Briefing note on the provisions in the Levelling Up and Regeneration Bill concerning Environmental Outcome Reports

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Introduction

1. We are instructed by Rights: Community: Action to provide a briefing note regarding "Environmental Outcome Reports" ("EORs") set out in the Levelling Up and Regeneration Bill ("the Bill").[1] EORs are proposed as a replacement to the existing EU-derived environmental assessment legal framework. This framework includes, among other things, Environmental Impact Assessments ("EIA") and Strategic Environmental Assessments ("SEA")).[2] In particular, we are asked to identify the legal problems or issues (if any) that arise from the current drafting of the clauses that set out the scope of EORs.[3]

2. In summary, the key problem with EORs is that the Bill leaves almost all of the detail of these replacement measures for secondary legislation. This means that it will be far more difficult to scrutinise the finalised proposals that eventually do come forward through these clauses. There is also a clear possibility that the proposals will involve, directly or indirectly, a rolling back of the existing level of environmental protection.

3. We note from the outset that there is nothing objectionable in principle with simplifying a highly technical system of environmental assessment that is often opaque and inaccessible to the general public. In many ways, this objective should be lauded. However, without a clear picture of what the proposed simplification will involve, it is

[1] Available here: https://bills.parliament.uk/bills/3155. The version we have seen is as amended in the Public Bill Committee. Our original briefing note was dated 21.11.22. We have updated it only to reflect the most recent clause numbering as of 13.2.23.

[2] EIA involves an assessment of the environmental impacts of certain projects i.e. development proposals, whereas SEA involves an assessment of "plans or programmes" which "set the framework for future development consent of projects" e.g. local plans. See Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (The EIA Directive) and Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive).

[3] Part 6 of the Bill, Clauses 138-152.

hard to say whether it will be a positive or negative step in terms of both environmental protection and public participation in environmental decision-making.

4. What we can say is that the "safeguards" set out in the Bill are weak in legal terms. They do not provide a strong guarantee that there will be no degradation of either environmental protection or public participation in decision-making.

Summary of provisions in the Bill

5. Clause 138 creates a power to specify, via regulations, environmental outcomes. Surprisingly, and in contrast to the environmental principles set out in the Environment Act 2021,[4] no such outcomes are specified in the Bill itself.

6. Clause 139(4) defines an EOR as a written report which, in summary, assesses the extent to which the plan or project being assessed would be likely to impact on the delivery of specified environmental outcomes. The EOR must also set out:

   a) Among other things, the required avoidance, mitigation or remedial measures proposed in relation to effects which might affect the outcome being delivered (139)(4)(b)),

   b) Proposals for monitoring and securing the proposed steps or possible impacts (119)(4)(c)).

7. Clause 139(1) provides that regulations "may" require an EOR to be prepared in relation to a proposed consent or plan. This gives the Secretary of State a wide discretion to decide what consents or plans, if any, will require an EOR.[5]

8. Clause 139(7)(d) provides that regulations may (in summary) state where an EOR is not required, in whole or in part, because an "adequate" assessment has already been carried out.

9. Clause 140 provides that regulations may (but are not required to) distinguish between two categories of consent, category 1 and category 2. This distinction appears to be

[4] Section 17(5).

[5] See also clause 139(7).

similar to the requirement in the existing EIA regime to distinguish between certain development proposals that always require a full environmental assessment (e.g. power stations, refineries etc[6]) and those proposals that might require a full assessment (e.g. larger housing schemes[7]). However, the extent to which these categories will reflect or depart from the existing two categories under EIA will depend on the content of the regulations that come forward.

10. Clause 140(7) provides that references to relevant consents and plans refers to modifications to those consents and plans, which reflects the current position.

11. Clauses 140(8) and (9) define a project in fairly broad terms.[8]

12. We note that clauses 138, 139 and 140 are all proposed to be subject to the affirmative resolution procedure.[9]

13. Clause 141 provides that regulations may set out monitoring or assessment requirements regarding the impact of consents or plans or proposals set out in applicable EORs.

14. Clause 142 is significant. It sets out various purported safeguards:

    a) The Secretary of State may not make EOR regulations unless "satisfied" that doing so will not reduce the existing level of environmental law protection (clause 142(1)).

    b) EOR regulations may not contain provision that is inconsistent with the implementation of the international obligations of the United Kingdom relating to

[6] See Schedule 1, Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571.

[7] See Schedule 2, Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571.

[8] Clause 140(8): *"Consent" means any consent, approval, permission, authorisation, confirmation or decision (however described, given or made) that is required, or otherwise provided for, by or under any enactment in relation to a project.* Clause 140(9): *"Project" means a project in the United Kingdom or a relevant offshore area involving— (a) construction, engineering, demolition, dismantling or decommissioning, (b) the installation, depositing or removal of any thing, (c) the exploitation of natural resources by any means, (d) a change in the use of land, a building or other structure, or (e) any other activity capable of affecting the natural environment, cultural heritage or landscape.*

[9] See the Memorandum concerning the Delegated Powers for the Delegated Powers and Regulatory Reform Committee (31 May 2022), available here:

https://publications.parliament.uk/pa/bills/cbill/58-03/0006/amend/LURB_DPM_0531.pdf.

the assessment of the environmental impact of relevant plans and relevant consents (clause 142(2)).

c) The Secretary of State is under a new duty to ensure that "sufficient information" will be provided to the public "at a sufficiently early stage" to enable "adequate public engagement" to take place (clause 142(3)). However, "sufficient" is not defined, and "adequate public engagement" is defined as such engagement with the public, in relation to a proposed relevant consent or proposed relevant plan, as the Secretary of State considers appropriate (clause 142(4)).

15. Clause 143 provides that the Secretary of State may only make EOR regulations which contain provision within devolved competences after consulting with the relevant national governments in the case of Scotland and Wales, or a Northern Ireland department in the case of Northern Ireland.

16. Clause 144(1) provides that the Secretary of State may direct that no environmental outcomes report is required to be prepared in relation to a proposed relevant consent which is solely for the purposes of national defence or preventing or responding to civil emergency. Clause 144(2) provides that EOR regulations may provide further circumstances in which the Secretary of State can direct that no EOR is required.

17. Clause 145 provides for the creation of a sanctions regime for compliance with EOR requirements. Clause 146 allows regulations to create reporting requirements for public bodies in relation to EORs.

18. Clause 147(1) imposes a requirement for public consultation before making regulations that set out environmental outcomes or amend, repeal or revoke existing environmental assessment legislation. Clause 147(2) imposes a requirement to consult "such persons as the Secretary of State considers appropriate" before making regulations which contain provision under clause 140(1)-(6) (consents and plans), 144(2) (exemptions by direction), 145 (enforcement) and 149 (interaction with existing environmental assessment legislation and the Habitats Regulations), or before making or modifying/withdrawing guidance on the assessment and monitoring of consents and plans. No minimum time limits are given for such consultation.

19. Clause 148 provides that public authorities must have regard to guidance from the Secretary of State in carrying out their functions in relation to EORs.

20. Clause 149 creates a wide power for regulations to provide that anything done or omitted to be done should be treated as satisfying or failing to satisfy the requirements of existing environmental legislation or the Habitats Regulations. This is presumably a catch-all power to allow deficiencies or inconsistencies to be easily corrected, for example following a proposed legal challenge.

21. Clause 151(2)(c) creates a number of additional powers including the power to "make consequential, supplementary or incidental provision… which amends, repeals or revokes any legislation (whenever passed or made)." This includes any provision made by or under an Act of Parliament or, notably, the devolved administrations, and retained EU law (clause 151(3)).[10]

Analysis

22. As we indicated in the introduction to this briefing note, it is hard to assess the legal impact of the government's EOR proposals, as the proposals have not been set out and the Bill provides little in the way of clarity.

23. What we can say is that the Bill as drafted will provide the government with sweeping powers to reshape the law of environmental assessment, with potentially very limited input from Parliament and the public.

24. While we cannot say how likely it would be practice, we note that under the wide scope of these powers, it would be entirely possible as a matter of law for the government to:

    a) Propose a strictly limited number of environmental objectives, compared to the existing criteria, against which plans and projects can be assessed,

    b) Exclude large categories of plans or projects from the requirements of environmental assessments entirely, through either a narrow definition of plans or projects subject to the EOR requirements or a separate exclusions by direction,

[10] We note also that as a result of this provision, there may be very significant devolution implications of EORs, with Parliament able to directly modify or repeal legislation passed by the devolved administrations.

c) Substantially limit public consultation through the EOR process to only that which the government considers to be "adequate",

d) Respond to alleged non-compliance with existing environmental law (through EOR regulations or otherwise) through regulations that mandate the courts to hold that there is compliance.

Of course, it is equally the case that, as a matter of law, the powers could be used to require the EOR process to be used in a way which is no different to, or even more extensive than the current EIA regime. However, it is difficult to see what point there would be in the former, and the latter seems unlikely.

25. The purported safeguards in Clause 142 rely heavily on the judgment of the Secretary of State. They would not provide sufficient legal protection to prevent any of the above possibilities from occurring. Parliament is, therefore, being asked to take it on trust that the system that eventually comes forward under the Bill will not provide less in the way of environmental protection or public participation than the framework that is currently in place.

26. We also note the comment in the Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee (para 1039) that:

> "Almost all of the existing environmental assessment framework is provided for by secondary legislation made by the relevant Secretary of State. There is therefore nothing new in these matters being the subject of delegated powers with suitable duties to consult and parliamentary scrutiny. Moreover, it would be odd if, going forward, the only ability to amend provision previously made by regulations is by way of primary legislation."

27. Whilst strictly correct in terms of the current location of the most of our domestic legislation on EIA and SEA, this observation overlooks the fact that the existing EIA and SEA regulations transpose the highly prescriptive requirements in the relevant EU Directives, which are far more akin to primary legislation than secondary legislation. There was, when those regulations were introduced, very limited scope to depart from the requirements of the relevant Directives. The discretion of the government regarding the content of secondary legislation concerning environmental assessment *then* compared to its discretion *under the Bill* is therefore not comparable.

Conclusion

28. The EOR provisions in the Bill create broad powers to design a new system of environmental assessment which may, or may not, provide an equivalent level of environment protection to the present system. In particular, the powers go well beyond those which would be necessary merely to reduce the length of or simplify Environmental Statements, and extend to the range of plans and projects which require assessment and the consultation which is required. The uncertainty as to the manner in which the powers will in fact be used is, of itself, a cause for concern.

29. As the UK is no longer bound by the EIA and SEA Directives, if the present government wishes to guarantee continuing equivalence of environmental protection, setting out the requirements of the new regime through primary legislation would be a far more effective way of achieving this objective than through secondary legislation, which can be easily amended or revoked by subsequent governments. A new system of environmental assessment that operates entirely through secondary legislation, with virtually nothing underpinning it in the way of primary legislation or otherwise, amounts to a significant change to the previous system.

30. We are asked specifically to comment on how the safeguards regarding environmental protection and public participation in the Bill could be strengthened. If this was the objective, it could be achieved in the following ways:

    a) A higher level of Parliamentary scrutiny could be applied to the exercise of the wide powers in Part 6 if every power under Part 6 was subject to the affirmative procedure.

    b) It is not clear to us that the power to direct that no EOR is required in circumstances outside of national defence or civil emergency has any likely benefit (Clause 144(2)). Such a sweeping power is clearly open to abuse.

    c) A minimum level of public participation could be guaranteed in clause 142, rather than left to the discretion of the Secretary of State.

    d) The Office for Environmental Protection could be given a more direct role in scrutinising the design of EOR regulations, that goes further than the general advisory role set out in s.30 of the Environment Act 2021.

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