



## **UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) SUBMISSIONS TO THE NET ZERO, ENERGY AND TRANSPORT COMMITTEE ON PROPOSALS FOR ENVIRONMENTAL OUTCOMES REPORTS**

### **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. This response is to the request for submissions by 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). In particular, the Committee is seeking views on the Bill's impact on environmental law in Scotland, via provisions to give the UK Government new powers to create a regime of "Environmental Outcomes Reports" (EORs) across the UK.
3. The submissions 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 has also been informed by input from its EIA Working Party and individual members. 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.

**Views on proposals in the UK Levelling-up and Regeneration Bill in relation to environmental law; and specifically in relation to provisions to give the UK Government new powers to create Environmental Outcome Reports, which would be applicable in Scotland.**

4. The request for submissions appears to ask for views on two matters:
- 1) the proposals in the Levelling Up Bill in relation to environmental law; and
  - 2) the provision to give the UK Government new powers to create Environmental Outcome Reports where those powers would be applicable to Scotland.

***1) the proposals in the Levelling Up Bill in relation to environmental law generally***

5. On one view, each of substantive Parts of the Levelling Up Bill are likely to have some impact on environmental law. However, the provisions in Parts 2-4, and 6-10 appear to focus on England alone and may only have an indirect effect on Scotland (where e.g. a planning matter could have a cross-border impact or effect)<sup>1</sup>. These submissions therefore provide some concise comment on the Part 1 ‘Levelling up Missions’ and mention planning data while the next sub-section focuses on Part 5: *Environmental Outcomes Reports*.
6. The Part 1 ‘Levelling Up Missions’ aim to address “geographical disparities” in economic, social or other opportunities or outcomes in the UK and in the absence of any exclusion, they appear to apply to Scotland. They are therefore very likely to affect areas of devolved competence including environmental law. It is unclear whether the provisions will confer any powers on the UK or Scottish Government or whether they will simply allow the UK Government to make plans that involve reserved and devolved matters. The consequence of this may be that the provisions result in a report on some matters but with no formal mechanism to take action without Scottish Government collaboration. For instance, a report suggesting that an expanded road network will improve a reported disparity will impact on the devolved responsibilities relating to air quality, noise, transport, health and safety and so on.

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<sup>1</sup> Should the NZET Committee seek submissions on the impact of the Levelling Up Bill on environmental law generally then further submissions may be presented.

7. Developing and working on the missions are also likely to draw upon principles and concepts of environmental and social governance (ESG) and many inter-related environmental principles and targets. It is unclear how the Levelling Up Missions and their development will be effectively informed by environmental principles and targets set out in the Environment Act 2021 and separately in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.
8. Further, Chapter 1, Part 3 of the Levelling Up Bill refers to provisions on planning data. This appears at times to refer on to England planning data see e.g. clause 75(1). However, Clause 80(1) then provides that:

“The Secretary of State may only make planning data regulations which contain provision within Scottish devolved competence after consulting the Scottish Ministers.”
9. There are similar provisions relating to Wales and Northern Ireland in Clauses 80(3) and (5). There is a need for clarity as to ‘who, what, where, when, why and how’ these provisions on planning data apply. The resource consequences of the planning data provision are likely to be significant see e.g. the associated information obligations under the freedom of information and environmental information provisions.

***2) the provision to give the UK Government new powers to create Environmental Outcome Reports where those powers would be applicable to Scotland***

10. Part 5 on Environmental Outcomes Reports (EORs) apply ‘in the UK’ and/or to ‘a relevant offshore area’ (clause 116).
11. At first glance, it appears that the Part 5 provisions seem hastily written. It is unclear as to how the EOR process is intended to work. UKELA understood that reform to the environmental impact assessment (EIA) and strategic environmental assessment (SEA) as to be subject to consultation, but this has not, to date, been pursued. The provisions in Part 5 of the Levelling Up Bill are effectively skeleton or framework provisions and much of the detail policy will need to be set out in regulations or subsequent legislation.

12. To illustrate the lack of clarity across the provisions, we set out below a few specific concerns within Part 5:

Clause 117(1) creates the power for regulations to be made requiring environmental outcome reports (EORs) for specified projects/types of consent but it is not clear how those regulations will apply to Scotland. There currently appear to be wide powers to decide.

Clause 117(5)(a) refers to reasonable alternatives to the relevant consent but there is no further explanation as to what 'reasonable' may mean.

Clause 117(7) notes that that proposed Regulations may, but don't have to, outline the meaning of 'development consent'.

Clause 118(3) there is a wide power in the proposed Regulations to state where consent is category 1 or 2 and the conditions that may apply.

Under Clause 119(1) the EOR Regulations may make provisions for assessment and monitoring of delivery of environmental outcomes report but there appears to be no obligation to provide for monitoring. The absence of monitoring of the effective of EIA was a key flaw in that regime until the monitoring obligations were inserted into EU legislation in 2014. Discretion as to whether the EOR Regulations include post-report monitoring of EORs will undermine their effectiveness.

13. Further, under Clause 121 powers may be exercised with respect to Scotland where they contain provisions within devolved competence following consultation with the Scottish ministers. This could well risk environmental outcomes being set in Scotland that are weaker or less ambitious than the Scottish Government may accept. And, while the Scottish Government may then seek to provide more ambitious or robust outcomes than the UK wide provisions, this will create uncertainty and potentially complaint that the more rigid provisions are unlawful and contrary to will of Westminster Parliament.
14. Clause 127 (and especially clause 127(2)(d) and (3)) would enable EOR regulations to amend, repeal or revoke existing EIA/SEA law or modify anything that would be required under the Habitats Directive where there is a requirement for an EOR to be

prepared for a specified plan or project. Given the lack of certainty as to what the EOR regime would look like or how it would work in practice, this is likely to create more uncertainty (e.g. how transitional provisions may work if you have a project that is developed under the existing EIA system but at the point a consent determination is made, the new EOR has been commenced) although these provisions should be seen in the context of the recently introduced Retained EU Law (Revocation and Reform) Bill (the Revocation Bill) published on 22 September 2022 which will have a much starker impact on existing environmental assessment legislation and case law if enacted in current form.

15. In a recent commons debate of 8 September 2022 on the Levelling Up Bill the then Minister of State, Levelling Up, Housing and Communities stated that:

“... we are committed to ensuring that the new system of environmental assessment will provide at least the same level of overall environmental protection as the existing system.”

16. However, it is unclear how Part 5 will work alongside the provisions within the Retained EU Law (Revocation and Reform) Bill.

17. A further concern is how the UK Government's 'Growth Plan' policy published on 23 September 2022<sup>2</sup>, that seeks to 'minimise the burden of environmental assessments' will interact with Part 5 and, indeed, the Revocation Bill. There is no clarity at all whether that Bill will simply incorporate or align to the proposals in the Part 5 provisions or whether there will be something different with respect to EORs. Stepping back, it is not clear at all that the Government intended via the Levelling Up Bill a complete recasting of all of environmental assessment provisions by the end of 2023; something that could well be the practical effect of the Revocation Bill coupled with the 'Growth Plan'.

18. Finally Clause 127 is very unclear. It refers to the interaction between existing environmental assessment and Habitats Regulations and suggests that these provisions may be retained while providing the opportunity for disapplying or otherwise modifying any provision and talks in quite surprising and imprecise language: see e.g. clause 127(2)(c) and: "... the co-ordination of things done under this Part ...". In relation to Scotland the position is further confused because the

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<sup>2</sup> <https://www.gov.uk/government/publications/the-growth-plan-2022-documents/the-growth-plan-2022-html>

relevant legislation mentioned relates to English habitats and assessment legislation, leaving it unclear whether any application in Scotland is intended and/or authorised

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