

Briefing for Peers: 21 February 2018

## EU (Withdrawal) Bill & archaeology

HoL Committee Stage debates

### Summary:

We would like to ensure that Peers are briefed to rise in support of amendments tabled to be debated Environmental on the EU (Withdrawal) Bill. **It is expected that these amendments will be being discussed on day 2 (26 February) or day 3 (28 February).** It would be beneficial if the potential implications on archaeology in the planning system were mentioned in the context of this debate.

- Archaeology is enabled by environmental principles which are codified in the Treaty of the Functioning of the European Union (article 191). These principles provide certain safeguards against adverse policy change and provide a basis for legal challenge.
- As drafted, the Bill does not transpose these principles into UK law. Government has suggested that they may seek to create a national policy statement on environmental principles. However, a policy-approach would be a weaker solution and it is not clear that an environmental policy statement would have influence over impacts on archaeology and the historic environment.
- We are seeking an amendment to the Bill to create a statutory footing in UK law for these principles, or an amendment which will commit government to developing another appropriate statutory instrument which will do this.
- *More detailed information is appended below.*

### Tabled amendments:

CBA and CIfA are supporting a number of amendments (full text of amendments below):

- **Amendment 28 (Lead Peer: Lord Krebs)**
  - This new clause, which requires the existing clause 4 to be deleted, aims to preserve, more comprehensively than the existing clause 4, rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from EU law and incorporated into domestic law via the European Communities Act 1972. Where such rights are incorrectly or incompletely transferred, it imposes a duty to make regulations to remedy the deficiency.
- **Amendment 66 (Lead Peer: Baroness Jones of Whitchurch)**
  - This would carry over key environmental principles contained in the EU Treaties.
- **Amendment 112 (Lead Peer: Lord Krebs)**
  - This new clause requires the Secretary of State and ministers of devolved authorities to consult on and bring forward proposals to establish a new environmental regulator and incorporate the environmental principles in domestic law.
- **Amendment 113 (Lead Peer: Lord Krebs)**

- This new clause would ensure the continuation of environmental functions currently exercised by EU institutions. It will also ensure oversight of this process by requiring the Government to establish a publicly accessible register of environmental governance functions and powers exercised by EU institutions
- **Amendment 317 (Lead Peer: Lord Wigley)**
  - In the UK, environmental protection is a devolved matter. However, while the UK is an EU Member State, environmental law in the four countries of the UK is guided by common frameworks set at EU level. This amendment would require the four governments to work together on proposals to maintain the existing common frameworks for environmental protection and sustainable development.

## Additional information:

- 1.1. The legal basis for these environmental principles is the Treaty on the Functioning of the European Union (TFEU), article 191. Sustainable development is also given legal power by article 11 of the TFEU.
- 1.2. Environmental principles have 3 main functions:
  - Interpreting EU-derived law
  - A lever to challenge actions in court, and
  - To guide future governmental decision-making
- 1.3. There are a number of key issues with which ClfA and CBA are concerned:
  - The *de facto* weakening of environmental protections, including for archaeology, that would result if the above functions of environmental principles are not preserved
  - The uncertainty over the status of case law which refers to EU principles not transcribed in the Withdrawal Bill (a matter of the management of delegated powers)
  - The uncertainty over how government will use delegated powers to shape regulatory bodies responsible for environmental protection and amend other technical aspects of the EU law when transposed
  - The uncertainty over how previously-held EU powers brought back to the UK after Brexit will be reserved or devolved to Scotland, Northern Ireland, and Wales.
- 1.4. On 12 November Secretary of State Michael Gove announced a consultation to ‘explore the scope and content of a new policy statement to ensure environmental principles underpin policy making’.
- 1.5. We believe that a policy approach would be weaker than a statutory one, and likely more limited in scope, permanence, strength of obligations, and relevance in court. Therefore, CBA and ClfA support the Wildlife and Countryside Link and Green Alliance’s proposition for any future environmental principles to be
  - established in law: either in statute directly, or underpinned by a strong legal base
  - subject to parliamentary and public consultation: set out in Standing Orders and statute.
  - binding: with a duty to comply
  - applied to all public bodies: Government Departments, agencies, and courts
  - overseen by an arbiter with prosecutorial functions: with strong remedies for non-compliance
  - devolution-sensitive: agreed by all four UK administrations
  - to go further and establish a principles policy proportionate to the challenge of passing on our environment in better condition
  - comprehensive: including international legal principles that have developed more recently than the Treaties, including non-regression, no net less and individual environmental responsibility.
  - accompanied by an implementation plan: laying out plans for integrating the principles in UK decision-making.

- 1.6. It is also useful to note that DEFRA Secretary of State Michael Gove MP had a positive meeting with the Heritage Alliance in November, and others in the natural environment sector have been encouraged by other changes in Government's stance which have occurred since Mr Gove became Secretary of State.

## **HoL Committee stage amendments in full**

### **Amendment 66:**

*Baroness Jones of Whitchurch*

*Lord Krebs*

*Baroness Bakewell of Hardington Mandeville*

*Lord Judd*

After clause 6, insert, the following new Clause—

#### **“Maintenance of EU environmental principles**

- (1) Public authorities must have special regard to and apply the principles set out in this section.
- (2) The principles in this section are—
  - (a) the precautionary principle as it relates to the environment,
  - (b) that preventive action should be taken to avert environmental damage,
  - (c) that environmental damage should, as a priority, be rectified at source,
  - (d) the polluter pays principle, and
  - (e) that environmental protection requirements must be integrated into the definition and implementation of policies and activities, with a view to promoting sustainable development.
- (3) The principles in subsection (2) may be called the “environmental principles”.
- (4) In carrying out their duties and functions arising by virtue of this Act, public authorities must take account of the public interest in—
  - (a) promoting sustainable development in the United Kingdom and overseas,
  - (b) preserving, protecting and improving the environment,
  - (c) the prudent and rational utilisation of natural resources,
  - (d) promoting measures at the international level to deal with regional or worldwide environmental problems, and combat climate change,
  - (e) guaranteeing participatory rights including—
    - (i) access to information,
    - (ii) public participation in decision making, and
    - (iii) access to justice,in relation to environmental matters, and
- (f) acting in a way that takes account of available scientific and technical data.
- (5) When making proposals concerning environmental protection, public authorities shall take as a base a high level of protection, taking account in particular of any new development based on scientific facts.
- (6) Subsection (7) applies in any proceedings in which a court or tribunal determines whether a provision of primary or subordinate legislation is compatible with the environmental principles.

(7) If the court is satisfied that the provision is incompatible with the environmental principles, it may make a declaration of that incompatibility.”

**Amendment 112:**

*Lord Krebs*

*Baroness Jones of Whitchurch*

*Baroness Brown of Cambridge*

*Baroness Byford*

After Clause 7, insert the following new Clause—

**“Environmental protection and improvement: continuation of powers and functions**

(1) Within one month of the passing of this Act, the Secretary of State must—

(a) publish and lay before Parliament a statement identifying those powers and functions listed in the public register established under subsection (2) that it expects—

(i) will continue to be exercised in the United Kingdom or on behalf of the United Kingdom by EU entities or other EU public authorities; or

(ii) will be transferred to existing or new public authorities in the United Kingdom; or

(iii) will cease to be exercisable under the terms of the withdrawal agreement;

(b) make regulations containing provisions to ensure that all relevant powers and functions relating to environmental protection or improvement exercisable by EU institutions anywhere in the United Kingdom or on behalf of the United Kingdom before exit day continue to have effect on and after exit day.

(2) The Secretary of State must establish and maintain a publicly accessible register of all relevant powers and functions relating to environmental protection or improvement exercisable by EU institutions anywhere in the United Kingdom before exit day.

(3) The register produced pursuant to subsection (2) must specify—

(a) the specific powers and functions relating to environmental protection or improvement exercised by EU institutions;

(b) the institution previously responsible for exercising those functions; and

(c) the empowering provision in EU law relating to those functions.

(4) The register produced pursuant to subsection (2) must include the following functions—

(a) monitoring and measuring compliance with legal requirements;

(b) reviewing and reporting on compliance with legal requirements;

(c) enforcement of legal requirements;

(d) setting standards or targets;

(e) co-ordinating action; and

(f) publicising information including regarding compliance with environmental standards.”

**Amendment 113 – after clause 7**

*Lord Krebs*

*Baroness Jones of Whitchurch*

*Baroness Brown of Cambridge*

Insert the following new Clause—

**“Environmental protection and improvement: continuation of powers and functions**

(1) Within one month of the passing of this Act, the Secretary of State must—

(a) publish and lay before Parliament a statement identifying those powers and functions listed in the public register established under subsection (2) that it expects—

(i) will continue to be exercised in the United Kingdom or on behalf of the United Kingdom by EU entities or other EU public authorities; or

(ii) will be transferred to existing or new public authorities in the United Kingdom; or

(iii) will cease to be exercisable under the terms of the withdrawal agreement;

(b) make regulations containing provisions to ensure that all relevant powers and functions relating to environmental protection or improvement exercisable by EU institutions anywhere in the United Kingdom or on behalf of the United Kingdom before exit day continue to have effect on and after exit day.

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(d) setting standards or targets;

(e) co-ordinating action; and

(f) publicising information including regarding compliance with environmental standards.”

**Amendment 317** – after Clause 11

*Lord Wigley*

*Baroness Jones of Moulsecoomb*

*Baroness Brown of Cambridge*

*Lord Judd*

Insert the following new Clause—

**“Common frameworks for environmental protection**

Within one month of the passing of this Act, a Minister of the Crown and the devolved authorities must jointly publish for consultation proposals for replicating the common EU frameworks that will apply in the United Kingdom immediately before exit day with the purpose of—

(a) achieving compliance with international environmental commitments;

- (b) establishing minimum common environmental objectives, harmonisation and standards, which aim at a high level of protection;
- (c) promoting sustainable development; and
- (d) facilitating the prudent and rational management of common resources after exit day.”