

## Written submission from Professor Colin T. Reid

1. Environmental law in Scotland has been transformed since the UK joined what is now the EU in 1973. There is no doubt that much of the transformation would have taken place without membership of the EU and that “Brexit” will not mean a reversion to the approach and content of the law of 40 years ago. Equally, though, it is clear that membership of the EU has ensured that action on environmental improvements has been taken on a faster timetable and more thoroughly than would otherwise have been the case (especially in areas where substantial financial investment has been required).

2. There are many consequences of Brexit and the final outcomes will depend largely on the details of the transition process within the UK (the “Great Repeal Bill”), the withdrawal agreement that is eventually reached and the new relationships agreed with the EU and other states. Even within a “hard Brexit” on the key issues of political significance, there may be scope for continuing closer relationships on more technical matters. The willingness of the EU to allow the UK to continue to participate in programmes such as the EU Emissions Trading Scheme is at present an unknown factor but one which will have a significant impact on the development of policy and law here.

3. Several features of EU environmental law are worthy of note and will not necessarily carry over into the post-Brexit provision. The first is the comparative stability of EU environmental law and policy. It takes a long time for initiatives to proceed through the EU law-making process, but once made, they tend to “stick”, without constant change. This makes them well-suited to the long-term efforts required to tackle major environmental problems such as water quality and climate change. The setting of targets for several years in the future and the stability of environmental standards enables industry and investors to plan ahead and allows for the integration of different policy areas to be developed. The greater scope for rapid change outwith the EU brings both the advantages and disadvantages of flexibility, with the potential to respond more quickly to changing circumstances but also a lack of certainty as to the future and a danger of policy being swayed by short-term political pressures.

4. A second feature is that EU law provides a common framework or set of standards for different jurisdictions. As well as its international implications and benefits for the commercial sector, this has consequences within the UK, where EU law has provided a shared framework within which each nation can exercise its own devolved powers to go its own way, but only so far. The need to comply with EU law has provided a dampener on fragmentation and a common foundation for the law, avoiding the need to consider other mechanisms to achieve co-operation and co-ordination where these are desirable. Without the shared EU framework, the extent of continuing co-ordination (or collaboration, or harmonisation) across the UK and the means by which this can be achieved will become live issues that require explicit attention.

5. A third feature is to note that obligations based by EU law tend to be of a rather different nature from those which were based on purely domestic rules prior to the UK's membership. EU environmental law has tended to impose obligations on Member States, that is on Ministers, which are based on targets to be met (e.g. recycling rates) or outcomes to be achieved (e.g. specific air or water quality), with very limited scope for exemptions or excuses if they are not. This is different from the approach in older domestic law which tended to favour very broad statements of purposes or functions supported by largely discretionary powers, leaving it to the executive body concerned (e.g. the Minister or an agency) to determine for itself the outcome that should result once all relevant considerations have been duly taken into account. Although the use of fixed standards is now an accepted part of environmental law across the UK, it is possible that some discretion might return, allowing some room for manoeuvre when meeting the standards seems particularly difficult, expensive or disproportionate or conflicts with other policy goals.

6. This relates to a further feature which is that EU law provides a means of calling the government to account. Where it is argued that a state is falling short of its obligations under EU law there is potential for the European Commission to use the Court of Justice to seek compliance. Moreover, the UK courts themselves are in a position to insist that the authorities keep to the long-term promises embodied in EU law, such as in the recent litigation over air quality targets<sup>1</sup>. In the absence of the EU dimension, however, there are much more challenging questions over how the government can be held to account over its environmental commitments when these are purely a matter of domestic law, as shown in the debates and uncertainty about the status and enforceability of the greenhouse gas reduction targets in the Climate Change Acts. Who will be able to take action in what forum if the measures are not taken to ensure that bathing beaches do not reach the requisite standard? There is an opportunity here to improve compliance with environmental law by establishing a meaningful environmental watchdog, to provide more thorough and accessible oversight than the European Commission could provide (and with the power it lacks to carry out investigations on the spot) in order to ensure that the government and agencies are indeed delivering on the environmental commitments undertaken.

7. In terms of transition, the stated aim in the short-term is to allow EU measures to continue in effect, but operating wholly within domestic law. This is a simple and desirable goal, but not one that can be easily achieved. EU law is entangled with domestic law in many ways, and although much of it can be fairly simply transposed, there are many instances where this is not the case. In some regimes there are procedural stages or decision-making which involve EU bodies and decisions have to be taken as to whether and in the hands of which bodies these are to be replaced in the UK. In some instances the EU involvement can simply be abandoned (e.g. with the end of direct participation in the EU's Natura 2000 network, the Commission's role in the designation of Special Areas of Conservation will not need replacement), but in others the EU role is absolutely central to the operation of the legal regime (e.g. approval for chemicals) and a replacement will have to be

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<sup>1</sup> *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; *ClientEarth v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin).

provided. There are resource and capacity issues, especially if all of the tasks currently handled by EU bodies become the responsibility of devolved authorities.

8. The task of bringing all the provisions into domestic law brings technical challenges. Domestic law often makes reference to EU law, e.g. in defining when an environmental impact assessment is required for certain categories of projects, and decisions will have to be taken – and legislation drafted and passed – on how such references are to be carried in to domestic law. Moreover, since any changes in EU law subsequent to the date of Brexit will be irrelevant, considerable care will be required to ensure that everyone knows exactly what it is in or from EU law that is being continued in effect. It will also have to be determined where tasks currently in the hands of EU bodies are allocated between government and separate agencies (such as SEPA and SNH). Given the scale of the task, it is probably sensible to aim at first simply for a transposition of the existing law, rather than to incorporate adjustments and improvements as part of the same process. There are lots of areas where EU law can be simplified or streamlined in the absence of the need to operate across several jurisdictions, and other points of substance where change may be desirable (e.g. aspects of the law on waste may not fit the ambitions of the Zero Waste policy), but it seems better to plan for this as a second stage.

9. A further technical matter raises much deeper constitutional issues. At present the wide power of the European Communities Act 1972 is widely used to authorise delegated legislation on environmental (and other) matters, taking advantage of the power of Ministers to legislate to implement EU obligations or “for the purpose of dealing with matters arising from or related to any such obligation or rights” (s.2(2)). A feature of the devolution settlements (e.g. Scotland Act 1998, s.57) is that UK Ministers retain this power to legislate even on devolved matters, so that there has been no need to distinguish strictly between devolved and reserved issues when legislating on EU-related matters. This distinction will now have to be scrupulously observed and legislation made in the appropriate place, or under the formal arrangements for consultation and approval where action at UK level is considered proper. This is likely to complicate the law-making process.

10. Such considerations do, of course, raise the major issue of where power is to lie post-Brexit. Most environmental matters are devolved, but as noted above there are arguments against fragmentation within the UK and structures for co-ordination may be thought desirable and steps taken to have these agreed or imposed (e.g. by retaining the right currently existing under the 1972 Act to legislate at Westminster on certain matters). The boundary of devolved matters<sup>2</sup> may not be drawn in the best place given the greater freedom of action allowed outwith EU frameworks, with potential for major dispute over how far matters such as agricultural policy should be wholly devolved or subject to a common UK framework.

11. A further very significant issue is raised by the international dimension. One aspect of this is that the UK’s obligations under international law will continue to form a limit on the freedom to develop our own environmental law. Indeed it is often overlooked that what we see as EU measures are sometimes the result of

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<sup>2</sup> Itself defined by reference to EU Directives in a couple of non-environmental instances.

international agreements which will continue to be binding after Brexit. Obligations in relation to air pollution, nature conservation, chemical safety and many other areas will continue. A key feature here is that international affairs remain the exclusive preserve of the UK government. The devolved administrations have no legal right to make international agreements, or even to be involved in their negotiation. This may be especially significant as new agreements are made, with the EU and others, on fisheries and on international trade, which may include terms that (intentionally or not) limit the extent to which domestic regulation is permitted to interfere with access to markets, e.g. in relation to genetically modified products.

12. This evidence has concentrated largely on structural and technical matters, on the task of trying to have a comprehensive and workable body of environmental law in place once the EU level is removed. Brexit does not by itself require significant change in the content of most environmental law. The single greatest substantive challenge as we move into the post-Brexit world appears to be the replacements for the Common Agriculture and Fisheries Policies, which have been so influential on the state of our land and waters. Other large-scale issues include future involvement in the EU Emissions Trading Scheme, which plays a major role in meeting Scotland's legal climate change obligations. Such big issues, though, are likely to attract political attention. A real danger is that in the sheer bulk of other changes needed to adapt to the post-Brexit world, the minor adjustments are not given sufficient scrutiny and that decisions are made which cumulatively change the nature and effect of much of our environmental law (unconsciously or in pursuit of the deregulatory agenda which featured strongly in the "Leave" campaign).

**This evidence is submitted in a wholly personal capacity and does not represent the views of any institution or organisation.**

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