, barristers, solicitors and consultants, in both 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 on aspects of the Retained EU Law (Revocation and Reform) Bill are in response to the call for evidence by the House of Commons Public Bill Committee. They 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.

Preliminary comments on the approach of the Bill and implications

3. 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 predominant source of domestic environmental law, at the end of 2023.

5. Undertaking 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 government has identified the full spectrum of retained EU law that will be subject to the Bill. 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 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."[1]

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

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

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, Parliament will not be able to consider retained EU law in the careful and systematic way that Parliament anticipated would be the case when it passed the European Union (Withdrawal) Act 2018. Instead of enabling Parliament to embark upon 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 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 UK environmental law

12. It is important to recognise that EU-derived environmental law is the predominant source of domestic environmental law and is embedded in domestic legal structures. It is difficult in practice to speak of 'UK environmental law' without acknowledging the role played by EU-derived provisions of domestic environmental law. Whilst plainly not all domestic environmental law is EU-derived, and 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 in the UK will be distinct and profound.

13. The bluntness of the Bill's central feature is compounded by a paucity of policy direction from 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[2], 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.

15. It is therefore unclear clear 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 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

[2] 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)

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 and 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 sections 112 and 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, including in the 25 Year Environment Plan.

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

20. The Bill will also 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 requirements of the Northern Ireland Protocol with respect to Northern Ireland and the Scottish Parliament's intention in enacting the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 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 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.

24. There are 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.

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 consulting the Scottish Ministers[3].

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[4], the Ramsar Convention[5] the Aarhus Convention[6], 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 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.

[3] See clause 123(1) of the Bill

[4] Convention on the conservation of European wildlife and natural habitats

[5] Convention on wetlands of international importance especially as waterfowl habitat

[6] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

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 in the case of DEFRA and retained EU environmental law. The largest amount of retained EU law by area will be the responsibility of DEFRA to review, at a time when DEFRA already has a challenging policy agenda to deliver, including the implementation of the wide-ranging Environment Act 2021.

30. The question of resources is already a real rather than purely hypothetical one. For example, the 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'.*[7] This has attracted the scrutiny of the newly-formed Office for Environmental Protection[8]. If the government is unable to meet statutory obligations relating to the environment (particularly very recently enacted ones), it is difficult to have confidence that it will be equipped to complete the wide-ranging review into all retained EU law that will be affected by the Bill prior to the end of 2023, including environmental law.

31. This is a particular problem for devolved administrations with less capacity and need to respond not just to the impact of the sunset provisions within their own competence, but the UK government's decisions on what it is going to keep or replace, bearing in mind that under the United Kingdom 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.

[7] https://www.gov.uk/government/news/update-on-progress-on-environmental-targets

[8] https://www.theoep.org.uk/news/oep-statement-environmental-targets-deadline-being-missed

Conclusions

32. 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.

33. 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.

34. Accordingly, should a wholescale review of retained EU law be considered desirable (and there are likely to be some areas of retained EU environmental law that it would be appropriate to review), that review should be undertaken within the wider environmental policy framework, including that recently introduced under the Environment Act 2021, section 19 of which will, when fully commenced, ensure that due regard is had to the government's policy statement of environmental principles when making policy.

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21 November 2022