



UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) WALES WORKING PARTY SUBMISSIONS IN RESPONSE TO CALL FOR EVIDENCE BY THE LEGISLATION, JUSTICE AND CONSTITUTION COMMITTEE OF SENEDD CYMRU ON THE RETAINED EU LAW (REVOCATION AND REFORM) BILL

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 Legislation, Justice and Constitution Committee of Senedd Cymru. They have been prepared by UKELA's Wales Working Party and Governance and Devolution Group. This evidence 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.

Overview; the Bill's Impact in Wales and on Wales's Regulatory Landscape

3. UKELA is submitting evidence to this inquiry in light of the extensive amount of Welsh and UK legislation that is derived from the EU . Indeed, this has created a vast body of environmental law over the last 40 years. The stability of environmental law therefore depends on a robust and thoughtful approach to retained EU law. As such, this Bill will have a hugely significant impact on the state of the environment in Wales.
4. Environmental policy is a devolved matter in the UK, but when the UK was an EU

Member State, environmental law across the UK remained relatively unified due to the common EU environmental law framework. This existed without the need to draw sharp lines around devolved policy competence for environmental matters domestically. During this time, the UK Government and devolved administrations often relied on secondary legislation to implement EU environmental law. This led to many 'primary' regulatory obligations in environmental law being contained in secondary legislation (such as those relating to environmental permitting or habitats protection). As noted in UKELA's 2012 report on [The State of UK Environmental Legislation](#), this led to a degree of complexity and fragmentation in environmental law, with some divergence across the devolved administrations, overlaid with secondary legislation transposing EU law.¹ Crucially, it raised important issues regarding scrutiny and democratic accountability for environmental legislation.

5. Since the UK's exit from the EU, these issues of complexity and the impact on scrutiny and the democratic accountability of environmental law have been significantly exacerbated. Post-EU, UK environmental law has been repatriated across the constituent parts of the UK, with divergent new UK environmental law being created on top of the existing legislative picture. This creates difficult legal issues around the interaction between retained EU environmental law and subsequent 'post-Brexit' domestic environmental legislation. This complexity is also the result of the impact and interrelation of UK Parliament and Senedd powers to amend EU retained law as well as the operation of Common Frameworks and the Internal Market Act 2020.

The role of the Senedd in the revocation and reform of retained EU law in devolved areas

6. Our essential position is that if retained EU environmental law is to be fundamentally changed, it should only be done following full and comprehensive domestic scrutiny by Senedd Cymru in devolved areas. 'Full scrutiny' means that the Senedd will be adequately involved and there will be timely participation of relevant institutional committees, civil society and expert stakeholders. EU environmental law did not appear overnight, it was the subject of detailed discussions between Members States over many decades. Similarly, the transposition of EU environmental law was most often subject to public consultation and evaluation. EU environmental law, as

¹ UK Environmental Law Association, King's College London, Cardiff University, [The state of UK environmental law in 2011-2012: Is there a case for legislative reform?](#) (May 2012).

transposed in the UK, forms a critical and coherent layer of our legal and policy framework for environmental protection and governance.

The implications arising from the potential deadlines introduced by the Bill

7. 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 sunset; and, (ii) the ability to ‘restate’ retained EU law that has been ‘sunsetting’. There is also a reserve power (for UK ministers only) to delay the deadline for sunset until 23 June 2026. 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.
8. 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 overnight.
9. The approach of the UK government to 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 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 sunset or possibly restated or replaced

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

subsequently, and therefore what domestic environmental law will look like after 2023.

- b. The Bill would impose a hard cliff-edge for EU-derived domestic environmental law, giving rise to a wholesale 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 will remove the bulk of retained EU law in one fell swoop.

The Welsh Government's decision not to carry out its own assessment of REUL, including not forming its own view on what is devolved and reserved; and the Welsh Government's capacity to carry out such an assessment and to use its powers under the Bill

- 11. The key issue here is that under the Bill's proposals, none of the democratic institutions of the UK will be able to consider retained EU law in the forensic and systematic way that Parliament anticipated would be the case when it passed the European Union (Withdrawal) Act. It will not enable these institutions to embark upon a detailed consideration of whether particular pieces of retained EU law should be removed from the statute book or replaced with new legislation to reflect the desires 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). This is essential to the future effectiveness of environmental law across the UK.
- 12. The bluntness of the Bill's central feature is compounded by a paucity of policy direction from government as to how a review of retained EU law would be carried out within the narrow window before the end of 2023 to inform the UK and devolved governments' consideration of whether any pieces of retained EU law should be kept on the statute book, and if so which pieces, so that regulations may be made to exempt those pieces of retained EU law from the general sunset provision.
- 13. There is no indication that the UK government has considered how a programme of reviewing all EU-derived environmental law should be conducted, and the principles and objectives that would guide such a review. In relation to environmental law as a whole, the approach proposed under the Bill to retained EU law therefore lacks a coherent underpinning in policy.

The Welsh Government's capacity to carry out such an assessment and to use its powers under the Bill

14. The assessment of REULs in the area of environmental law and policy including decision making and governance and in particular, who is responsible for 'saving' these provisions is a monumental task that will take a significant amount of resource. This is at a time when the global community is focused on addressing the climate and nature emergencies that are the real challenge for Wales and the rest of the UK. Diverting such considerable resource to this task in the environmental context is, therefore, particularly significant.

Implications for Wales's legal landscape, including the introduction of new categories of legislation, and issues relating to clarity and accessibility

15. It is widely acknowledged that Welsh law is already in a state of complexity and confusion as a result of the incremental nature of devolution. Environmental law has been identified as one of the key areas of Welsh law in need of codification. This is important because accessibility is at the heart of the democratic process for environmental protection in Wales. The introduction of EU retained law has added an additional layer of complexity to this situation along with the impact of other elements of the post-Brexit legislative framework as outlined above (e.g. common frameworks and the Internal Market Act 2020). The current proposals for the creation of a new category of 'assimilated law', and associated complications over UK Ministers and Welsh Government powers in this respect, will not achieve greater certainty but actually complicate the state of legislation further.

Summary

16. 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 and policy in Wales (and throughout the UK) will be undermined and weakened.

UKELA Wales Working Party

16 November 2022

Contact: info@ukela.org.

Registered charity 299498, company limited by guarantee in England 2133283.
Regd office: c/o Norose Company Sec. Services Ltd: 3 More London Riverside, London SE1 2AQ, UK
www.ukela.org
President: Right Hon Lord Justice Lindblom