

LEGISLATIVE CONSENT MEMORANDUM

ENVIRONMENT BILL

1. This Memorandum has been lodged by Roseanna Cunningham MSP, Cabinet Secretary for Environment, Climate Change and Land Reform, under Rule 9.B.3.1(a) of the Parliament's Standing Orders.
2. The Environment Bill was introduced in the House of Commons on 30 January 2020. The Bill and supporting documents can be found at <https://services.parliament.uk/Bills/2019-20/environment.html>. A previous version of the Bill was introduced on 15 October 2019 but fell as a result of the dissolution of the UK Parliament for the General Election which was held on 12 December. This Memorandum relates to the Bill as introduced in January 2020.
3. The Scottish Government intends to lodge a legislative consent motion in relation to the Bill.

Content of the Bill

4. Part 1 of the Bill is headed "Environmental Governance" and contains the UK Government's proposals for its strategic framework for environment policy following exit from the EU. The later Parts of the Bill deal with various matters of domestic environmental regulation.
5. Two elements of Part 1 extend to Scotland. Clause 19 sets an obligation on UK Ministers to make a statement to the UK Parliament on the impact that a Bill introduced has on environmental standards. In addition, the majority of Chapter 2 of Part 1 (together with related interpretation provision in Chapter 3 of Part 1), which contains provisions on the UK Office for Environmental Protection, extends to Scotland.
6. Clause 19 is a "non-regression provision" which was not included in the version of the Bill which was introduced prior to the UK General Election. This clause requires that, where a Bill introduced into either House of the UK Parliament contains a provision that, if enacted, would be environmental law, the Minister in charge of the Bill must make a statement to that House. The statement must set out that the Minister is of the view that the Bill does not have the effect of reducing the level of protection provided by any existing environmental law, or that the Minister cannot make such a statement but wishes the House to proceed with the Bill.
7. Chapter 2 of Part 1 sets up the UK Office for Environmental Protection (OEP) and specifies its powers and functions, including enforcement functions in relation to failures by public authorities to comply with environmental law. All parts of Chapter 2 of Part 1 extend to Scotland, other than the provisions for monitoring of environmental plans and targets for which provision is made in Chapter 1 of Part 1 (which does not extend to Scotland). Chapter 3 of Part 1 (interpretation of Part 1) also extends to Scotland. However, the OEP's functions are restricted to matters that are both environmental law, as defined in Chapter 3 of Part 1 (legislative provision mainly concerned with "environmental protection", which is also defined), and which is not "devolved legislative provision". Devolved legislative provision is defined as legislative

provision (a) contained in an Act of the Scottish Parliament, or an instrument made under such an Act or (b) which would be within the legislative competence of the Parliament if contained in an Act of the Scottish Parliament. It is important to note that this exclusion includes matters that are currently provided for under UK legislation, but which could be legislated for by the Scottish Parliament.

8. The Scottish Government has committed in the Programme for Government to develop proposals to ensure that the role of environmental principles and effective and proportionate environmental governance is maintained in Scotland, and that any legislative measures required will be taken forward in a planned Continuity Bill. The UK Environment Bill provisions provide a specific exclusion from the scope of the OEP for the Scottish Ministers and for the Scottish Parliament: “public authority” for the purposes of the OEP’s enforcement functions in Chapter 1 of Part 1 means a person carrying out any function of a public nature that is not a “devolved function” (defined as a function which could be exercised within devolved competence (within the meaning of section 54 of the Scotland Act 1998)) and expressly excludes, so far as relevant to Scotland, the Scottish Parliament and Scottish Ministers.

9. Discussions are continuing between the four UK administrations on how the future governance bodies in each territory should work together, including on climate change and matters covered by future Common Frameworks. At present, the OEP would be given an obligation to consult equivalent bodies on matters with cross-border effects, and a mirroring provision is planned for the devolved bodies. Any additional measures for closer joint working on certain issues will be taken separately in each territory, and do not raise issues of legislative consent.

10. The later parts of the Bill comprise a number of domestic environmental measures related to waste and resource efficiency, air quality, water quality and chemicals. These are outlined in more detail in the following paragraphs.

Provisions which relate to Scotland

Environmental Governance

11. As noted above, Clause 19 of the Bill, which extends to Scotland, requires a statement on standards to be made in the UK Parliament on introduction of ‘environmental law Bills’. An ‘environmental law Bill’ may in principle extend to Scotland (with the requirement for legislative consent triggered in the usual way).

12. The Scottish Government considers that the statement required under clause 19 of the Bill provides little reassurance of the UK Government’s commitment to future standards. This provision reflects the UK’s Government’s policy to reject any commitment to future alignment with EU standards. This is not the policy of the Scottish Government, and provisions shall be introduced to give Scottish Ministers the power to keep Scots law aligned with EU law, where appropriate. In advocating legislative consent for the measures where consent is sought in later parts of the Bill, the Scottish Government is not endorsing the UK Government’s policy on non-regression and divergence from EU standards.

13. The UK Government is not seeking legislative consent for this provision. It considers that clause 19, as making provision for statements to be made in Parliament, relates to the reserved matter of the Parliament of the United Kingdom. The Scottish Government agrees that consent is not required for this provision because it specifies a procedure which is to be followed in respect of a particular class of provision in Bills before the UK Parliament. Whilst environmental protection and environmental law are generally not reserved, this clause would not, in itself, have any effect on those matters. The Scottish Government also expects early notice and discussion of whether any such proposals would have the effect of reducing standards so as to give rise to the need for a statement to this effect. The Scottish Government would not consent to legislation where a UK Bill reduces environmental standards in a devolved area. The Scottish Government expects the Sewel Convention to be respected in these circumstances.

14. Chapter 2 of Part 1 (together with interpretation provision in Chapter 3 of Part 1) makes provision for the establishment and functions of the OEP. These relate to monitoring improvements in the environment and enforcement of environmental law. These provisions also set out enforcement functions in relation to failures by public authorities to comply with environmental law. The UK Government is not seeking legislative consent to this provision and the Scottish Government agrees that consent is not required, given the way in which the Bill restricts the OEP's functions as described in para 7 above.

15. The UK Government has acknowledged that the reserved areas that might be governed in Scotland are very limited. The Scottish Government considers that the extension to Scotland creates a potentially confused position. It would have been preferable if the UK Government had agreed that the position in very small areas of reserved law in Scotland could have been governed by the body that will be set up in the Continuity Bill to govern devolved environmental law.

Waste and resources

16. Clauses 47, 48, 49, 50 and 61 and their associated Schedules contain provisions within the legislative competence of the Scottish Parliament, in relation to producer responsibility and associated charging schemes and resource efficiency. The UK Government is seeking legislative consent to these provisions.

17. Clauses 55 and 60 contain provisions within the legislative competence of the Scottish Parliament in relation to powers to make regulations for the collection of waste data for the purpose of tracking waste electronically.

Air Quality

18. Clause 69 and its associated Schedule contain provisions within the legislative competence of the Scottish Parliament, in relation to improving air quality.

Water Quality

19. Clauses 81, 84 and 85 contain provisions within the legislative competence of the Scottish Parliament in relation to water quality priority substances and the

arrangements for Solway Tweed River Basin District regulations in order to enable future updates of substances after the UK leaves the EU, and allow for functions to be exercised separately in respect of water bodies in Scotland and England.

Chemicals

20. Clause 125 and 126 and their associated Schedule contain provisions within the legislative competence of the Scottish Parliament, in relation to Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

Reasons for seeking legislative consent

Producer Responsibility

21. Powers in relation to waste and resources are generally devolved. A number of existing producer responsibility regimes, including those relating to packaging and waste electrical and electronic equipment (WEEE) operate on a UK basis with the support and consent of the devolved governments.

22. These provisions will enable the reform of existing producer responsibility arrangements and the introduction of new schemes in the future. Extended producer responsibility schemes seek to make producers responsible for the full net costs of managing their products at end of life. The powers provide for modulated fees that incentivise producers to design their products with re-use and recycling in mind, as those that make their products easier to recycle will pay less. The provisions and related work will also modernise existing powers to set producer responsibility obligations, extending them to the prevention of waste and redistribution of surplus products and materials.

23. The provisions are drafted to confer powers separately on Scottish Ministers in relation to Scotland. They also allow for the UK Secretary of State to make regulations for Scotland with the consent of Scottish Ministers, with similar arrangements for the other devolved governments. As such, the powers allow for schemes to be established at a UK-wide level, if there is consent from the devolved governments, or for Scottish Ministers to establish separate producer responsibility schemes in Scotland. The Scottish Government is content with this approach on the basis that it respects devolved competence, as consent would be required from the Scottish Ministers for the Secretary of State to make regulations, which extend to Scotland. The Scottish Government is content for the UK government to legislate in this area, subject to the consent of the Scottish Ministers, because the present extended producer responsibility schemes operate on a UK-wide basis and it would not be within the competence of the Scottish Parliament to make provisions to extend future schemes beyond Scotland.

24. The Bill also makes amendments to sections 41 and 56 of the Environment Act 1995 to supplement existing charging powers available to enforcement authorities, including the Scottish Environment Protection Agency (SEPA). In particular, they create a charging scheme relating to producer responsibility schemes established under Schedule 4 of the Bill, thereby providing for SEPA to recover costs incurred by

them as a result of undertaking compliance and enforcement activity in relation to such schemes.

25. Schedule 4 recognises the devolved competence of the Scottish Ministers to bring forward legislation to establish producer responsibility schemes and further recognises that any Regulations may include provision concerning the charging of specified persons as a means of recovering costs incurred by SEPA. Equally, they allow for charging arrangements to be introduced in Scotland through Regulations made by the Secretary of State where the consent of Scottish Ministers has been secured. This arrangement would allow for charging schemes linked to producer responsibility obligations to operate on a UK-wide basis as they do now, where this is the express preference of the Scottish and UK Governments. The Scottish Government is content with this approach.

Resource Efficiency

26. The Bill contains powers to enable regulation to be made requiring information to be provided about a product's resource efficiency. This information will enable consumers to identify products that are more durable, repairable and recyclable and will inform them about how to dispose of used products.

27. The provisions will also enable the setting of resource efficiency requirements for products. Regulations made under this power may include requirements in relation to aspects of the products design which affects its expected life, durability, reparability and upgradeability. This will support a shift towards durable, repairable and recyclable products, and packaging.

28. New powers to set resource-efficiency standards for products will help drive a shift in the market towards products that can be more easily recycled and repaired, as well as products that last longer and which can be re-used more easily.

29. The provisions are drafted to confer powers separately on Scottish Ministers in relation to Scotland. They also allow for the UK Secretary of State to make regulations for Scotland with the consent of Scottish Ministers, with similar arrangements for the other devolved governments. As such, the powers allow for standards to be established at a UK-wide level if there is consent from the devolved governments, or for Scottish Ministers to establish separate standards in Scotland, within our devolved competence. The Scottish Government is content with this approach on the basis that it respects devolved competence, and are content for the UK government to legislate in this area because it may be an area in which we wish UK-wide standards to be established.

Waste Data

30. Currently the movement of waste across the UK is recorded through a paper-based system of waste transfer notes. A new electronic system is current being developed, and funded, by DEFRA, with active participation of Scottish Government and SEPA.

31. The Scottish Government's "Making Things Last" strategy set out Scotland's intention to move towards electronic waste management. SEPA has long highlighted the potential role of electronic waste tracking in reducing waste crime. Improvements in waste tracking information are also intended to support future policy development.

32. In October 2017, SEPA, Scottish Government and Zero Waste Scotland published a new Waste Data Strategy, which set out a commitment to work with others to support the development and delivery of electronic systems to capture data and track the movement of non-hazardous and hazardous waste and other materials.

33. Much of Scotland's waste is managed within Scotland but there are also significant movements of waste across the UK. There are therefore some benefits from working with the other governments on a UK-wide system. While the regulation-making powers are separate, all administrations are working closely together on how the system will operate in practice.

34. Any regulations made under the power would allow the Scottish Government and SEPA to access and separate out Scotland only data i.e. the powers must enable Scottish Ministers to gather and aggregate data etc. from the tracking system on a Scotland-only basis. The powers would also enable the Scottish Government to transpose the electronic tracking system requirement of the European Commission's Circular Economy Package.

35. The provisions are drafted so that Scottish Ministers are able to develop, maintain or host an electronic system. Alternatively the provisions would allow the administrations to collaborate to establish a UK-wide system. The Scottish Ministers would also have power to establish a special purpose vehicle or community interest body for these purposes to allow industry to develop, maintain or host an electronic system. The Scottish Government is satisfied that the above arrangements respect devolved competence while allowing for co-operation on a UK-wide system as appropriate.

Air Quality

36. The air quality provisions apply to England only, with the exception of Schedule 11 (1) and (2). These provisions amend section 80 of the Environment Act 1995 to require the national (UK) air quality strategy to be reviewed within 12 months of this legislation coming into force, and subsequently to be reviewed every five years. Air quality is devolved, and the UK air quality strategy has been to a large extent superseded by the Cleaner Air for Scotland strategy. However it is considered appropriate to maintain a joint UK strategy to take account of certain reserved matters that are relevant to air quality, such as vehicle and fuel standards, and also to address transboundary air quality issues. The Scottish Government is content that this approach respects devolved competence.

Water Quality

37. The protection of the water environment in Scotland is devolved. However, there are two cross-border river basin districts which are situated partly in Scotland and partly in England, where existing UK legislation applies. The Water Environment

(Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004 (the “Solway Tweed Regulations”) apply to the Solway Tweed River Basin District. The Solway Tweed Regulations provide for functions in respect of the district to be exercised jointly by the Secretary of State and Scottish Ministers, and by SEPA and the Environment Agency. The Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003 (the “Northumbria Regulations”) apply to the Northumbria River Basin District. As the Northumbria River Basin District is primarily in England, and only a very small part with no water bodies lies in Scotland, the Northumbria Regulations provide for most of the functions in relation to the district to be carried out by the Secretary of State or the Environment Agency.

38. Clause 81 (read with clause 85 relating to interpretation) allows the Secretary of State to make regulations to update specified legislation, including the Solway Tweed Regulations and the Northumbria Regulations, in connection with chemical substances in surface water or groundwater, including specifying the standards to apply in respect of those substances in surface water or groundwater, the setting of objectives in relation to such substances and in relation to the classification of those substances in surface water or groundwater. The original intent behind these provisions was to allow for changes subsequent upon changes to the Priority Substances Directive expected within the next 2 years, although the drafting allows for broader changes. The provisions cannot be applied generally in Scotland, but could be applied to the Scottish parts of the Solway Tweed River Basin District and the Northumbria River Basin District, subject to the consent of Scottish Ministers. We are content with this approach, as it reflects that there is existing UK legislation in place for these cross-border districts, and devolved competence is respected as the changes can only be applied to the Scottish parts with the Scottish Ministers’ consent.

39. Clause 84 enables the Secretary of State to amend the Solway Tweed Regulations, with the consent of the Scottish Ministers, to allow for functions to be exercised separately in the Scottish and English parts of the Solway Tweed River Basin District. As outlined above, functions are currently exercised jointly. The Scottish Government requested that this provision be included to allow us to act separately for issues which relate specifically to Scotland in future. Devolved competence is respected as the changes can only be made with the Scottish Ministers’ consent.

Chemicals

40. It is the Scottish Government’s view that, short of retaining full participation in the European Chemical Agency and associated EU regulations, chemicals regulation in the UK is best delivered on a UK-wide basis. The Scottish Government has already given its consent to a number of UK Statutory Instruments to establish a UK chemicals regulatory regime, which will take effect at the end of the implementation period (the REACH EU Exit Statutory Instruments).

41. The provisions in the Bill enable the Secretary of State to make regulations to amend Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency (the REACH Regulations) as amended by the REACH EU Exit Statutory Instruments and forming part of our

retained EU law. The effect of these provisions is to allow amendments to the UK chemicals regulatory regime to be made by regulations.

42. Certain articles which set out the fundamental aims and principles of the REACH regulation are excluded from the regulation making power, including but not limited to those on 'No data, no market' and the minimisation of animal testing.

43. The powers provided by Schedule 19 paragraph 3 ensure that where regulations made by the Secretary of State, which amend the REACH Regulations, are within devolved competence (within the meaning of section 54 of the Scotland Act 1998) the consent of the Scottish Ministers is required.

44. The REACH Enforcement Regulations 2008 (the "REACH Enforcement Regulations") were made under section 2(2) of the European Communities Act 1972. Section 1 of the European Union (Withdrawal) Act 2018 repeals the European Communities Act 1972. The effect of the 1972 Act will be saved during the implementation period by the European Union (Withdrawal Agreement) Act 2020. However, when the implementation period ends there will be no power to amend the REACH Enforcement Regulations. The Environment Bill provides the Secretary of State and the devolved governments the power to amend the REACH Enforcement Regulations. These powers can be exercised separately by the Scottish Ministers in relation to Scotland in line with their devolved competence.

Consultation

45. The UK Government and devolved governments jointly consulted on major reforms to the packaging producer responsibility regime in February 2019¹. The Scottish Government is continuing to work with the UK Government and other devolved governments on these reforms and a further consultation is expected later this year.

Financial Implications

46. In general, the provisions set out in the Bill are enabling provisions which do not have direct financial implications. Detailed financial assessments will be set out when regulations are brought forward in due course.

47. As an example, the producer responsibility provisions do not, themselves, have any financial implications. However, regulations made under those provisions could involve significant costs for both government and business. The Scottish Government's expectation would be that a full financial assessment and business regulatory impact assessment would be prepared to accompany such regulations to allow for effective scrutiny at the appropriate time.

48. In relation to waste tracking, the development of a new system carries a cost which is currently being borne by the UK Government. If Scotland decided to develop its own separate system, this would carry an additional cost. If such a change in

¹ The consultation page can be found here: <https://consult.defra.gov.uk/environmental-quality/consultation-on-reforming-the-uk-packaging-produce/>

approach was being considered, a full financial analysis would be undertaken at the appropriate time.

Scottish Government's view

49. As noted above, provisions in the Bill deal with a number of matters that, in the Scottish Government's view, fall within the legislative competence of the Scottish Parliament. The Scottish Government supports the approach set out in the Bill to those matters requiring consent, which respect the competence of the Scottish Parliament and Ministers. Some of these provisions are consequent on the UK's withdrawal from the EU: while the Scottish Government regrets that EU exit is now taking place, it recognises that replacement legislation is required for those frameworks previously provided by EU law.

50. The Scottish Government therefore recommends that the Scottish Parliament consents to those provisions of the Bill which relate to domestic environmental matters for the reasons set out above.

Conclusion

51. It remains a matter of regret to the Scottish Government that the UK is withdrawing from the EU. The Scottish Government considers this will have widespread detrimental effects on the UK and Scotland.

52. Whilst the domestic elements of the Bill are considered satisfactory, this does not override the Scottish Government's deep concerns over the harm that will be inflicted on Scotland by withdrawal from the European Union. In advancing a Legislative Consent Motion for the measures where consent is sought in later parts of the Bill, the Scottish Government is not endorsing the UK Government's policy on non-regression and divergence from EU standards, which is reflected in the non-regression clause in Part 1.

53. Nevertheless, the Scottish Government recognises that replacement legislative underpinning is required in a number of the areas covered by the Bill. As the relevant provisions respect the competence of the Scottish Parliament and Scottish Ministers, the Scottish Government recommends the Parliament consents to the Bill as set out in this memorandum.

Draft legislative consent motion

54. The Scottish Government is proposing a motion which provides consent to the following provisions of the Bill:

Waste and resources

Clauses 47, 48, 49, 50 and 61 and their associated Schedules and clauses 55 and 60.

Air Quality

Clause 69 and its associated Schedule.

Water Quality

Clauses 81, 84 and 85.

Chemicals

Clause 125 and its associated Schedule.

55. The Scottish Government intends to lodge a legislative consent motion in these terms:

That the Parliament agrees that the relevant provisions of the Environment Bill, introduced in the House of Commons on 30 January 2020, relating to producer responsibility and associated charging schemes, resource efficiency, electronic waste tracking, review of the UK air quality strategy, water quality priority substances, arrangements for Solway Tweed River Basin District and Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

SCOTTISH GOVERNMENT
May 2020

*This Legislative Consent Memorandum relates to the Environment Bill (UK legislation)
and was lodged with the Scottish Parliament on 27 May 2020*

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