



## **Submission to call for evidence on the delegated powers conferred on the Scottish Ministers in the European Union (Withdrawal) Bill**

**by Scottish Environment LINK's Brexit Subgroup**

**Date: 5 October 2017**

Scottish Environment LINK welcomes the opportunity to provide a written response to the Delegated Powers and Law Reform Committee's call for evidence on the impact of the delegated powers conferred on the Scottish Ministers in the European Union (Withdrawal) Bill.

In this respect, LINK members, representing the voice of the environment as well as over half a million members throughout Scotland, would like to highlight the following important aspects:

- 1) Scottish Ministers and Scottish Parliament need to ensure that the entire body of EU environmental law as well as environmental principles are faithfully transposed into domestic law. The loss of key governance functions currently performed by EU institutions must also be addressed.**

The majority of legislation protecting our environment and climate, as well as other policies with a great impact on both (such as agriculture and fisheries) derive from EU law. As such the provisions of the Withdrawal Bill will be critical for ensuring that environmental protections are safeguarded and continue to be expanded and improved, and that there is no watering down of standards.

As indicated in the UK Government's paper on "Legislating for the UK's withdrawal from the European Union", in introducing the Withdrawal Bill, "the UK Government is mindful of the need to ensure that the right balance is struck between the need for scrutiny and the need for speed"<sup>1</sup>. The use of statutory instruments (SI's) is proposed as the way to ensure that the UK has a "functioning statute book" after the UK formally exits from the EU.

However, the powers conferred to ministers across the UK, including Scottish Ministers, are considerable. As such, a number of issues in terms of transparency, scrutiny and oversight need to be addressed. These are explained in greater detail in (2).

Despite this, the Withdrawal Bill, as introduced, falls short of addressing two critical points that would truly ensure that EU environmental law is preserved and can be built upon in the future:

- i) EU environmental principles: EU environmental principles such as the "precautionary principle" and "polluter pays" are enshrined in EU Treaties and have been the cornerstone of EU environmental law. Failure to convert these principles into domestic law alongside the EU environmental acquis would be detrimental to the interpretation of retained EU law and could limit future environmental ambitions. It is a Scottish Government commitment to ensure that our laws continue to reflect progressive EU approaches in the future; transposing these principles is critical to achieving this.
- ii) Governance gap created in the absence of EU institutions: While the UK Government has stated that the Withdrawal Bill will "copy and paste" EU law into domestic legislation, simply converting the wording of the law will not be adequate to ensure its consistent application once the UK has

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<sup>1</sup> Legislating for the UK's withdrawal from the European Union (March 2017): [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604516/Great\\_repeal\\_bill\\_white\\_paper\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf)

## LINK Consultation Response

left the EU. On leaving the EU, Scotland and the rest of the UK will lose the governance and enforcement roles of the Commission, European Court of Justice and other EU bodies, for instance in monitoring and measuring environmental indicators; ensuring proper implementation of environmental law and policy; checking and enforcing compliance; and reviewing and reporting on the state of nature and the performance of legislation. Therefore, to ensure that retained EU law has the same practical impact, governance mechanisms are needed to take on the functions of existing EU bodies. Such a body or institution must have (a) adequate resources, (b) be independent of government, (c) have relevant expertise and (d) have sufficient legal powers to enforce the law and hold the various governments to account.

LINK members hope that Members of the Scottish Parliament would only grant a Legislative Consent Motion to the Withdrawal Bill if it addresses the above concerns. Reassurances also needed in terms of EU law being faithfully transposed into domestic law and given the same status as all other primary law; this means that changes to retained EU law can be made only through primary legislation and appropriate Parliamentary scrutiny.

### **2. The powers conferred on Scottish Ministers in the Withdrawal Bill are far-reaching with limited scrutiny and no clear opportunities for stakeholder engagement**

The Withdrawal Bill allows for any necessary amendment to EU law so that legal certainty can be ensured on “exit day”, as indicated in the Explanatory Notes. However, Clauses 7, 8 and 9 of the Withdrawal Bill confer very broad powers on ministers to amend, repeal or replace EU law. The UK Government has said that delegated powers will only be used to make “technical” amendments to EU law that are necessary to remedy any “deficiencies” in EU law that need to be corrected to enable the law to function in the UK.

However, there is no clear definition of what constitutes a “technical” change and there is a risk that ministers may use the delegated powers to make non-technical policy changes with insufficient parliamentary scrutiny. The term “deficiencies” could also be given an inappropriately broad meaning. Clause 7(1)(ii) sets out a non-exhaustive list of possible deficiencies that the delegated powers could be used to remedy, but the list is illustrative only and does not place limits on the scope of the meaning of “deficiencies.”

A clause of further concern is Clause 17(1) which provides that ‘A Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act.’ This is an incredibly broad power with no limitations placed on it and would enable ministers to amend, repeal or replace law in a huge range of areas given that leaving the EU impacts many aspects of legislation.

LINK members consider that insofar as identified “deficiencies” of retained EU law are concerned, it is critical that all non-technical changes are only made when necessary, following a more robust process outlined below that also allows for extensive and substantive stakeholder consultation.

Clause 7(5) of the Bill gives ministers powers to assign functions currently exercised by EU bodies to new or existing bodies, but no obligation to do so. Equally, it enables ministers to abolish such functions. Where such governance bodies fall within devolved competence, similar powers to assign functions to existing or new Scottish bodies should be provided for in the Bill. The structure of such governance arrangements must not undermine the devolution agreements and should allow for wide stakeholder engagement and consultation.

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Finally, the Bill leaves 'exit day' undefined, creating the possibility that ministers in the UK and Scotland will be able to exercise these wide-ranging powers for potentially extensive periods of time. The Bill should provide a guarantee that powers will lapse at the point of the UK's exit from the EU.

### **3. LINK members would welcome greater stakeholder consultation and parliamentary scrutiny with respect to the provisions of the Withdrawal Bill**

These broad delegated powers under the Withdrawal Bill are subject to inadequate parliamentary scrutiny allowing ministers to amend or repeal retained EU laws without proper scrutiny or oversight. LINK members believe that parliaments should be granted a greater role when it comes to substantive amendments. It is now understood that a process of "triaging" will be pursued in Westminster to address this point as far as the UK Parliament is concerned.

We therefore welcome the proposals by the Minister for UK Negotiations on Scotland's Place in Europe "to work with the [Scottish] Parliament and its committees to agree a set of principles and a process that will ensure that the instruments that are made under the Bill receive the appropriate scrutiny". We look forward to these proposals and would welcome the opportunity of providing relevant input. We hope that a more robust and transparent process can be put in place for Scotland.

More specifically, LINK members support that where delegated powers are exercised by Scottish Ministers, there must be adequate scrutiny of such powers by the Scottish Parliament. Enhanced mechanisms for scrutiny and sifting are needed as not all changes are "technical" and some could have substantive implications on the scope and function of EU law. This could involve the creation of a time-limited parliamentary committee that will scrutinise SI's to sift through key changes that merit further deliberation. The committee should be able to request evidence from ministers and stakeholders as well as recommend substantive changes to SI's. We would support that both the Scottish Ministers and Scottish Parliament engage widely with stakeholders and pursue their deliberations with great transparency.

What is more, it is critical to understand the role of the Scottish Parliament in developing SI's to implement the provisions of the Bill. To our understanding, when SI's are needed to correct "deficiencies" in legislation that falls within the competency of the devolved administrations, these will be developed by the civil servants of that administration. This is a critical point that needs to be confirmed. Similarly, there is little detail provided when it comes to provisions of the Withdrawal Bill that suggest that UK and Scottish Ministers can act jointly. It would be good to clarify this process to maximise transparency, Parliamentary scrutiny as well as allow for stakeholder engagement.

#### **For more information contact:**

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