

Environment, Climate Change and Land Reform – Legislative Narrative

Introduction

On 29 March 2017, the UK Government began the formal legal process of negotiating the UK's withdrawal from the European Union (EU). Exiting the EU has significant implications for environmental protection in Scotland, particularly given that 80% of Scottish environmental legislation is derived from EU legislation.

The European Union (Withdrawal) Act 2018 (EUWA) will repeal the European Communities Act 1972 (the 1972 Act) on the day that the UK leaves the European Union. The 1972 Act provided the legal basis for the UK to join the European Economic Community, the organisation that would eventually help create the EU, and incorporate EU law into UK law.

The EUWA converts EU law, as it stands at the moment of EU Exit, into UK law and allows for UK legislation based on EU legislation to continue to have effect after exit. The EUWA also provides temporary powers for UK and Scottish Ministers to make changes to EU-derived law that has effect in the UK after exit, to ensure that it can continue to operate properly. Using these powers, the Scottish Government has undertaken a large programme of work to prepare a functioning statute book for EU Exit and mitigate, as far as possible, the consequences of a potential no-deal exit.

What has been done?

Given the significance of EU law for environmental protection in Scotland, work on preparing legislation was a high priority in the Environment, Climate Change and Land Reform portfolio.

An initial review was undertaken across the Scottish Government focussed on areas with the greatest potential impact for Scotland in a no-deal scenario. For the ECCLR portfolio the review drew on the expertise of a variety of public bodies, including the Scottish Environment Protection Agency and Scottish Natural Heritage. It was also informed by stakeholder engagement including with Defra, BEIS and the other devolved administrations.

Each area reviewed relevant legislation to understand whether it would still work after EU Exit. This included assessing the potential impact of not fixing legislation immediately in a no-deal scenario and the likelihood of this impact occurring. This process involved reviewing over 250 pieces of legislation. Based on this analysis, a list of high priority corrections for each policy area was agreed by the Cabinet Secretary for the Environment, Climate Change and Land Reform.

Teams then focussed on making the corrections in these areas. Scottish Ministers agreed that one way to ensure our laws continued to operate was through co-operation with the UK Government and the other devolved administrations. They agreed to consent to legislate through UK Statutory Instruments (SI), where proposed UK-wide policy aligned with the aims of Scottish Ministers. In these instances, under arrangements agreed with the UK Government and the Scottish Parliament, Scottish Ministers wrote to the Scottish Parliament to seek its agreement to Ministers consenting to the corrections being made through UK legislation. In policy areas where corrections were made through Scottish Statutory Instruments (SSI), these were laid in the Scottish Parliament for scrutiny.

As of 11 April, when the EU granted an extension to Article 50, all high priority corrections within the ECCLR portfolio had been made via 27 SIs and 5 SSIs. A list of these instruments is in Appendix A.

What does this mean for legislative landscape?

The purpose of the EUWA and our corrections has been, as far as possible, to ensure our laws can function on EU Exit and to make sure the same rules and laws apply on the day after exit as on the day before. As a result of completing all the high priority fixes, we have mitigated as far as possible, the risk of potential damage to environmental protection in Scotland on EU Exit. We have also ensured the maximum possible certainty and continuity to businesses, people and public services across Scotland. Below are a couple of detailed examples of the impact and importance of our fixes.

The Scottish Crossbill

The Scottish Crossbill bird is of the finch family which is native to the Caledonian Forests of Scotland. The Scottish Crossbill was confirmed as a unique species to Scotland in August 2006, on the basis of having a distinctive bird song.

In Scotland, the Wildlife and Countryside Act 1981 offers protection to birds which are either threatened or endangered and come under the definition of “wild bird”. “Wild birds” are defined as those which are resident, or a visitor to, a Member State of the EU. Following EU Exit, the Scottish Crossbill would no longer qualify for protection as it is not resident, and does not visit, other Member States.

On 5 March 2019, The Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019 were laid, which extended the definition of “wild birds” to any bird of a species “which is ordinarily resident in, or is a visitor to, the United Kingdom or any Member State or the European territory of any Member State”. This SSI ensures the continued protection of the Scottish Crossbill following EU Exit.

Protecting marine environments in Scotland

The Marine Strategy Framework Directive requires the UK to put in place measures to achieve or maintain good environmental status in the marine environment by 2020. Regulation of the marine environment is a highly complex area, including functions which are either legislatively or executively devolved, and functions that are wholly reserved to the UK Government. As a result, the four administrations agreed that the Directive should be transposed on a UK-wide basis by the Marine Strategy Regulations 2010, providing a UK-wide framework for meeting the requirements of the Directive.

Careful drafting was necessary to ensure that corrections in this area, especially the reallocation of functions which are currently carried out at EU level, continue to respect devolution but also enable a continuing UK framework for protection of the marine environment. Given the cross-border nature of the marine environment in the North East Atlantic, the SIs in this area allow for on-going collaboration across the UK after EU Exit but also, with the EU. For example, the amendments ensure that the UK will continue to develop its marine strategy with other countries in the north east Atlantic through the OSPAR convention, and that standards of consultation are maintained if any elements of the marine strategy are changed in future. Fixing legislation in this area is central to the continued protection of the unique ecosystems and biodiversity of the North East Atlantic ocean.

Next steps

The terms of the UK's exit from the EU are still unknown. Dependent on the terms of exit, there will be a number of further steps needed to ensure our legislation continues to function.

- **No-deal:** Should the UK exit the EU without a deal, the SIs and SSIs that have been laid over the past year will come into force on exit day. Further corrections will be required in areas which were not assessed as critical for our law to continue to function for EU Exit.
- **Transition Period or Extension of EU Membership:** A transition period would only come into effect if a deal is agreed with the EU on the terms of our exit. In a transition period, or while we remain a full member of the EU in an extension, we are subject to EU law. This means that during this period we will continue to implement relevant EU law and make changes to our correcting EU Exit SIs and SSIs to reflect it.
- **Future Relationships:** The SIs and SSIs that we have put in place allow for our law to continue to function in the event of a no deal scenario. In either a deal or no-deal scenario, the UK Government will negotiate a future relationship with the EU. The terms negotiated may result in different corrections needing to be in place (e.g. to reflect on-going relationship with the EU or new reporting structures). In some areas, the SIs and SSIs will form the basis of future UK-wide frameworks, and may need amendments to reflect agreements reached during those negotiations. These proposals will require further scrutiny by the Scottish Parliament.

Appendix A

List of 5 SSIs made in the Scottish Parliament for ECCLR interests (as at 11 April):

- The Environment (Scotland) (EU Exit) (Miscellaneous Amendments) Regulations 2019
- The Conservation of Habitats and Species (Scotland) (EU Exit) (Amendments) Regulations 2019
- Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019
- The Marine Environment (Scotland) (EU Exit) (Amendments) Regulations 2019
- The Animal Welfare (Scotland) (EU Exit) (Miscellaneous Amendments) Regulations 2019

List of 24 SIs consented to by the Scottish Government with ECCLR interests (as at 11 April):

- The Justification Decision Power (Amendment) (EU Exit) Regulations 2019
- The Ionising Radiation (Basic Safety Standards) (Miscellaneous Provisions)(Amendment)(EU Exit) Regulations 2018
- The Greenhouse Gas Emissions Trading Scheme (Amendment) (EU Exit) Regulations 2018
- The Health and Safety (Amendment) (EU Exit) Regulations 2018
- The Environment (Amendment etc.) (EU Exit) Regulations 2019
- The Floods and Water (Amendments etc.) (EU Exit) Regulations 2019
- The Persistent Organic Pollutants (EU Exit) Regulations 2018
- The Control of Mercury (EU Exit) Regulations 2018
- The Fluorinated Greenhouse Gases and Ozone-Depleting Substances (EU Exit) (Miscellaneous Amendments) Regulations 2019
- The Waste (UK) (EU Exit) (Miscellaneous Amendments)
- The Ionising Radiation (Environmental and Public Protection) (Miscellaneous Amendments) (EU Exit) Regulations 2019
- The Nagoya Protocol (Compliance) (Amendment) (EU Exit) Regulations 2018
- The Leghold Trap and Pelt Imports (Amendment etc) (EU Exit) Regulations 2019
- The Air Quality (Miscellaneous Amendment and Revocation of Retained Direct EU Legislation) (EU Exit) Regulations 2018
- The Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations 2019
- The Marine Environment (Amendment) (EU Exit) Regulations 2018
- The Environment and Wildlife (Legislative Functions) (EU Exit) Regulations 2019
- The REACH etc. (Amendment) (EU Exit) Regulations 2019
- The Chemicals (Health and Safety) and Genetically Modified Organisms (Amendment of Retained EU Law) (EU Exit) Regulations 2018
- The Waste (Miscellaneous Amendments) (EU Exit) (No.2) Regulations 2018
- The Environment (Miscellaneous Amendments) (EU Exit) Regulations 2019
- The Detergents (Safeguarding)(Amendment)(EU Exit) Regulations 2019
- The REACH etc. (Amendment etc.) (EU Exit) (No. 2) Regulations 2019
- The Greenhouse Gas Emissions Trading Scheme (Amendment) (EU Exit) (No. 2) Regulations 2019

List of 3 SIs with ECCLR interests relating to reserved or disputed matters (as at 11 April):

- The Trade in Endangered Species of Wild Fauna and Flora (Amendment) (EU Exit) Regulations 2018
- The International Waste Shipments (Amendment) (EU Exit) Regulations 2018
- The Detergents (Amendment)(EU Exit)Regulations 2019