RESPONSE BY UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) TO THE CONSULTATION PAPER: *REFORMING THE FRAMEWORK FOR BETTER REGULATION*

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. It prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response to the consultation paper, *Reforming the Framework for Better Regulation* (July 2021) by the Department for Business Energy & Industrial Strategy (BEIS) has 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. This response 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.

2. The comments in this response pertain specifically to the consultation paper as they relate to environmental protection and UK law and policy relating to the environment. UKELA has commented in previous consultation responses and evidence submissions[1] that the highly devolved nature of environmental law policy makes the post-Brexit transition to UK environmental law particularly complex, since much of environmental law derived from, and was unified by, EU environmental law pre-Brexit. This is partly due to the extensive body of EU environmental law, as well as international environmental law obligations that were implemented through EU law

[1] See e.g. UKELA's written evidence to the House of Lords EU Environment Sub-Committee Inquiry on the UK-EU Trade and Cooperation Agreement (5.2.21) and its submissions to the HL Committee on Common Frameworks (Sept. 2021) : www.ukela.org.

(such as the 1979 Bern Convention on the Conservation of European Wildlife and Habitats, and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters).

3. That said, some of the questions in the consultation paper are not within the scope of UKELA's work and we have noted this when certain answers cannot reasonably be provided in this consultation response.

Preliminary points

A) Wider context

4. The consultation paper provides inadequate evidence that the wider context within which regulatory frameworks must operate has been properly taken into consideration. There are four aspects of particular relevance to environmental matters: international obligations; devolution; the recent history of intense legislative development; and sustainability and climate change issues.

5. **International obligations** relating to environmental protection arise not only from multilateral environmental agreements (MEAs), but also, pertinently in this context, from the EU-UK Trade and Cooperation Agreement (TCA). Article 393 TCA outlines a set of 'environmental and climate' principles which each party commits to respect, including the principle of preventive action to avert environmental damage, the precautionary approach, the polluter pays principle, and a commitment to environmental impact assessment. Article 391 of the TCA also commits both the EU and UK not to 'weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period'. In thinking about regulating for environmental protection, the UK administrations should be prioritising compliance with these international commitments to environmental protection policy and non-regression.

6. The primary reason for extensive international obligations in the field of environmental law is that regulating the natural environment often involves crossing boundaries, whether because environments or ecosystems cross political boundaries (as in the case of shared watercourses, habitats or other aspects of the connected biosphere) or because activities in one geographical location will impact the natural environment in another location (as in the case of air pollution).

7. **Devolution** means that matters regulated at a UK level must operate against what can be varied backgrounds across the UK. The discussion in the consultation paper does not indicate how regulatory approaches are to take account of these backgrounds, seek the collaboration necessary when matters handled at UK and devolved levels interact and respond to any difficulties arising from the operation of the United Kingdom Internal Market Act 2020 or link with the work of the Office for the Internal Market. It should be noted that the Internal Market Act allows for considerably less divergence on environmental grounds than administrations have been accustomed to under EU law.

8. The need to operate alongside potentially divergent policies in the different parts of the UK may increase the value of the certainty of a rule-based approach over the flexibility of a more discretionary one.

9. The recent history of **rapid and wide-ranging legislative development**, particularly through expanding the statute book dramatically to accommodate Brexit and the COVID-19 pandemic has meant that there is now a highly fragmented statute book, where regulatory transparency and coherence are both compromised. This is damaging for the clarity of the law, and for public trust in knowing what the law is and how it might be enforced. This legislative complexity particularly affects UK environmental regulation in light of the extensive body of regulation required to address environmental problems (see para 13 below); the large body of EU environmental law (largely transposed by secondary legislation and now subject to minor amendments as retained EU law); devolved responsibility for environmental law and policy; and periodic waves of major environmental law reform (a new wave occurring with the Environment Bill 2019-21).

10. The challenges of **sustainability and climate change** have been identified by the Government as central to rebuilding the economy, but these issues are also absent from the discussion in the consultation paper. Not least in order to comply with the general statutory duties in relation to climate change and biodiversity, regulatory decisions need to be assessed in terms of their environmental consequences and it is not clear how this is to be incorporated into decision-making. Without a truly pervasive approach to tackling climate change across government, the obligation to reach Net Zero will not be fulfilled. Moreover, the principle that our economy is embedded within nature and not external to it, is something central to the report to Government by Professor Sir Partha Dasgupta: *The Economics of Biodiversity: The*

Dasgupta Review (HM Treasury, February 2021) which notes in its Headline Messages that:

> "Governments almost everywhere exacerbate the problem [i.e. the failure to properly value nature] by paying people more to exploit Nature than to protect it, and to prioritise unsustainable economic activities." (page 2)

11. Whilst the consultation questions do not engage directly with environmental law and policy, many of the areas covered are central to environmental regulation, such as energy, transport, and agriculture. This means that considerations relating to environmental regulation should not be left out of account. This is reinforced by the requirement in the Environment Bill 2019-21 for all Ministerial policymaking to have 'due regard' to the Policy Statement on Environmental Principles (to be developed under that legislation). This legal requirement is to embed consideration of environmental protection across all government policymaking and so should shape this better regulation reform exercise. Furthermore, stakeholders in the field of environmental law and policy should be fully engaged in this exercise, even if not involved in the review and analysis by the Taskforce on Innovation, Growth and Regulatory Reform (TIGGR).

B) General approach

12. UKELA is concerned about the general principle proposed by the consultation paper to move to what is described as a 'less-codified, more common law-focused approach' to regulation. That is not to say that UKELA supports greater direct regulation but simply that the outcome of the most recent de-regulation exercise appeared to result in very little difference in environmental law and policy[2]. Conversely, a clearer approach to enforcement and sanctions has made a marked impact. Thus the Regulatory Enforcement and Sanctions Act 2008 has provided regulators with more flexible tools to support enforcement of environmental regulation. And the comprehensive Sentencing Guidelines for Environmental Offences (2014) issued by the Sentencing Council has helped secure increased environmental penalties for polluters; illustrated by the exceptional statutory maxima for environmental fines found for instance in the Environmental Protection Act 1990. Notably the Environmental Sentencing Guidelines (2014) finally addressed a persistent problem in pollution cases whereby appropriate environmental penalties

[2] See e.g. https://www.gov.uk/government/news/red-tape-challenge

and sanctions by the sentencing courts (i.e. the magistrates' court, the Crown Court) were regularly undermined by appeals to the criminal appeal courts.[3]

13. Moreover, the intricate and dense body of UK environmental law shows that direct regulation is vital for addressing environmental problems, and that the common law model of resolving disputes is structurally unsuited to dealing with environmental problems. This is primarily because environmental problems are collective – they are caused by a wide range of actors and activities and they are felt by a diverse range of people and environments. It is also because environmental problems are dynamic, and often unpredictable in how they will evolve.[4] Responsive, direct regulation is thus the backbone of environmental law and addressing collective environmental problems in a coherent way. By contrast, the common law performs a quite different role in addressing and vindicating rights of individuals in specific incidences. This can be an important function of the common law in circumstances where environmental regulation is separately addressing the public interest.[5] A 'common law' approach to regulation is thus an anomalous language and idea when thinking about environmental regulation.

14. The vital nature of regulation for addressing environmental problems highlights the very real need to address the *quality* of environmental regulation, particularly in light of the recent and rapid increase in legislation post-Brexit as highlighted above. There are significant challenges of the transparency and clarity of the law, as well as the internal consistency of regulation, which justify improving regulation, but not in a way that introduces more uncertainty and room for confusion. UKELA has consistently highlighted the need for this kind of reform work,[6] and the case has only strengthened in light of Brexit, which has seen an increasing level of complexity and fragmentation of environmental regulation in particular, including how it interacts with other areas of regulation (such as how air quality standards interact with planning law requirements, and how regulation to control plastic waste might interact with the Internal Market Act 2020).

15. Assessing any move to greater reliance on discretionary rather than rule-based regulation must also take account of how that discretion can be controlled. This involves both specific appeal mechanisms and the opportunities for judicial review.

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[3] See e.g., *R v Milford Haven Port Authority* [2000] WL331173 (Court of Appeal (Criminal Division) and *R v Anglia Water R v. Anglian Water* Services Ltd [2004] Env LR 10.
[4] Fisher, Lange and Scotford, *Environmental Law: Text, Cases and Materials* (2nd ed, OUP 2019) ch 2.
[5] *Coventry v Lawrence* [2014] UKSC 13.
[6] UKELA, King's College London and BRASS, *The State of UK Environmental Legislation in 2011-2012: Is There a Case for Legislative Reform?*, May 2012 (Final Report).

Recent and proposed changes to judicial review in relation to time-limits, remedies and ouster clauses, as well as the long-standing issue of costs (where the UK is still not wholly compliant with its obligations under the Aarhus Convention in relation to access to justice in environmental matters) have raised legitimate concerns that the availability and effectiveness of this route to ensure that regulators act within legal frameworks are being weakened. In essence, UKELA considers that a 'less codified, common law-focused' approach to regulation is fundamentally misconceived in the context of environmental law and policy.

Q1: What areas of law (particularly retained EU law) would benefit from reform to adopt a less codified, more common law-focused approach?

16. For the reasons outlined above, there are no obvious areas of environmental law and policy that may be regarded as benefiting from reform to a less-codified, more common law-focused approach.

Q2: Please provide an explanation for any answers given.

17. See paragraphs 4-15 above.

Q3: Are there any areas of law where the Government should be cautious about adopting this approach?

18. Yes, environmental law and policy.

Q4: Please provide an explanation for any answers given.

19. The reason for Answer 3 is provided in Answer 2 and in paragraphs 4-15 above.

Q5: Should a proportionality principle be mandated at the heart of all UK regulation?

20. No. When using the concept of proportionality, there is always a difficult issue of what are the objectives that are being justified by the concept of proportionality. In relation to environmental protection, these objectives can often exclude environmental considerations. As Professor Maria Lee explains:

> Systematic analysis of the pros and cons of a policy is of course important... But it should be noted that a quantitative approach to cost benefit assessment routinely undervalues environmental protection. At its most basic, this is because it is simply easier to quantify the costs of regulation than the benefits of regulation, creating a structural disadvantage for environmental (and other social) protection: 'The costs of preventive actions are usually tangible, clearly allocated and often short term, whereas the costs of failing to act are less tangible, less clearly distributed and usually longer term.' This is a phenomenon that has persisted long after it has been well understood.[7]

21. This concern is reinforced by the fact that proportionality is used to guide regulatory action so that it supports economic growth in section 108(2)(b) of the Deregulation Act 2015.

22. UKELA thus considers that references to a proportionate approach, whilst sensible in some cases, may be an opportunity for giving undue priority to conflicting considerations that could result in adverse environmental effects being either ignored or deemed acceptable because of economic factors.

23. There is however an important distinction that needs to be made between *designing regulation*, where the above considerations apply, and *implementing and enforcing regulation*. In the latter respect, regulators usually have discretion which is often applied on a risk-based or proportionality basis (see para 23).

Q6: Should a proportionality principle be designed to 1) ensure that regulations are proportionate with the level of risk being addressed and 2) focus on reaching the right outcome?

24. For the reasons provided in Answer 5, this is a complex question to answer. As for the suggestion that regulations should be designed to focus on 'reaching the right

[7] Maria Lee, *DEFRA's draft Environmental Principles Policy Statement* (April 2021) https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=869755.

outcome', this prima facie true, but there is a policy judgement to be made about what the 'right' outcome is. For regulations that affect or touch on environmental protection, the 'right' outcome should include a clear-sighted focus on contributing to environmental standards and targets, including climate change, biodiversity and air pollution targets. As for risk-based regulation, many regulators (including e.g. the Environment Agency)[8] already adopt this approach to enforcement of regulation, which is a sensible approach to the exercise of enforcement powers. When it comes to regulating risk, this is a different issue, and issues of prevention and precaution arise for environmental risks, depending on the level of knowledge about those risks.

Q7: If no, please explain alternative suggestions.

25. Developing alternatives would require a systematic analysis of how objectives of environmental regulation should be most effectively designed into regulatory form, particularly after the passage of the Environment Bill 2019-21.

26. For the reasons set out above, UKELA suggests reorienting the focus of reforming better regulation to address the clarity and transparency of regulation, as well as its coherence. In terms of coherence, internal policy and regulatory consistency is important, as is coordination of different bodies of intersecting regulation, so as to address coherently all-of-government priorities, including environmental protection and climate change.

Q8: Should competition be embedded into existing guidance for regulators or embedded into regulators' statutory objectives?

27. No. Unless the government requires all business organisations to commit to meaningful notions of sustainability and environmental ambitions such that these override the current primary concerns of business seeking to make a profit for shareholders, then promoting competition among businesses by regulators risks promoting unsustainable practices. This is not to say that UKELA objects to competition but simply that requiring regulators to encourage and promote

[8] https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy.

competition without equal or even greater prominence being given to environmental protection considerations is unhelpful.

28. It should be noted that the Environment Agency is already subject to the 'growth duty' in section 108 of the Deregulation Act 2015, which ensures that its work supports economic growth as well as environmental objectives (as set out in section 4 Environment Act 1995).

29. UKELA considers that there could be a role for regulators to promote innovation towards more sustainable and environmentally supportive practices and this may well result in financially beneficial outcomes to any particular business. However, the innovation should be in seeking to secure environmental improvement and enhancement by e.g. securing carbon reduction, encouraging biodiversity etc.

Q9: Should innovation be embedded into existing guidance for regulators or embedded into regulators' statutory objectives?

30. As mentioned above, there may be some instances where innovation could be drawn into guidance for regulators for instance, where an organisation is adopting an innovative approach to securing sustainability or to significantly improving and enhancing the environment. However, this is not to say that innovation should be embedded into the way that regulators operate at all costs. This will undermine the consistency and certainty that many organisations desire when carrying on business.

Q10: Are there any other factors that should be embedded into framework conditions for regulators?

31. Yes. The environmental principles and environmental protection objectives that are emerging in the Environment Bill 2019-2021 should be embedded into the framework conditions for all regulators.

Q11: Should the Government delegate greater flexibility to regulators to put the principles of agile regulation into practice, allowing more to be done through decisions, guidance and rules, rather than legislation?

32. Above all, there needs to be certainty for all regulatory stakeholders;[9] greater flexibility to regulators and regulation tends to provide less certainty. For example, promoting a circular economy requires clear rules on when waste ceases to be waste, on minimum standards for industrial practices, and when regulatory exceptions will apply. Without this kind of certainty, investment in new markets for recovered and recycled materials is unlikely to be forthcoming. Thus, for environmental regulation (and intersecting areas of regulation such as planning, agriculture, transport), there appears to be no good reason to remove certain legislative provisions only to provide a weaker form of regulatory control via precedent-type decisions, guidance and less formal rules.

Q12: Which of these options, if any, do you think would increase the number and impact of regulatory sandboxes? a. legislating to give regulators the same powers, subject to safeguarding duties; b. regulators given a legal duty; c. presumption of sandboxing for businesses.

33. UKELA has not had any particular experience of regulatory sandboxes and is unable to comment on this and the following question.

Q13: Are there alternative options the Government should be considering to increase the number and impact of regulatory sandboxes?

34. See paragraph 33 above.

[9] UKELA, King's College London and BRASS, *The State of UK Environmental Legislation in 2011-2012: Is There a Case for Legislative Reform?*, May 2012 (Final Report).

Q14: If greater flexibility is delegated to regulators, do you agree that they should be more directly accountable to Government and Parliament?

35. In thinking about lines of accountability, there should be a clear recognition of the separate constitutional roles of Parliament and Government, entailing different forms of scrutiny and control. Regulators are generally set up – through parliamentary legislation – at arm's length from government in order to best serve the public interest, rather than to implement current government policy, and should generally be accountable to Parliament as representing that interest, not to Government. At the same time, it is important that regulators work with relevant government departments, particularly where regulatory expertise is helpful in developing and reviewing government policy.

36. There should also be mechanisms that respect the legitimate interests of the Welsh and Scottish Parliaments and the Northern Ireland Assembly in the effect of regulatory activities which may control matters outwith their direct responsibilities but have a significant impact on those.

Q15: If you agree, what is the best way to achieve this accountability? If you disagree, please explain why?

37. See the answer to Question 14 above.

Q16: Should regulators be invited to survey those they regulate regarding options for regulatory reform and changes to the regulator's approach?

38. The views of those subject to regulation are clearly very important in identifying the consequences and practicality of any change in approach, but it is important that theirs is not the only voice. Regulation is put in place to protect a range of public interests, not to serve those of the regulated enterprises, so it is not only views from that one group of stakeholders that should be sought. In relation to environmental protection in particular, as noted above, a wide range of professional and non-governmental bodies have expert and representative views to consider.

Q17: Should there be independent deep dives of individual regulators to understand where change could be introduced to improve processes for the regulated businesses?

39. The value or objective of this is unclear.

Q18: Do you think that the early scrutiny of policy proposals will encourage alternatives to regulation to be considered?

40. The answer to this question is simply not known. There does not appear to be the case to provide effective alternatives to some form of regulation, particularly where there are any environmental implications to a policy proposal.

41. Early scrutiny of policy proposals would be positive providing that such scrutiny is informed by robust environmental principles as found and supported in the Environment Bill 2019-2021. It should also include discussions with the devolved administrations to ensure that areas of potential difficulty are identified and that work can proceed across the UK on a suitable timetable to address how changes may have an impact across devolved and reserved matters (whether based on seeking coherence or managing legitimate divergences).

Q19: If no, what would you suggest instead?

42. N/a.

Q20: Should the consideration of standards as an alternative or complement to regulation be embedded into this early scrutiny process?

43. See the answers to Q18 & Q19 above.

Q21: Are there any other changes you would suggest to improve impact assessments?

44. Yes. The environmental principles including those set out in the Environment Bill 2019-2021 should be central to early policy scrutiny and impact assessment in order to promote joined-up government approaches to tackling climate change and the pursuit of a high level of environmental protection.

Q22: If no, what would you suggest instead?

45. N/a.

Q21: Do you think that a new streamlined process for assessing regulatory impacts would ensure that enough information on impacts is captured?

46. This is unlikely to be ensured when environmental impacts are involved. Indeed, there may be occasions when environmental impact assessment simply cannot be carried on through a streamlined process.

Q22: If no, what would you suggest instead?

47. UKELA is not supportive of a streamlined approach.

Q23: Are there any other changes you would suggest to improve impact assessments?

48. None that are known.

Q24: What impacts should be captured in the Better Regulation framework? Select all which apply: a. Innovation; b. Trade and investment; c. Competition; d. Environment

49. a) innovation; b) trade and investment; and d) environment.

Q25: How can these objectives be embedded into the Better Regulation Framework? Can this be achieved via: a. A requirement to consider these impacts; b. Ensuring regulatory impacts continue to feature in impact assessments; c. Encouragement and guidance to consider these impacts, but outside of IAs; d. Other? (please explain)

50. Helping to secure innovation, investment and environmental improvement and enhancement could be achieved by: a) requirements, b) featuring them in impact assessment, and c) encouragement and guidance. However, environmental improvement and enhancement is more likely to be secured by clearly structured legal requirements rather than, say, encouragement and guidance.

Q26: The current system requires a mandatory PIR to be completed after 5 years. Do you think an earlier mandated review point, after 2 years, would encourage more effective review practices?

51. This is beyond the scope of UKELA's work but it is unclear that this would be a more effective review practice, not least because it often takes some time for business and other practices to adapt to changes in regulation, especially when capital investment or connected supply chains or services are involved.

Q27: If no, what would you suggest instead?

52. See the answer Question 26 above.

Q28: Which of these options would ensure a robust and effective framework for scrutinising regulatory proposals? a. Option 1; b. Option 2; c. Option 3; d. Other (please explain)

53. This is beyond the scope of UKELA's work.

Q 29: Which of the four options presented would be better to achieve the objective of striking a balance between economic growth and public protections? a. Adjust; b. Change; c. Replace; d. Remove; e. Other (please explain)

54. This is beyond the scope of UKELA's work.

Q30: Should the One-in, X-out approach be reintroduced in the UK?

55. This is beyond the scope of UKELA's work.

Q31: What do you think are the advantages of this approach?

56. This is beyond the scope of UKELA's work.

Q32: What do you think are the disadvantages of this approach?

57. This is beyond the scope of UKELA's work.

Q33: How important do you think it is to baseline regulatory burdens in the UK? a. Very important; b. Somewhat important; c. Somewhat unimportant; d. Not very important.

58. This is beyond the scope of UKELA's work.

Q34: How best can One-in, X-out be delivered?

59. While the aim of removing unnecessary regulation is to be supported, any rigid metric such as OIXO is likely to distort the consideration and focus attention on detailed rules rather than a more holistic view of how the objectives of the regulatory system can best be achieved, and how coherent and clear a body of regulation is as a whole.

Q35: Are there any other matters not mentioned above you would suggest the Government does to improve the UK regulatory framework?

60. In addition to the points raised, there does not appear to be any discussion about the significance and impact of a number of the existing statutory duties on regulatory and other public bodies in relation to equality, biodiversity, climate change, air pollution and so on. It is not clear how compliance with the substantive and procedural obligations that are imposed is to be accommodated within any change in regulatory approach.

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