GREENER UK

# Briefing for MPs for day 2 of committee stage of the EU (Withdrawal) Bill

November 2017

## Retaining EU Law (93, 94, 95)

The Government's White Paper assured us that this Bill will mean that "the whole body of existing EU environmental law continues to have effect in UK law".[1] However, the Bill does not do this. There are legal obligations that will not be retained because they can currently only be found in EU Directives, and *not* in the domestic legislation that transposes those Directives.

It may appear that clause 4 will capture these aspects of the law, but it will not do so because the clause concocts some unnecessary and inexplicable restrictions in 4(1)(b) and 4(2)(b).

These restrictions mean that important obligations of environmental law will be lost. These include reporting and reviewing obligations that are crucial in making sure that the law is complied with and up to date. These reporting requirements may look dry, but they are a crucial stepping stone to ensuring the government is complying with environmental standards. Without the right data, ClientEarth would not have been able to hold the government to account on air pollution.

Obligations on the Government to meet various energy performance targets will also be lost. All of these requirements, which currently form a part of our law, will be lost on exit day.

This problem is not exclusive to environmental law (though it is felt particularly strongly there). The point is simply that the Bill does not do what it said it would – it does not ensure that the law is retained.

In fact, the specific limitations set out in clause 4 are somewhat bizarre. Consider clause 4(2)(b), which insists that aspects of EU law should only be retained if they have been recognised by a Court before exit day. This has the rather inexplicable consequence that contentious aspects of law will be retained, whereas those aspects that are so obvious as to have never needed litigation will be lost.

## Securing Retained Law (NC2, NC58 + NC25, NC55)

In its White Paper, the Government quite sensibly noted that after we have left the EU it will be for "Parliament (and, where appropriate, the devolved legislatures) … to decide which elements of [retained EU] law to keep, amend or repeal".[2] This is surely the right approach: whatever Brexit might mean, this House taking back control of our laws is clearly an ingredient of it.

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1 pg17.
2 [1.12].

But this is not what the Bill does. Instead, the Government is proposing that it will be possible to amend, repeal and modify retained EU law via Statutory Instrument. As we well know, the scrutiny procedures that accompany Statutory Instruments are inadequate. ClientEarth have pointed out that this would "give Ministers extensive discretion to alter, amend, remove and meddle with our essential environmental safeguards without proper public scrutiny… Laws that have been created through democratic processes must be protected from being amended or revoked on the diktat of a Government Minister".[3]

In its report in March of this year, the Constitution Committee warned of a "risk aris[ing] of certain areas of law—simply as a result of the happenstance that they began life as directly effective EU law—being permanently vulnerable to being reshaped through the use of delegated powers".[4] It is precisely this risk that is realised by the current draft of this Bill.

In a similar vein, the Bar Council believe that "It would be a matter of great constitutional concern if the 'Great Repeal Bill' were to contemplate the possibility that repeal, or other significant change to the substantive content, of law currently deriving from EU Directives could be effected by a process similar to the making of [European Communities Act] s2(2) instruments".[5] But again, this is exactly what this Bill proposes: a democratic deficit of constitutional concern.

Mark Elliot, Professor of Public Law at the University of Cambridge has said that parts of the retained law have an "almost schizophrenic character",[6] and no doubt this unsatisfactory state of affairs will be improved by amendment NC25/NC55, which ensures that laws that were first created via an open and democratic process at the EU level will be treated accordingly here in the UK.

The content of much retained EU law includes substantive policy content that would have been properly made by primary legislation but for the UK's EU membership. The future status of that law should recognise and reflect this.

## Principles (NC60/NC67)

The environmental principles, such as the precautionary principle, must be applied by courts, businesses and Government in their decision-making. They form an essential component of environmental law, which necessarily must be able to look ahead to the long-term and be flexible in its application.

The environmental principles are not unique to EU law – they are principles of environmental law in general, and are also found in a number of international environmental treaties to which the UK is a signatory. This includes the Convention on Biological Diversity, the Convention on Climate Change and the Convention on the Law of the Sea. Currently, the UK gives effect to these obligations to the international community through its membership of the EU, and in particular the appearance of these principles within the Treaty on the Function of the European Union.

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3 ClientEarth Report, The Withdrawal Bill: Destination and Journey (September 2017) 12, 14 https://www.documents.clientearth.org/library/download-info/13448/
4 [67].
5 Quoted by the Constitution Committee, [57].
6 https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/

This Bill does not adequately retain the three key roles of the environmental principles: in interpreting the law, in guiding future decision-making, and as a basis for legal challenge in court.

The limitation of relying exclusively on UK case law to retain these principles can be seen in a recent analysis by Professor of Environmental Law at UCL, Richard Macrory. He notes that "when it comes to, say, the Habitats Regulations the UK courts will still be obliged to apply the interpretation of the precautionary principle as contained in *Waddenzee*".[7] But this emphatically does not mean that the precautionary principle will necessarily apply more broadly, as it currently does.

This risk is exacerbated by the fact that "in Judicial Review, the British courts have been reluctant to employ [the principles] in the resolution of disputes in the absence of a clear steer from the CJEU. With the exception of the precautionary principle, it is difficult to find any material application of other core environmental principles in the higher courts in the last thirty years".[8]

In order to retain the law we have, to leave the environment in a better state than we found it, and to be world-leaders in high environmental standards, we must specifically retain the environmental principles in UK law so that polluters will be forced to pay for their polluting activities, so that dangerous chemicals posing risks to health are not authorised for use while we remain unsure of their effects, and so that environmental considerations are properly woven into decision-making across government.

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