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Dear Stuart,

The Biodiversity Beyond National Jurisdiction (BBNJ) UK Bill

Thank you for your letter of 29 October 2025 setting out questions raised by the Delegated Powers and Law Reform Committee in relation to legislative consent to the UK bill, the Biodiversity Beyond National Jurisdiction (BBNJ) Bill (the “Bill”).

I have addressed these questions in turn below. Before that, I have set out the context within which analysis and engagement with the UK Government is ongoing, and considerations around timescales.

Context

As you will be aware, the UK Government introduced this Bill with limited time for the Scottish Government to assess the implications for devolution and with a challenging overarching timetable through the UK Parliament that is driven by the need to have legislation in place to ratify the BBNJ Agreement in time for the UK to participate in the first Conference of Parties (“CoP”) established under the BBNJ Agreement, expected in August next year. Given the Scottish Government’s support for the aims of the legislation, and that decisions taken at the CoP may impact on Scottish interests, we have been working to ensure devolved interests are appropriately reflected without causing delay to ratification. Missing the intended deadline for ratification risks the UK being unable to take its seat at the CoP, which would exclude the UK from decision making that may impact Scotland’s interests.

Therefore, the Scottish Government’s initial Legislative Consent Memorandum (LCM) recommended consent for some, but not all, clauses of the Bill, given the need for further analysis and engagement government-government with the UK Government to fully explore the impacts of provisions for devolved competence, and any protections that may be required, for example, through amendments to the face of the Bill. I should highlight that at the time of introduction, in a letter to my UK Government Ministerial counterpart, Seema Malhotra MP, I put on record the Scottish Government’s disappointment in relation to the time afforded for analysis and the initial consideration of devolution in the draft Bill.

The Scottish Government has since been undertaking a rapid analysis of the implications of the Bill for devolved competences and is continuing to engage with the UK Government to understand the full implications of the Bill and explore measures to ensure devolved aspects are respected and addressed appropriately in the Bill, including by amendment where necessary.

Timescale

Due to the speed at which this Bill is progressing through the UK Parliament, any amendments we wish to be introduced to protect devolution should be tabled by the UK Government during the House of Lords Committee stage, prior to the Lords Reporting stage. The Lords Committee stage is currently expected in mid-December, though of course, the timetable is subject to change and could fall later. Any amendment impacting on devolution will trigger a corresponding legislative consent process. Therefore, notwithstanding any amendments with an impact on devolved matters that could be tabled outwith those the UK Government may table as a result of agreement with the Scottish Government, we expect to lodge the planned supplementary LCM with the Scottish Parliament for the remaining clauses, including any amendments, by mid-December (noting that amendments are usually tabled around a week prior to the Lords Committee date). I recognise that this is a tight timescale for your scrutiny of the supplementary LCM. I would appreciate any efforts you can make to prioritise consideration and, while of course the Scottish Government is not in control of parliamentary or ratification timelines, my officials stand ready to support in any way they can.

Response

Before turning to the specific questions asked, it's important to say that in all cases, the Scottish Government is exploring, and agreeing, with the UK Government the most effective protections and respect for, devolved competences. When we identify the full range of appropriate protections, I will bring a recommendation forward on legislative consent for the Scottish Parliament to scrutinise.

This intergovernmental engagement is rapid, ongoing, and evolving. It is therefore important not to pre-judge the outcome of it, as it seeks to secure not only effective implementation in a way that is consistent with, and appropriately respects, devolved competence, but also to better understand the way in which provisions in the Bill will operate in practice and impact on legislatively and executively devolved powers, in order to be able to identify what protections may be necessary.

The Committee asked the following questions with regards to clause 9(2)(a) to (f), clause 11(2), clause 21, and clause 25(2) and (4):

- 1. To set out in full its concerns with the provisions it has not yet reached a position on.**

There were a number of provisions in respect of which we did not give a position in my initial LCM. That is because these provisions required further work, both within the Scottish Government given the range of policy implicated, and through engagement with the UK Government, to fully understand how provisions will operate in practice and what the likely impacts will be upon Scottish legislatively and

executively devolved marine competences. In many cases, there simply was not sufficient time to do this deep and complex analysis across all provisions, in the interval between the UK Government sharing the draft Bill with us, and Introduction of the Bill in the UK Parliament. Therefore, our concerns were varied and, in many cases, nascent, due to the lack of time afforded to us to fully conduct the necessary analysis from a devolved perspective. We are further on now with this process, but we are not at the end of it, so what follows is without prejudice to ongoing analysis, engagement and negotiation government to government.

- Clauses 9(2)(a) to (f): we are seeking assurances from the UK Government in relation to the provisions to ensure that due regard is given to Scottish interests.
- Clause 11(2): we are working through this provision to understand how this will operate in practice, the stages and scenarios involved, the implications for devolved competence and options for the protection of devolved competences – this may result in amendment to the Bill.
- Clause 21, 25(2) and (4): these clauses are associated with the implementation and commencement of the Bill. We were unable to provide a final position on these clauses as there was not sufficient time to work through all clauses prior to the lodging of the initial LCM. We are working through these clauses in tandem, as we seek to reach final recommendations in relation to the Bill.

2. Why it might be considered appropriate for the powers to be exercisable by the Secretary of State within legislative competence, and not by the Scottish Ministers?

We recognise that there may be cases where it is appropriate, and proportionate, for powers to be exercised at a UK-level, provided there is sufficient involvement for Scottish Ministers. We are working through powers and scenarios and considering what adequate protection for Scottish interests and powers may look like, ranging from formal amendment on the face of the Bill, to underpinning intergovernmental agreement across clauses.

3. What consideration has been given to:

- (i) **Conferring such powers on the Scottish Ministers (solely or concurrently), or**
- (ii) **Requiring the consent of the Scottish Ministers before the powers may be exercised by the Secretary of State within legislative competence, or**
- (iii) **Requiring a consultation with the Scottish Ministers before the powers may be exercised by the Secretary of State within legislative competence?**

All of these options have been under active consideration when exploring what protection mechanisms may be necessary across different clauses. As I set out earlier, it is important not to pre-empt or prejudice analysis and engagement with the UK Government on specific clauses, but for example, where we identify that decisions will impact on devolved matters to such a degree that Scottish Ministers must be involved and able to intervene, we are exploring a range of protections, from

concurrent powers to consent mechanisms, to consult requirements and underpinning intergovernmental agreement.

4. How the Scottish Government intends to facilitate scrutiny by the Scottish Parliament of the exercise of the powers within legislative competence by the Secretary of State?

Building on the current work that the Scottish Government is undertaking in close collaboration with the UK Government on the Bill, we are exploring options to ensure that the continued work associated with the BBNJ Agreement is underpinned by appropriate mechanisms and working practices that protect devolved interests into the future. It is expected that this will vary depending on the issue and powers. While we work through options with the UK Government, we are cognisant of the importance of appropriate scrutiny by the Scottish Parliament, in addition to the scrutiny of the LCM before consent is given to any relevant clauses. I will ensure that the final LCM addresses this crucial issue and my officials can meet with clerks to discuss further in advance of that if helpful.

Clause 14(2) and (3)

The Committee asked the following question with regards to clause 14(2) and (3):

The Committee agreed to ask the Scottish Government to set out in full its concerns with these provisions, which it has not yet reached a position on.

Clause 14 provides for powers for the Secretary of State to amend the marine licensing system under the Marine and Coastal Access Act 2009 (“MACAA”). Equivalent powers were introduced for the Scottish Ministers to amend the marine licensing system under the Marine (Scotland) Act 2010 (“MSA”). For licensable marine activities in areas beyond national jurisdiction (“ABNJs”), there is currently an overlap in responsibilities between the UK and Scottish Governments. This overlap arises from the licensing provisions under MACAA and the MSA, with administrative arrangements currently in place in Scottish secondary legislation to avoid double regulation. Under the Bill, as currently introduced, this overlap, including available powers under those provisions, continues. This means that powers under MACAA as well as under the MSA could be used to regulate Scottish marine licensable activities in ABNJs.

The Marine Management Organisation (“MMO”) is currently the responsible licensing authority for certain existing licensable activities in ABNJ. The Scottish and UK Governments propose to update the division of responsibilities for existing licensable marine activities and any new proposed activities in ABNJ through secondary legislation.

We are in the process of engaging with the UK Government to find an appropriate split of responsibilities for the licensing of marine activities in ABNJs between the MMO and Scottish Ministers which is planned to be implemented through UK and Scottish secondary legislation, using powers under the Bill. It is proposed that Scottish Ministers will be the responsible licensing authority for activities in ABNJ that fall within devolved competence and the MMO will remain responsible for licensing all other activities in ABNJ.

We are currently working with the UK Government to launch a joint consultation in relation to this shortly. We will seek sufficient agreement for splitting the responsibilities for marine licensing in ABNJ in secondary legislation in a manner that respects devolved competences. This includes securing sufficient reassurances for this split in the exercise of powers under the BBNJ Bill.

Clauses 17(2) and 18(1)

The Committee asked the following question with regards to clauses 17(2) and 18(1):

The Committee agreed to ask the Scottish Government whether it considers it would be appropriate to include a requirement for the Scottish Ministers to consult before exercising these powers, particularly in light of the similar power already contained at Section 32(5) of the Marine (Scotland) Act 2010, which requires the Scottish Ministers to consult when making an order to exempt an activity from requiring a marine licence.

We do not consider that a formal duty to consult should be included within clauses 17(2) and 18(1) for the following reasons.

As regards clause 17(2), it inserts an order-making power into section 21 of the MSA to allow Ministers to extend the list of licensable marine activities in contemplation of obligations under the BBNJ Agreement. This new power will operate within the existing scheme of section 21 of the MSA, and it will complement the existing power of Ministers to add or remove licensable marine activities within section 21(3), which is itself not subject to a duty to consult.

Similarly, as regards clause 18(1), it provides a power for Scottish Ministers to make environmental assessment regulations for the purposes of implementing Part 4 of the BBNJ Agreement (which primarily concerns environmental impact assessment (“EIA”) requirements. Regretfully, powers to amend EIA regulations were lost with the UK’s departure from the European Union and the repeal of the European Communities Act 1972 (the “1972 Act”), particularly the heavily used section 2(2). Clause 18(1) of the Bill effectively replaces section 2(2) of the 1972 Act, for the purposes of implementing EIA requirements for licensable marine activities in accordance with BBNJ Agreement obligations. Section 2(2) of the 1972 Act was not subject to a formal duty to consult, and we do not think that it would be appropriate to include such a duty in relation to the powers in clause 18(1).

In relation to both clauses 17(2) and 18(1), the powers would be used to implement obligations in the BBNJ Agreement. For example, in the case of the order-making power to extend the list of licensable marine activities (clause 17(2)), powers for fast adaptation of the licensing provision would be required to control a new activity posing harm to the marine environment. Equally, the power in clause 18(2) could be used to adapt EIA requirements to implement standards or guidelines adopted by the CoP under Article 38 of the BBNJ Agreement. Given this, and the potential need to act urgently to remain compliant with obligations under the BBNJ Agreement, it would not be appropriate to include a formal requirement to consult in this instance.

However, in practice, Scottish Ministers remain subject to public law principles, including in relation to legitimate expectations and procedural fairness and routinely

consults in relation to legislative changes where appropriate. For example, at the time of writing, the Scottish Government and the UK Government are about to launch a joint consultation in relation to amendment of the marine licensing regime in ABNJs following the passage of the Bill, which it is anticipated will include the use of powers in clause 17(2).

We are also in the process of seeking to amend the Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017 through agreeing amendments with the UK Government to the face of the BBNJ Bill, similar to those already contained in clause 15 of the BBNJ Bill concerning the Marine Works (Environmental Impact Assessment) Regulations 2007. These amendments are required to be made to meet obligations under the BBNJ Agreement. We will continue to review our approach to clause 18 as these negotiations progress.

Clause 19

The Committee asked the following with regards to clause 19:

The Committee agreed to ask the Scottish Government how it intends to facilitate scrutiny of any exercise of the power by the Secretary of State with the consent of the Scottish Ministers.

As you are aware, Part 6 of the Levelling-up and Regeneration Act 2023 (“LURA”) concerns Environmental Outcome Reports (“EORs”). Clause 19 of the Bill amends section 154 of LURA to ensure that the coverage of Part 6 extends to the area beyond national jurisdiction. As you mention in your letter, under Part 6 of LURA, the Secretary of State retains the power to act alone in making EORs within devolved legislative competence, subject to the consent of the Scottish Ministers. In November 2023, the Deputy First Minister and Cabinet Secretary for Finance at the time, Shona Robison, wrote to you to confirm our view that this power (contained in section 152 of LURA) falls within the scope of Protocol 2, providing the Scottish Parliament with an opportunity to scrutinise any such decision.

Given the speed with which the Bill has been introduced and is progressing through the UK Parliament, the Scottish Government is keen to facilitate ongoing transparency, discussion and information flow with the Committee. My officials have reached out to Committee Clerks and hope to meet with clerks in the near future to discuss further.

I am copying this letter to the Convener of the NZET Committee, who has also written to me regarding legislative consent for the BBNJ Bill.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Gillian Martin". The signature is fluid and cursive, with the first name "Gillian" written in a larger, more prominent script than the last name "Martin".

GILLIAN MARTIN