

Submission to call for evidence on the impact of the European Union (Withdrawal) Bill upon the devolution settlement and the expected legislative consent memorandum

by Scottish Environment LINK's Brexit Subgroup

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Introduction

Scottish Environment LINK welcomes the opportunity to provide a written response to the Finance and Constitution Committee's call for evidence on the impact of the European Union (Withdrawal) Bill upon the devolution settlement and the expected legislative consent memorandum.

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.

In this respect, Scottish Environment LINK members support that all EU law is faithfully transposed into domestic law. Members are also calling for environmental principles such as the precautionary principle and polluter pays which have underpinned EU environmental law to be converted into domestic law, as well. In addition, we believe it is critical to address the governance gap created by the fact that when the UK leaves the EU, it will not be possible to have recourse to the European Commission and European Court of Justice.

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. The appropriateness of the powers proposed in the Bill for UK Ministers and Scottish Ministers:

The Withdrawal Bill, as introduced, confers a number of powers to Ministers in Scotland and the UK to ensure the conversion of EU law into domestic law; the Bill also allows for any necessary amendment to EU law so that legal certainty can be ensured on "exit day", as indicated in the Explanatory Notes. This process is necessary if we are to retain EU environmental protections and ensure that this can be completed in a timely manner before "exit day". However, the powers conferred are considerable and even extend to making changes to the Withdrawal Bill itself. As such, a number of issues in terms of transparency, scrutiny and oversight need to be addressed.

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 retained EU law that are necessary to remedy any "deficiencies" in EU retained law that need to be corrected to enable the law to function in the UK. These changes are often referred to as "technical". 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 of many aspects of legislation.

As such, LINK members request that EU law is 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. What is more, insofar as identified “deficiencies” of retained EU law are concerned, it is critical that all non-technical changes are only be made when necessary, following a more robust process outlined below.

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. Where powers are to be exercised by Ministers in Westminster, a new committee should review the use of delegated powers and assess where such use of powers needs further scrutiny. Similarly, 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.

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 European Union.

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.

2. The approach proposed in the Bill for repatriating powers which are currently competences of the European Union and the implications of this approach for the devolution settlement in Scotland

Legislation for the environment, climate, agriculture and fisheries has been primarily developed at the EU level. Due to the devolved nature of these policy areas within the UK, Scotland has been able to legislate in those areas insofar as this was not contravening EU law. A clear example of this was when Scottish government introduced the plastic carrier bag charge, allowing Scotland to pursue more ambitious environmental policies without disrupting the level playing field created by EU law. The environmental benefits of this became evident immediately: Scotland reduced its use of plastic carrier bags by 80% in one year.

Similarly, where EU rules allowed, the devolved nature of these policy areas meant that Scotland could adopt a different policy approach to other parts of the UK. For example, the EU opt-out for genetically modified (GM) crops meant that Scottish Government could decide not to allow the use of GM crops. In contrast, previous UK Government statements have indicated there is some consensus in favour of the use of GM crops.

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Given the above, the environmental sector is very interested in the approach for repatriating EU powers. The environment knows no borders, and as stated in the Legislative Consent Memorandum for the Withdrawal Bill there is sense in considering where UK frameworks might be needed to “facilitate the management of common environmental resources”. Cooperation and coordination across the UK is necessary to ensure that there is no risk of diluting environmental protections in favour of perceived competition gains. At the same time, it is important to respect the devolution settlement by ensuring that any frameworks are agreed by all UK governments, and that they allow for policy divergence when circumstances require this, such as climate, geography, local biodiversity, and local traditions. There is also a need to ensure that as the UK exits the EU, the Scottish government as well as the administrations in Wales and Northern Ireland, are able to pursue more ambitious environmental policies, beyond the baseline provided by any UK frameworks.

Currently, the Bill provides no clear way forward for agreeing which policy areas may require the introduction of UK frameworks, while also taking into account the provisions of the devolution settlements. Combined with the absence of any public initiative to openly and transparently discuss these critical issues with stakeholders across the UK, this creates a lot of uncertainty particularly given the complexity of EU law, not least where the environment is concerned. Scottish Environment LINK members support an open and informed debate on these processes to ensure the best outcome of our environment. Such a dialogue needs to be initiated as soon as possible and involve stakeholders.

3. The need to establish common UK frameworks to replace EU frameworks in devolved policy areas such as agriculture and environment

As outlined in (2), there may be a need for considering joint UK frameworks to safeguard our environment. However, it is critical to have the right processes in place for agreeing which aspects of different policy areas may be better legislated for at a UK level and which in Scotland, England, Wales and Northern Ireland.

It is therefore critical that the process by which any UK frameworks are agreed is joined-up and fully respects the devolution settlement. In other words, Scottish Environment LINK members would like to see a process whereby any new UK frameworks for the environment post-Brexit are jointly developed and agreed by all four countries and subject to an appropriate level of scrutiny by all four legislatures.

We would note that in the case of Northern Ireland in particular, it would make sense to consider involving the Republic of Ireland in some of the discussions given the fact that the island of Ireland is considered a distinct ecological unit. This is certainly an important consideration as far as environmental issues are concerned but also for other sectors.

Given the complexity of the issue and the fact that it would be the first time such a process is attempted at a UK level outside the EU, Scottish Environment LINK members believe that the process should be:

- Based on robust evidence and data, including impact assessments
- Provide ample opportunities for stakeholder engagement and input across the UK countries
- Be jointly developed and agreed by the UK and devolved governments, as well as their respective legislatures

4. The suitability of current inter-governmental relations structures for a post-Brexit environment

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There are a number of examples of intra-UK coordination as well as UK/Irish cooperation; the same is true for the Nordic countries which cooperate further through the Nordic Council. It will be important to assess those against the criteria outlined above and through appropriate stakeholder consultation as well as deliberation with Parliament, to develop an approach to the inter-governmental structures needed post-Brexit.

It is possible that different inter-governmental structures will be needed for different policy areas, involving different parts and levels of governments as well as agencies. It will also be important to ensure Parliamentary oversight of these structures and how they are delivering on their remit. Scottish Environment LINK members look forward to engaging on this process so that the structures agreed can deliver for our environment. However, our members would like to highlight a critical governance gap emanating from the UK's exit from the EU which future inter-governmental structures will need to urgently address.

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 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. 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 (i) adequate resources, (ii) be independent of government, (iii) have relevant expertise and (iv) have sufficient legal powers to enforce the law and hold the various governments to account.

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.

Such governance arrangements must facilitate civil society engagement. Currently, the current Court System in Scotland and in the UK cannot be considered equivalent to the role performed by EU institutions. This relates in particular to issues with judicial review which is too expensive and of narrow focus to compensate for the loss of complaints mechanisms to the Commission and the role of the European Court of Justice. The power of the Commission to fine the Government has been an effective tool and new remedies, in addition to the limited remedies available through judicial review, must be established.

5. Mechanisms that could be put in place to ensure that the Scottish Parliament has sufficient oversight over the process of negotiating, legislating for and implementing Brexit, and of the exercise of powers conferred on Scottish and UK Ministers by the European Union (Withdrawal) Bill.

As stated above, we welcome the oversight of the Scottish Parliament in terms of the process of negotiating, legislating for and implementing Brexit, and of the exercise of powers conferred on Scottish and UK Ministers by the Withdrawal Bill.

In addition to the points made in previous sections, we hope that Members of the Scottish Parliament should only grant a Legislative Consent Motion to the Withdrawal Bill if, among other provisions, it:

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LINK Consultation Response

- i. *Provides safeguards to the status of retained EU law:* retained EU law needs to be provided the same status as domestic law. This would mean that primary legislation and appropriate scrutiny would be needed for any future amendments to key environmental legislation.
- ii. *Converts into domestic law EU environmental principles:* The Withdrawal Bill does not provide sufficient clarity about the status of “environmental principles” of EU law enshrined in EU Treaties such as polluter pays, precautionary principle and rectification at source. These principles have been the cornerstone of EU environmental and public health legislation. The Withdrawal Bill should ensure that environmental principles are brought over into domestic legislation.
- iii. *Puts forward a solution to the identified governance gap, as explained in (4).*

What is more, it is critical to understand the role of the Scottish Parliament in creating statutory instruments (SI's) to implement the provisions of the Withdrawal 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.

Furthermore, under the provisions laid out in the Withdrawal Bill, the role of the UK Parliaments in scrutinising and amending those SI's is limited. Scottish Environment 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.

Given the reassuring proposals from the Minister for UK Negotiations on Scotland's Place in Europe to work with the Scottish Parliament to enhance its role, we hope that a more robust process can be put in place. This could involve the creation of a time-limited Parliamentary Committee that will scrutinise SI's in order 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.

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