The Scottish Parliament
Pàrlamaid na h-Alba

FINANCE AND CONSTITUTION COMMITTEE

AGENDA

24th Meeting, 2017 (Session 5)

Wednesday 25 October 2017

The Committee will meet at 10.00 am in the David Livingstone Room (CR6).

1. **Decision on taking business in private:** The Committee will decide whether to take item 3 in private.

2. **European Union (Withdrawal) Bill (UK Parliament Legislation):** The Committee will take evidence on legislative consent memorandum LCM (S5) 10 in a roundtable format from—

   Simon Collins, Executive Officer, Scottish Fishermen's Federation;

   Kate Houghton, Planning Policy and Practice Officer, Royal Town Planning Institute;

   Isobel Mercer, Policy Officer, RSPB Scotland;

   Robin Parker, Public Affairs Manager, WWF Scotland;

   Dr Serafin Pazos-Vidal, Head of Brussels Office, COSLA;

   Professor Colin Reid, Professor of Environmental Law, University of Dundee;

   Clare Slipper, Political Affairs Manager, NFU Scotland;

   Daphne Vlastari, LINK Advocacy Manager, Scottish Environment Link.

3. **Consideration of Evidence:** The Committee will consider the evidence heard at agenda item 2.

FCC/S5/17/24/A

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The papers for this meeting are as follows—

Agenda item 2

Note by the Clerk	FCC/S5/17/24/1
PRIVATE PAPER	FCC/S5/17/24/2 (P)

Finance and Constitution Committee

24th Meeting 2017 (Session 5), Wednesday 25 October 2017

European Union (Withdrawal) Bill: Scottish Government Legislative Consent Memorandum

1. The purpose of this paper is to provide information for the Committee's evidence session in relation to the European Union (Withdrawal) Bill at which it will take evidence in a roundtable format from—

- Simon Collins, Executive Officer, Scottish Fishermen's Federation;
- Kate Houghton, Planning Policy and Practice Officer, Royal Town Planning Institute;
- Isobel Mercer, Policy Officer, RSPB Scotland;
- Robin Parker, Public Affairs Manager, WWF Scotland;
- Dr Serafin Pazos-Vidal, Head of Brussels Office, COSLA;
- Professor Colin Reid, Professor of Environmental Law, University of Dundee;
- Clare Slipper, Political Affairs Manager, NFU Scotland; and
- Daphne Vlastari, LINK Advocacy Manager, Scottish Environment LINK

European Union (Withdrawal) Bill

2. The UK Government's European Union (Withdrawal) Bill was introduced in the House of Commons on 13 July 2017. The Bill and its accompanying documents are available via the following link: http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html.

3. The Bill's Explanatory Notes[1] state that—

> "The UK Parliament does not normally legislate within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned. It is also the practice of the Government to seek the consent of the devolved legislatures for provisions which would alter the competence of those legislatures or of the devolved administrations in Scotland and Northern Ireland."

4. The Explanatory Notes go on to state, therefore, that the UK Government will seek legislative consent for the following provisions of the Bill—

- "The preservation and conversion of EU law, because some areas in which laws are being preserved and converted would be within devolved competence.

[1] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf

- The replication of the EU law limit on the devolved institutions and the power to vary that limit, because this will alter the competence of the devolved institutions.

- The conferral on the devolved administrations of the power to make corrections to the law, the power to implement a withdrawal agreement, the power to implement international obligations, as well as the power to incur preparatory expenditure and the powers to impose and modify fees and charges as this will also alter the competence of the devolved administrations or give them the power to act in relation to devolved matters.

- The repeal of the European Communities Act 1972 (ECA), as the devolution statutes refer to the ECA (via the Interpretation Act 1978) to impose an EU law limit on devolved competence, a limit that the repeal of the ECA will alter."

The Legislative Consent Memorandum

5. The Scottish Government published its Legislative Consent Memorandum on 12 September 2017[2].

6. The Minister for UK Negotiations on Scotland's Place in Europe made a ministerial statement in relation to the Bill on 12 September[3].

7. On 19 September 2017, the Minister for UK Negotiations on Scotland's Place in Europe wrote to the Committee, setting out the reasons why the Scottish Government would not be able to recommend that Parliament give its consent to the European Union (Withdrawal) Bill, as currently drafted.[4]

8. The Scottish Government believes that at present the Bill does not reflect the principles of devolution and have set out amendments to the Billl which would address these concerns.

Report from Joint Ministerial Committee (European Negotiations)

9. The Minister for UK Negotiations on Scotland's Place in Europe wrote to the Committee on 17 October to report on the meeting of the JMC (EN) which took place on 16 October[5]. The letter provided a copy of a Joint Communique agreed at the meeting, which includes a statement of principles to underpin work on common frameworks.

[2] http://www.scottish.parliament.uk/S5ChamberOffice/SPLCM-S05-10-2017.pdf
[3] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11069&i=101083
[4] http://www.scottish.parliament.uk/S5_Finance/General%20Documents/Letter_Minister_for_UK_Negotiations_on_Scotlands_Place_in_Europe_Convener_19_September_2017.pdf
[5] http://www.parliament.scot/S5_Finance/General%20Documents/Report_back_from_JMC__16_October_2017.pdf

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Written evidence to the Committee

10. The Committee issued a call for evidence seeking views on the impact of the Bill upon the devolution settlement at the start of the Parliament's summer recess. In particular, the Committee invited views on the following issues—

- The appropriateness of the powers proposed in the Bill for UK Ministers and Scottish Ministers;
- 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;
- Whether there is a need to establish common UK frameworks to replace EU frameworks in devolved policy areas such as agriculture and environment; the appropriateness of the arrangements for these suggested by the European Union (Withdrawal) Bill; and alternative models for discussing, agreeing and operating any common frameworks that may be required;
- The suitability of current inter-governmental relations structures for a post-Brexit environment, and alternative processes and structures that may improve the effectiveness of intergovernmental relations, in light of the process of EU withdrawal and the development of common frameworks;
- 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.

11. 15 responses were received. These can be accessed on the Committee's website via the following link:
http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/106324.aspx

12. An overview of the written evidence received in response to the Committee's call for evidence on the Bill is provided at **Annexe A**.

13. Written submissions provided by those participating in the roundtable discussion are provided at **Annexe B**. Please note that WWF Scotland did not provide a written submission.

Committee Clerks
October 2017

ANNEXE A: EUROPEAN UNION (WITHDRAWAL) BILL: OVERVIEW OF WRITTEN EVIDENCE

Purpose

1. The Committee issued a call for written evidence with regard to the UK Government's European Union (Withdrawal) Bill in mid-July. The Scottish Government published a Legislative Consent Memorandum on the Bill on 12 September. The call for written evidence closed on 29 September. This paper does not provide an account of all views expressed in the written submissions but rather an overview of the main themes and views expressed from the written submissions received.

Background

2. The Committee sought views in its call for evidence on the European Union (Withdrawal) Bill with regard to five main issues as follows:

- The appropriateness of the powers proposed in the Bill for UK Ministers and Scottish Ministers;
- 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;
- Whether there is a need to establish common UK frameworks to replace EU frameworks in devolved policy areas such as agriculture and environment; the appropriateness of the arrangements for these suggested by the European Union (Withdrawal) Bill; and alternative models for discussing, agreeing and operating any common frameworks that may be required;
- The suitability of current inter-governmental relations structures for a post-Brexit environment, and alternative processes and structures that may improve the effectiveness of intergovernmental relations, in light of the process of EU withdrawal and the development of common frameworks;
- 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.

3. Fifteen responses were received and a list of respondents is attached. The remainder of this paper provides an overview of the evidence received against six main areas considered in the written submissions:

- Impact on the Devolution Settlement
- Sewel Convention
- European Union Policy-Making

- Common Frameworks
- Delegated Powers
- Charter of Fundamental Rights

Impact on the Devolution Settlement

4. A wide range of respondents considered the implications of the Bill for the operation of the devolution settlement in Scotland. Generally, respondents expressed concern at the implications for devolution and in some instances suggested amendments to the Bill which could seek to address issues raised. For example, Professor Jim Gallagher commented that—

> "The UK government argue that their approach is essentially a holding operation until an appropriate allocation of powers can be made. This looks like a rationalisation: it is always easier to retain power, especially when you have no clear idea what will need to be done, as with much of Brexit. This is however inconsistent with the approach of devolving responsibility unless there is good reason to reserve it, and it is not consistent with the devolution deals for Scotland, Wales and Northern Ireland" (p.4).

5. Professor Michael Keating considered (p.2) that the Bill "represents a rolling-back of devolution" and that the shift away from a reserved powers model towards a greater degree of conferred powers would make it "difficult to make coherent policy or to work across policy fields". This shift in approach, he considered, would result in a move "closer to a hierarchical model of devolution, in which the broad principles [are] set in London and the details filled in across the nations". Dr Tobias Lock (p.7) stated that the Bill "will result in a shift in balance … with Westminster's powers being augmented and Holyrood's staying the same".

6. Professor McHarg et al observed that the "UK Government is correct to say that the devolved institutions will be no more restricted in their competence than they are at present if the Bill is enacted in its current form. However, this does not mean that the approach taken by the Bill has no impact on the devolution settlement" (p.11). and then proceeded to raise a range of objections to the approach taken in the Bill. In particular, they noted that the approach taken in Clause 11 would "greatly increase the complexity involved in determining the boundaries of devolved competence". They went on to state that—

> "The highly particularistic approach taken in clause 11 is also inappropriate in a constitutional division of powers, which ought to proceed on the basis of broad allocations of reserved and devolved powers, relying upon a robust system of intergovernmental relations to sort out inevitable overlaps and spillovers. Instead, the approach in clause 11 pegs the limits of devolved competence to the way in which EU level competences had been exercised at a particular point in time (exit day). This is not only inherently arbitrary and likely to become increasingly out-dated, but it is almost certain to have unintended and unpredictable consequences for both the devolved and UK governments" (p.13).

7. The Law Society of Scotland queried which Acts of the Scottish Parliament Clause 11 would apply to. The Society then suggested a range of alternative approaches to that taken in Clause 11, without expressing a preference, as follows:

A. Adopt the provision in the Bill on a transitional basis that is subject to a specific cut-off date. Upon expiry of the transitional period, powers in devolved areas would return to devolved legislatures unless agreement had been reached to the contrary;
B. Repeal the EU law constraint and allow EU competences to be allocated as determined by Schedule 5 of the Scotland Act 1998;
C. Replace the cross-cutting EU constraint with new cross-cutting constraints, such as to protect the UK single market or to comply with international obligations;
D. Repeal the EU law constraint and amend Schedule 5 to re-reserve specific competences to the UK level.

8. COSLA considered that the Bill would result in "less local government influence on existing EU Policy areas than we do now" and stressed the need for an approach that embedded subsidiarity and proportionality to be adopted. COSLA stated that the Bill—

> "places the main power for repatriating and adapting these sources of EU law into the hands of UK ministers, with only consultation allowed for Scottish Ministers. This risks excessive ministerial discretion and a lack of accountability for powers that are currently shared between the EU and the devolved administrations (often with Local Government input)" (p.2).

9. Lastly, the Institute for Government (IfG) stated that it could see the validity of both the Scottish and UK Government perspectives on the approach taken in Clause 11 of the Bill. The IfG considered that there required to be negotiation and compromise with regard to the approach taken. The IfG proposed that—

> "the UK and devolved governments should urgently agree a set of principles to determine in which areas Westminster should gain the power to legislate for the whole UK in order to replace EU law. That should be accompanied by a non-exhaustive list of powers that will be 'released' immediately upon exit day to the Scottish Parliament (and the other devolved institutions). The presumption should be that powers are devolved unless there is a strong, evidence-based reason why new frameworks will require the passage of legislation at Westminster" (p.4).

Sewel Convention

10. Some respondents commented on the Sewel Convention and the recognition by the UK Government that the Bill engaged the Sewel Convention. Respondents also tended to note the Supreme Court judgement that the Convention was not justiciable. This tended to result in a recognition that Westminster would be able to legislate in this area regardless of whether the Scottish Parliament provided consent to the Bill. For example, Dr Tobias Lock commented—

> "A refusal by the Scottish Parliament to give legislative consent would consequently have political implications only, but not legal implications. Westminster would still be able to legislate as intended" (p.9).

11. Whilst respondents recognised the legal position, respondents tended to express concern at the political consequences of the UK Government legislating without the consent of the devolved legislatures. For example, NFU Scotland stated (p.4) that it "is concerned about the political implications such a situation would bring about in terms of relations between the UK Government and the devolved administrations". McHarg et. al. commented on this position in the following terms—

> "There is no clear constitutional understanding as to what circumstances are sufficiently abnormal to justify ignoring a refusal of devolved consent as the situation has never arisen before. However, it is at least arguable that, given the seriousness of the constitutional issues at stake, lack of devolved consent should only be overridden in cases of necessity. Clearly, it is not necessary that the EUW Bill be enacted in its current form in order to secure an orderly Brexit" (p.14).

European Union Policy-making

12. A range of respondents, particularly those from sectoral backgrounds, emphasised perceived advantages of the current legislative and policy-making process in the European Union. Such responses tended to emphasise the scope with the EU policy process for variation and flexibility across the UK in the implementation of policy. For example, the RSPB noted that—

> "the EU's Common Agricultural Policy currently provides a consistent and coherent policy framework across the UK that also allows a degree of flexibility, recognising that farming, nature and communities are different in different parts of the UK and face varying challenges, but that there are also many similarities across the UK's rural areas that necessitate consistency and complementarity of approach. This context will not change post-brexit" (p.4).

13. Similarly, Scottish Environment Link also recognised that scope for a variable approach to implementation was integral to the current approach to policy-making with regard to the environment, climate, agriculture and fisheries. Specific examples of devolved policy-making with regard to the plastic bag carrier charge and the decision not to allow the use of genetically modified crops were cited as examples of

MENU

variation within the UK as part of a EU legislative framework. Scottish Environment Link commented—

> "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" (p.3).

14. RIAS noted the positive impact of a range of EU legislation in areas such as environmental legislation and employment law. RTPI Scotland noted the significant impact of EU directives and funding decisions upon the planning sector in Scotland. RTPI Scotland suggested that—

> "With membership of the EU no longer a factor, the most appropriate replacement for this would be for the environmental responsibilities of devolved governments to be augmented with responsibilities from the EU. However this will require agreements between the governments in the UK in order to handle cross border environmental impacts and to create a common environmental framework within which, for example, industries would function".

15. Alternatively, NFU Scotland whilst noting the high standards which the Common Agricultural Policy (CAP) had brought about in areas such as animal health and welfare, food safety and environmental protection also noted that the CAP could be prescriptive, top-down in nature, stifled innovation and could result in counter-productive results. NFU Scotland considered that—

> "leaving the EU presents a valuable opportunity to develop a new agricultural policy and regulatory framework that is much better fitted to the differing contexts of agriculture across the UK.
>
> It is the position of NFUS that devolution of agricultural policy has worked very well for Scottish agriculture as it has allowed decisions on the implementation of the CAP to be made closer to the businesses it impacts. Under this arrangement, Scotland has been free to implement agricultural policy in different ways to its neighbours elsewhere in the UK" (p.2).

16. Professor Colin Reid, on behalf of the Brexit and Environment Network, made a similar point in relation to the scope for variation in policy-making with regard to the environment. He commented—

> "The devolution agreements post-date the UK's membership of the EU and were crafted in the light of the multi-level governance structure that has evolved at EU level. The EU rules provided a framework and in some areas a

MENU

> minimum benchmark that all EU (and by extension UK) states have to abide by. There is divergence in environmental policy within the UK but within the context of the EU frameworks and standards" (p.2).

17. A number of respondents also noted that the governance arrangements provided by EU institutions in spheres such as environmental policy would also need to be created within the UK post-Brexit. For example, RSPB Scotland stated—

> "Environmental law will only achieve desired outcomes with the support of robust institutions to ensure implementation and, when necessary, enforcement of that law. EU institutions such as the European Commission and the European Court of Justice play a central role in this process at present, undertaking monitoring, oversight, implementation and enforcement of environmental law. Current domestic governance arrangements such as judicial review, parliamentary processes and domestic environmental agencies in Scotland, and in the UK, are not equivalent to existing EU arrangements".

General Principles of EU Law

18. General principles of EU law are derived from the EU treaties and from the decisions of the Court of Justice of the European Union. The Bill seeks to bring these principles into domestic law, with the exception of the Charter of Fundamental Rights (considered later in this paper), but modifies these principles to seek to ensure that these principles would not be the basis for a right of action in a court of law. Instead, these rights would become an interpretational aid for courts considering EU-derived law. A range of respondents emphasised that the general principles of EU law should be given effect in domestic law. For example, McHarg et. al. noted that—

> "The General principles of EU law include recognition of fundamental rights, proportionality, legal certainty, due process, equality and subsidiarity. Although these are given effect in domestic law by virtue of clause 4, Schedule 1 makes clear that there will be no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law" (p.2).

19. This issue, and the wider issue of the application of general principles of international law, was raised by a number of respondents in relation to environmental principles. For instance, the RSPB stated—

> "Many of our strongest environmental protections are underpinned by general principles of international environmental law, such as the precautionary principle and the polluter pays principle. These principles, which have proved instrumental in the effective development and application of environmental protections, are embedded in the EU treaties but are not currently articulated in domestic law. The Bill does not provide sufficient clarity that these principles will be converted alongside other EU law. This is critical to ensure environmental legislation, including any jointly agreed frameworks between

MENU

the UK Government and devolved administrations, is applied and developed correctly in the future (p.1-2).

Common Frameworks

20. The issue of how common frameworks for policy fields returning from the EU may be established was commented upon by the vast majority of respondents. Respondents tended to be critical of the approach taken in the Bill with regard to the repatriation of powers whilst recognising a need for common frameworks to be developed. For example, Professor Jim Gallagher stated—

> "As it stands, the bill arrogates to UK ministers and the UK Parliament all powers currently exercised in Brussels. While this might be defensible in the short run – when it remains deeply unclear what leaving the EU might mean, what transitional arrangements might be, and what might replace the UK's EU obligations – it is not consistent with the UK's territorial constitution. This should be recognised explicitly in the legislation, but it, and the devolved governments, should also acknowledge the powers the UK government will need for continuing international obligations, while leaving other UK frameworks to be settled by mutual agreement between the different governments" (p.4).

21. A variety of respondents tended to contextualise their position on common frameworks with comment on the weak nature of current IGR structures in the UK and the need for these structures to be made more effective. Generally, there was agreement that these frameworks should be developed through a process of discussion and agreement between the UK Government and devolved administrations. For example, COSLA commented:

> "After withdrawal, there will be market and regulatory issues that need to be dealt [with] on a UK-wide basis to maintain the single internal market. The notion that this should be done by restoring pre EU-membership Westminster-only arrangements seems unreasonable as devolution and multi-level governance has changed the constitutional and legal landscape in the intervening period. New models of intergovernmental policy coordination are needed" (p.5).

22. In a similar vein, the RSPB noted that "the four UK governments will need to agree and establish new and improved mechanisms for inter-governmental working at both Ministerial and official levels. Wider stakeholder involvement and consultation should also be included as a core part of this process" (p.5). For the Institute for Government a strengthening of IGR in the UK as a result of Brexit should require a guiding principle "that the four governments would work together in partnership to reach consensus on the UK's Brexit strategy and on consequential changes to the UK territorial constitution" (p.1). COSLA suggested that the arrangements for inter-governmental decision making should be set out in the Bill.

23. A wide variety of structures and forums were suggested as examples of means to strengthen IGR in the UK[6]. Generally, however, respondents wished to see structures dealing with common frameworks that operated on the basis of consent across the UK and between jurisdictions. For example, NFU Scotland commented—

> "NFUS agrees with the suggestion from a range of commentators that the simplest way to ensure all the devolved administrations have input is via a strengthened Joint Ministerial Committee, rebuilt into a UK Council of Ministers covering the various aspects of policy for which agreement between all four UK administrations is required. As part of this process, it is also important that all governments undertake meaningful consultation with interested stakeholders" (p.5).

24. The lack of consideration within the Bill on the issue of the establishment of common frameworks was also a cause for concern for some respondents. For example, Professor Colin Reid stated—

> "Given the need for future policies to be coordinated and negotiated by the devolved administrations together with the UK government, the lack of explicit and detailed consideration of how those administrations and, crucially, their legislatures can be involved in both the transfer and future development of policy is a significant weakness in the present Bill and associated proposals. This gap also undermines the principle of participation that underpins good environmental governance".

25. The issue of how the funding of any competences that may be repatriated was also highlighted by some respondents as an area where the Bill was silent and would require detailed consideration. Lastly, some respondents stressed the need to improve inter-parliamentary relations alongside strengthened inter-governmental relations.

Delegated Powers

26. The powers proposed for UK and Scottish Ministers to amend primary legislation via the use of subordinate legislation in order to amend, repeal or replace EU law were the subject of widespread comment from respondents. There tended to be a general acceptance of the need for the use of delegated powers but concern at the scope of the powers proposed in the Bill. For example, Scottish Environment Link commented—

> "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

[6] For example, see the submissions from COSLA and Professor Keating.

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" (p.2).

27. COSLA commented on this issue that—

"the powers of UK and Scottish Parliaments to scrutinise the use of the repatriated powers need to be enhanced if decisions making is to be brought closer to the people. The current provisions of the Bill are weaker than the existing EU arrangements".

28. Generally, respondents sought additional safeguards around the use of delegated powers or enhanced scrutiny processes[7]. For example, the Law Society of Scotland suggested that the UK Government should consider limiting the delegated powers provisions in the Bill in line with the House of Lords Select Committee on the Constitution recommendations in its report on this issue[8]. A number of respondents, such as the RSPB, were of the view that drawing a distinction between solely technical changes to legislation as opposed to policy changes was an arbitrary distinction. Another issue raised by a number of respondents was that the lack of a definition of when 'exit day' would occur could result in Ministers having extensive powers for a period of time considerably longer than two years.

29. The use of delegated powers by UK Ministers to amend devolved legislation was also the subject of concern. For example, the Institute for Government stated—

"The UK government is keen to give itself the maximum room for manoeuvre. That is in principle sensible, given the complexity and unknown size of the task of correcting the huge bulk of retained EU law in advance of exit day. However, the wide scope of executive powers in the bill does give rise to valid concerns, not least in terms of the implications for devolution.

In particular, we agree that the consent of Scottish ministers … be sought before UK ministers act in devolved areas. That would be in keeping with the established Sewel convention that consent is sought for primary legislation that relates to devolved issues.

We also believe there is a strong case for treating the Scotland Act 1998 (and the Government of Wales Act 2006) as fundamental constitutional laws that should not be subject to amendment by means of secondary legislation, which can be passed with little scrutiny at Westminster" (p.3).

[7] For example, see the submissions from the Law Society of Scotland, McHarg et. al., Professor Colin Reid, NFU Scotland, Scottish Environment Link and the RSPB.
[8] House of Lords Select Committee on the Constitution, 9th Report, Session 2016-17, 'The Great Repeal Bill and Delegated Powers'.

30. Dr Lock highlighted the time pressures which will apply in relation to scrutiny of subordinate legislation relating to the Bill. He commented—

> "One of the main concerns in this regard must be parliamentary scrutiny both at the Westminster and at the Scottish level. The main challenge in this regard will be time-pressure: even if appropriate mechanisms for effective scrutiny are found, the sheer time-pressure for effecting changes may render them ineffective" (p.5).

31. In this regard, the Law Society of Scotland suggested that the UK and Scottish governments should undertake an early programme of consultation on the draft subordinate legislation which will be required as a result of the Bill. Dr Lock also highlighted that the powers contained in the Bill for Scottish Ministers with regard to devolved competences were more constrained than those for UK Government Ministers. He observed that—

> "It is not entirely clear why Scottish ministers should be categorically excluded from powers to modify direct EU legislation so far as it falls within the devolved competence. For instance, a number of private international law instruments (e.g. the Brussels Regulations) may need specifically Scottish adaptations given the separateness of Scots law and the Scottish judiciary. Hence at least for these cases a case could be made that powers to modify them should be exercised by Scottish ministers" (p.8).

Charter of Fundamental Rights

32. A number of respondents, primarily from a legal perspective, raised concerns that the Bill would result in the Charter of Fundamental Rights no longer forming part of domestic law. The Law Society of Scotland commented—

> "We recommend that the UK Government should reconsider the removal of the Charter of Fundamental Rights and take stock of concerns which are held by many about the potential for erosion of human rights which may occur as the result of the removal of the Charter and the creation of difficulties for the UK Courts interpreting retained EU law in the absence of the Charter" (p.7).

33. Dr Lock highlighted that the effect of the exclusion of the Charter from domestic law would result in a change to the powers of the Scottish Parliament. He noted that—

> "The Charter currently only applies where the Scottish Parliament legislates within the scope of EU law. However, in some areas the Charter provides stronger protection than the European Convention on Human Rights. Examples include an express right to the protection of personal data, childrens' rights, a more comprehensive right to a fair trial, and many social rights" (p.6).

Annexe A: List of Respondents

1. Professor Jim Gallagher, Gwylim Gibbon Policy Unit (325KB pdf)

2. The Law Society of Scotland (338KB pdf)

3. Dr Tobias Lock, Edinburgh Law School (320KB pdf)

4. Open Britain Open Scotland (423KB pdf)

5. The Royal Incorporation of Architects in Scotland (127KB pdf)

6. Royal Town Planning Institute Scotland (156KB pdf)

7. NFU Scotland (214KB pdf)

8. Dr Craig McAngus University of Aberdeen (183KB pdf)

9. Dr Serafin Pazos-Vidal, COSLA (132KB pdf)

10. RSPB Scotland (521KB pdf)

11. Colin T. Reid Professor of Environmental Law (218KB pdf)

12. Michael Keating, Professor of Politics, University of Aberdeen (191KB pdf)

13. Scottish Environment LINK (347KB pdf)

14. Professor Aileen McHarg University of Strathclyde (368KB pdf)

15. Akash Paun, Fellow of the Institute for Government (368KB pdf)

ANNEXE B: SUBMISSIONS FROM ROUNDTABLE PARTICIPANTS

Scottish Fishermen's Federation

Simon Collins, Executive Officer

Introduction

The Scottish Fishermen's Federation (SFF) was formed in 1973 to preserve and promote the collective interests of Scotland's fishermen's associations. Its nine constituent associations[9] represent more than 500 vessels, ranging in size from small creel boats to 80-metre pelagic trawlers.

The SFF believes that Brexit presents a unique set of opportunities for Scotland to reinvigorate its coastal and island communities and deliver a thriving, profitable and sustainable seafood industry.

Given that the fisheries in what will become the UK EEZ are currently managed largely by the EU, and UK vessels account for a minority of overall catches from them, Brexit creates two major opportunities for the catching sector:

- The power to stablish a more effective and reactive fisheries management system in our waters that delivers business as well as environmental sustainability. The EU's Common Fisheries Policy does a poor job on both counts. We insist that fisheries regulations incorporate a commitment to sustainable harvesting whilst allowing the fleets to operate in an economically coherent manner. Scottish fishers have a proven track record of managing stocks sustainably, rebuilding depleted fish stocks and protecting the wider ecosystem.

- Fairer and more appropriate shares of catching opportunities within UK waters. Asserting control over who has access to our highly productive and diverse fishing grounds could generate significant and sustainable economic growth in Scotland's island and coastal communities at no cost to the taxpayer.

Other opportunities include the freedom to explore new markets for seafood in rapidly expanding economies outside the EU, the ability to direct any grant funding in ways more suited to Scotland than the EU currently allows, and scope for innovative thinking around fleet diversification and development.

The Scottish fishing industry seeks close working relationships with both the Scottish and UK Governments during the Brexit process and subsequently. We intend to secure the best possible deal for all Scottish fishers, irrespective of constitutional developments, and believe that the two Governments working together would

[9] Anglo-Scottish Fishermen's Association, Clyde Fishermen's Association, Fife Fishermen's Association, Fishing Vessel Agents & Owners Association (Scotland) Ltd, Mallaig and North West Fishermen's Association Ltd, Orkney Fisheries Association, Scottish Pelagic Fishermen's Association Ltd, The Scottish White Fish Producers Association Ltd and Shetland Fishermen's Association.

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produce the best possible outcome for the fishing industry on both sides of the border.

Round table discussion points

NB: two of the nine SFF constituent associations[10] require more time to consider these issues, and reserve their position.

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

The SFF recognises that the Bill provides UK Ministers with extensive powers that are bound to give rise to unease in Westminster and Holyrood, and would have preferred the Bill to address a number of shortcomings in EU fisheries legislation upon its transfer to UK law.

That said, the SFF draws the Committee's attention to three overriding considerations:

- The upside for the fishing industry and for Scotland as a whole from controlling access to and managing our own fisheries is so significant that excessive delay to the Bill's passage would be unacceptable;

- Given the short timetable afforded to the Article 50 process, it is hard to see how else the UK can avoid legal vacuum. The wholesale transfer of EU law minus its legal 'inoperabilities' appears to be the only realistic option in that context;

- For over 40 years, the Scottish fishing industry has frequently been subjected to the apparently unchecked and arbitrary whim of unelected officials in Brussels, and without any parliamentary scrutiny at all. The Bill represents an advance on that state of affairs.

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.

The SFF believes that the Bill's approach to repatriating powers from the EU requires amendment if it is to respect the devolution settlement and deliver appropriate fisheries management.

Specifically, Clause 11 of the Bill provides that where a rule or policy area is covered by EU law on the date of withdrawal, then it will, after withdrawal, become part of 'retained EU law' and will be put beyond the competence of the Scottish Parliament, regardless of whether the policy area is devolved.

[10] The Orkney Fisheries Association and the Clyde Fishermen's Association.

This is particularly significant in the case of fisheries, as retained EU law will include all but the legally inoperable parts of the Common Fisheries Policy (CFP). Scottish Ministers would need to seek the agreement of the UK Parliament for amendments to this and other legislation regulating fisheries, dramatically limiting Scotland's ability to carry out its devolved responsibilities and deliver effective, reactive fisheries management.

The SFF is deeply concerned that the Scottish Government and Parliament would be unable to make changes to the discard ban, for example, which Scottish Ministers as well as the fishing industry recognise as unworkable in Scottish waters in its present form. In this and in many other areas of fisheries management, the devolution settlement and all that implies for reactive policymaking suited to regional conditions is a vital component of fleet and even environmental sustainability.
Justification for Clause 11 appears to rest on three, interrelated considerations: ensuring absolute legal certainty at the point of exit; the desirability of a short, 'clean' Bill in a congested parliamentary timetable; and the difficulties of picking through 40 years' worth of EU legislation and apportioning the appropriate parts, clause by clause, to the devolved administrations. While the SFF is not in a position to offer expert opinion on these points, it observes that even if Clause 11 is required for these reasons on Day One of Brexit, it could be amended to expire on Day Two.

3. Whether there is a need to establish common UK frameworks to replace EU frameworks in devolved policy areas such as agriculture and environment; the appropriateness of the arrangements for these suggested by the European Union (Withdrawal) Bill; and alternative models for discussing, agreeing and operating any common frameworks that may be required.

The SFF believes that common UK frameworks for certain aspects of fisheries policy are sensible and desirable, and notes agreement on the principles underlying UK common frameworks at the Joint Ministerial Committee meeting on 16 October 2017.

4. The suitability of current inter-governmental relations structures for a post-Brexit environment, and alternative processes and structures that may improve the effectiveness of intergovernmental relations, in light of the process of EU withdrawal and the development of common frameworks.

The SFF believes that safeguards need to be built into intergovernmental processes to ensure that the Scottish fishing industry's predominance within the UK fishing industry is taken into proper consideration.

Scotland accounts for around 65% of the value and volume of fish landings by UK vessels, and represents over half of the UK catching sector's employment. Peterhead, Lerwick and Fraserburgh alone account for over 70% of UK finfish landings (i.e. excluding shellfish, where landings are distributed more evenly around the UK). Unsurprisingly, the Scottish fishing fleet accounts for the lion's share of catches of many of the UK's most important commercial fish stocks.

The SFF has long argued that Scottish Ministers should take the lead role in negotiating UK quotas for stocks in which the Scottish fishing industry has the predominant interest, just as other devolved administrations should lead in negotiations for stocks in which their industries represent the predominant share. This arrangement need not be enshrined in primary legislation; it may be that the devolved administrations would be content with a memorandum of understanding enshrining this principle.

Aside from the specific context of international quota talks, the UK will act as a 'Coastal State' in a number of forums, and of course as a member of many other bodies that may not be primarily concerned with fishing but could affect the industry indirectly (climate change forums, for example). Given that Defra would be the UK Government department representing the UK to the outside world, the SFF suggests that the Scotland Office be given an express remit to ensure that the views of the Scottish Government and Scottish Parliament are taken properly into account in formulating UK positions when fisheries are directly or indirectly concerned.

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.

The SFF has no particular view or expertise on how the Scottish Parliament should exercise oversight over the Brexit process or powers conferred on Scottish and UK Ministers. Its member associations are focused on the opportunities created by Brexit to build a strong, sustainable seafood industry that will generate significantly more economic activity in Scotland's coastal and island communities, and is confident that the Scottish Parliament will continue to support the fishing industry in achieving those aims.

Royal Town Planning Institute
Kate Houghton, Planning Policy and Practice Officer

The Royal Town Planning Institute (RTPI) is the champion of planning and the planning profession. We work to promote the art and science of planning for the public benefit. We have around 2000 members in Scotland and a worldwide membership of over 24,000. We:

- support policy development to improve approaches to planning for the benefit of the public;
- maintain the professional standards of our members;
- support our members, and therefore the majority of the planning workforce, to have the skills and knowledge they need to deliver planning effectively;
- maintain high standards of planning education;
- develop and promote new thinking, ideas and approaches which can improve planning;
- support our membership to work with others who have a role in developing places in Scotland; and
- improve the understanding of planning and the planning system to policy makers, politicians, practitioners and the general public.

General Observations
RTPI Scotland welcomes this opportunity to submit written evidence to the Finance Committee of the Scottish Parliament regarding its inquiry into the Impact of the European Union (Withdrawal) Bill on the Devolution Settlement. Planning is already a devolved matter. However, the context in which planning operates, including environmental protection and public funding, is heavily impacted by EU Directives and EU funding decisions. The distribution of powers 'returned' from the EU following the UK's exit could therefore have a significant impact on the way the planning system in Scotland functions.

The RTPI does not take a stance on constitutional issues, but focuses its efforts on ensuring that planners working in all the jurisdictions of the UK have the tools they need to be able to deliver great places for people. It is therefore in our interest to ensure that the legislative architecture of the planning system and the context in which it operates is as effective as possible.

We acknowledge that the focus of this call for evidence is the impact of the European Union Withdrawal Bill on the devolution settlement. However, it may be useful to highlight evidence submitted by RTPI Scotland to the European and External Relations Committee inquiry into Scotland's Relationship with the EU in September 2016. This briefing still stands, and provides further detail on the areas of EU legislation and authority most relevant to the operation of the planning system in Scotland. In brief, the UK's withdrawal from the EU most impacts on planning in the following ways:

- Funding, of both development and research
- Environmental protection and enhancement
- Agriculture and fisheries (rural land management)

- Movement of labour, regulation and standards, particularly in relation to planning skills

Principles of Devolution
In response to the Smith Commission Inquiry of 2014 RTPI Scotland developed a number of guiding principles that could be applied to the devolution of government. While developed for a different scenario, these remain relevant to the current debate surrounding how powers 'returned' from the EU will be distributed between Westminster and the devolved governments and Northern Irish Executive.

The principles are:

- *Subsidiarity* – that any new powers are vested in, and exercised, at a level that will be most effective in supporting all parties to deliver better places throughout the UK. This includes the UK, Scotland, the city regions, local authorities and communities.

- *Coordination* – that any new powers support and complement the ability to coordinate approaches to planning across the borders within the UK

- *Appropriateness* – that any new powers allow the UK Government or devolved administrations and their partners to develop specific approaches to tackle needs specific to each place where appropriate

- *Resourced* – that any new powers are properly resourced to ensure their effective implementation

- *Aligned* - that any new powers complement and don't contradict or 'get in the way' of other powers that are devolved

- *Engagement* – that any new powers are consulted upon and that the UK Government, devolved governments and the Northern Ireland Executive work with their delivery partners in assessing how best to make them work

- *Spatial* – that any new powers are examined in terms of how they will impact on the different geographies of the whole of the UK so as to promote better integrated approaches. Too often subsequent policy approaches are programme or silo-based

Alignment
With regard to the relationship of existing devolved powers to powers to be repatriated, it is particularly worth highlighting the above principle of alignment. As outlined above, planning is a devolved issue. It is also closely tied to Environmental Impact Assessment and Strategic Environmental Assessment, both of which stem from EU Directives transposed into Scots law. In addition, the European Regional Development Funds have been important sources of public finance, making development plans deliverable by providing capital funding.
'Taking back control' was a powerful motive behind the vote to leave the EU. As described above many environmental matters are already the responsibility of the

MENU

governments of Scotland, Wales and Northern Ireland. The turn of the century arrangements to set up governments in the nations of the UK assumed continued membership of the EU, which would provide a common framework within which those governments would administer environmental functions. With membership of the EU no longer a factor, the most appropriate replacement for this would be for the environmental responsibilities of devolved governments to be augmented with responsibilities from the EU. However this will require agreements between the governments in the UK in order to handle cross border environmental impacts and to create a common environmental framework within which, for example, industries would function.

The UK is a world leader in environmental protection and as a result our environmental expertise is sought after round the world. The Scottish Government has committed itself to the future strength of the regulations that protect our environment, and RTPI Scotland supports this position. It is important that changes to our environmental laws brought about by EU withdrawal are subject to the closest scrutiny.

RSPB Scotland
Isobel Mercer, Policy Officer

Introduction

The RSPB in Scotland is supported by nearly 90,000 members and campaigns on issues affecting wildlife and the natural environment. We welcome the opportunity to respond to this consultation, given the huge implications of Brexit for Scotland's natural environment: currently 80% of environmental protections in the UK stem from EU law and institutions. Furthermore, governance of environmental matters in the UK is largely devolved but many environmental issues do not respect borders. It is therefore vital that the UK Government and the devolved administrations work constructively together, in a way which respects the devolution settlements, to maintain minimum common standards at least as high as those currently in place, so as to effectively address cross-border environmental issues.

We welcome assurances from the Scottish Government that a post-brexit Scotland will maintain *at least* the same level of environmental protection as is currently afforded by EU legislation.[1] The EU (Withdrawal) Bill (hereafter "the Bill"), by ensuring that environmental protections are brought over into domestic law, is the first step to delivering on this promise in practical terms. We also recognise that the Bill is necessary to ensure legal certainty on 'exit day'. In particular the Bill needs to:

- Convert the entire body of European environmental law into domestic law, including fundamental principles of international and EU environmental law;
- Provide for new governance arrangements so that there is effective implementation of environmental standards, whatever the UK and Scotland's future relationship with EU institutions;
- Restrict the use of secondary legislation, before and after Brexit, and create processes for robust parliamentary scrutiny of any changes made through secondary legislation during the conversion of EU law.

General comments on the Bill

We have a number of general concerns with the Bill, as currently drafted, which are outlined in a briefing by Greener UK, a coalition of environmental NGOs, alongside our proposed amendments to the Bill. Our concerns can be summarised in three main points:

1. Environmental principles: Many of our strongest environmental protections are underpinned by general principles of international environmental law, such as the precautionary principle and the polluter pays principle. These principles, which have proved instrumental in the effective development and application of environmental protections, are embedded in the EU treaties but are not currently articulated in domestic law. The Bill does not provide sufficient clarity that these principles will be converted alongside other EU law. This is critical to ensure environmental legislation,

[1] https://news.gov.scot/speeches-and-briefings/securing-the-interests-of-scotlands-environment-and-progress-on-climate-change-following-the-eu-referendum

MENU

including any jointly agreed frameworks between the UK Government and devolved administrations, is applied and developed correctly in the future.

2. Secondary legislation: We have several concerns about the scope and scrutiny of delegated powers conferred to Ministers by the Bill, which will be discussed in our response to question 1. Additionally we are concerned about the lack of clarity regarding the status of retained EU law. The entirety of our EU-derived environmental laws should be given a status equivalent to primary legislation, so that it can only be amended or repealed by an Act of the relevant legislature and not be left vulnerable to future change.

3. Environmental Governance: Environmental law will only achieve desired outcomes with the support of robust institutions to ensure implementation and, when necessary, enforcement of that law. EU institutions such as the European Commission and the European Court of Justice play a central role in this process at present, undertaking monitoring, oversight, implementation and enforcement of environmental law. Current domestic governance arrangements such as judicial review, parliamentary processes and domestic environmental agencies in Scotland, and in the UK, are not equivalent to existing EU arrangements. The Secretary of State for the Environment, Food and Rural Affairs Michael Gove, has recognised the need for new environmental institutions[2], and Scottish Government officials have also acknowledged in discussions that this issue must be addressed, for instance that 'it is essential that appropriate governance arrangements are introduced in order to implement, monitor, audit and enforce standards'. However, neither the UK nor the Scottish Government have proposed any tangible additional environmental governance regimes. The Bill should provide for new governance mechanisms to be introduced in all four of the UK countries so that our environmental laws are not rendered unenforceable.

1. The appropriateness of the powers proposed in the Bill

RSPB Scotland recognises that, given the vast amount of EU law in force in the UK, Statutory Instruments and delegated powers will be necessary to ensure legal continuity on the day of exit. We welcome the statement in the explanatory notes to the Bill that legislation cannot be considered deficient '*merely because a minister considers that EU law was flawed prior to exit*', meaning that these powers can only be used to correct deficiencies that arise as a result of our withdrawal from the EU. However, we remain concerned that the powers proposed are too broad in scope and are not sufficiently constrained to the purpose of the faithful transposition. As currently drafted, the Bill gives UK and devolved Ministers the potential to make significant and wide-ranging changes with limited parliamentary oversight.

For instance, both the explanatory notes to the Bill and the White Paper cite an example of the type of 'operational' amendment that might be necessary: *'the [current] law requires the UK to obtain an opinion from the European Commission on a given issue…the power to correct the law would allow the Government to amend UK domestic legislation to replace the reference to the Commission with a UK body,*

[2] https://www.gov.uk/government/speeches/the-unfrozen-moment-delivering-a-green-brexit

or to remove this requirement entirely.' This example is concerning, as the removal of such a requirement would represent the loss of important monitoring and oversight mechanisms and in our view goes far beyond what might be considered a technical change. We believe it is vital that these sorts of non-technical changes are not made through the use of delegated powers conferred by the Bill and should only be made using primary legislation at a later date.

Additionally, whilst the use of delegated powers is restricted to, at most, two years after 'exit day', 'exit day' remains undefined. We acknowledge that flexibility is necessary to allow for any potential transitional arrangements, but we are equally concerned about the potentially extensive period of time during which UK and devolved Ministers may utilise these wide-ranging powers.
We therefore suggest that the Bill places the following safeguards on any delegated powers:

- Assurance that delegated powers will only be used to ensure that converted EU law operates with equivalent scope, purpose and effect; or to implement any rights or obligations arising from negotiations with the EU;
- A requirement that non-technical changes to legislation, where appropriate, are made by primary legislation only and that this should only occur if agreed, and subject to an appropriate level of scrutiny, by all four administrations;
- A guarantee that powers will lapse at the point of the UK's exit from the EU; and
- Creation of a robust 'sift and scrutinise' system so that every statutory instrument undergoes an appropriate level of scrutiny and to ensure appropriate and independent oversight of the use of delegated powers.

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

Powers relating to most environmental matters, including agriculture and fisheries, are currently devolved. To date, these powers have been exercised in the context of the UK's membership of the EU, which has shared competence for such matters.[3] In light of the widely recognised importance of a coordinated transboundary approach and the maintenance of a level playing field for the effective protection of the environment, these areas are strongly governed by EU policy and legislation.

We are particularly interested in the approach proposed in the Bill for repatriating these powers relating to environmental matters and the implications of this for the devolution settlements, insofar as this relates to how the UK Government and the devolved administrations can work constructively together to secure an approach that both respects the devolution settlements and guarantees common environmental standards. This issue will therefore be dealt with in our response to question 3.

[3] i.e. its shared competence for environmental matters between the EU and the Member States and applies in relation to a range of areas that includes agriculture, fisheries (with the exception of marine biological resources under the common fisheries policy which is an exclusive competence of the EU), and the environment.

MENU

3. Whether there is a need to establish common UK frameworks to replace EU frameworks in devolved policy areas such as agriculture and environment; The appropriateness of the arrangements for these suggested by the Withdrawal Bill; Alternative models for discussing, agreeing and operating any common frameworks that may be required

The importance of common standards for the effective protection of the environment will not diminish post-brexit. Indeed, the principles justifying EU-level cooperation and regulatory alignment on environmental matters apply equally if not more strongly to intra-UK cooperation and regulatory alignment. RSPB Scotland was therefore pleased to note the commitment in the *Government's Programme for Scotland 2017 – 2018* to 'collaborate where appropriate to develop UK-wide approaches for relevant issues'. We believe that the common set of environmental standards, currently in place as part of the UK's membership of the EU, should be retained in domestic law and policy post-brexit.

The justification for retaining a coordinated, transboundary approach to environmental protections is well-evidenced. For instance, the recent 'fitness check' of the Birds and Habitats Directives clearly demonstrated the added value that this legislation provides both in terms of a 'level playing field' for economic operators and a more effective, coordinated and consistent approach for achieving nature conservation objectives. Similarly, the EU's Common Agricultural Policy currently provides a consistent and coherent policy framework across the UK that also allows a degree of flexibility, recognising that farming, nature and communities are different in different parts of the UK and face varying challenges, but that there are also many similarities across the UK's rural areas that necessitate consistency and complementarity of approach. This context will not change post-brexit.

The loss of these common standards therefore place the UK's environment and shared natural heritage in danger of significant regulatory divergence and a less coordinated approach to environmental governance. In addition, it would risk resulting in an environmentally damaging process of competitive deregulation across the UK's four countries. In order to respect the devolution settlements, it will therefore be essential for the UK and devolved governments to work closely and constructively together to agree on how to effectively embed existing EU environmental law in domestic law through the withdrawal process.

When it comes to new common frameworks post-brexit, for instance in the areas of agriculture or fisheries, it is essential that these are developed and agreed by all four nations, subject to an appropriate level of scrutiny by all four legislatures and underpinned by a clear and agreed framework of guiding principles. In particular we believe that any new common framework should:

- Be designed based on a robust and transparent assessment of the environmental impacts under a range of plausible scenarios;
- Set ambitious common standards that are at least as high as those set out in existing EU law, at the same time as retaining an appropriate degree of flexibility so as to allow implementation to be tailored to the specific environmental context in each nation;

- Prevent competitive deregulation within the UK by setting a minimum common baseline but not prevent any nation from introducing higher standards or tailoring policy to their own political, environmental and cultural context;
- Be developed alongside a new set of fair and transparent environmental funding arrangements based on objective environmental criteria and the delivery of public benefits, to replace the loss of EU funding streams and enable effective implementation;
- Include robust shared governance arrangements to replace the current set of processes by which the EU institutions ensure that all of the UK's jurisdictions are acting in accordance with their obligations under EU law. These should include clear monitoring and reporting requirements, and associated compliance and enforcement mechanisms; and
- Include shared environmental ambition to help meet the UK's national and international commitments and obligations, including the Convention on Biological Diversity and Sustainable Development Goals.

4. The suitability of current inter-governmental relations structures for a post-Brexit environment, and alternative processes and structures that may improve the effectiveness of intergovernmental relations, in light of the process of EU withdrawal and the development of common frameworks

To enable the development and agreement of common standards for the environment, as set out in our response to question 3, the four UK governments will need to agree and establish new and improved mechanisms for inter-governmental working at both Ministerial and official levels. Wider stakeholder involvement and consultation should also be included as a core part of this process.

5. The 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 Withdrawal Bill

The Bill does not provide sufficient clarity about the role that will be given to the Scottish Government and the Scottish Parliament in creating Statutory Instruments needed to convert EU law into Scots Law (e.g. EU regulations) or for technical changes required to current EU derived Scots law. Our current assumption is that the Scottish Government and Holyrood will, and should, be provided with a role equivalent to the one given to the UK Government and the UK Parliament.

Based on this assumption, whilst we recognise that a vast amount of legislation will need to be considered in a relatively brief amount of time, it is important that rather than leaving it to the UK Government and devolved administrations to justify the use of delegated powers, independent oversight on the use of such powers should be put in place. One such mechanism, as set out in our response to question 1, would be a 'sift and scrutinise' system to identify statutory instruments which require an enhanced level of scrutiny. For some of the more nuanced or contentious statutory instruments identified by this mechanisms a parliamentary scrutiny committee should be created that can:

- Require a draft of the proposed SIs to be laid before the appropriate legislature;
- Require the relevant Minister to provide further evidence or explanation as to the purpose and necessity of the proposed instrument;
- Make recommendations to the relevant Minister in relation to text of draft SIs;
- Recommend that Parliament does not proceed with a draft SI.

Furthermore, the relevant Minister should be required to have regard to any recommendations made by the committee, or results of public consultation (where appropriate), before laying a revised draft SI before the relevant legislature.

A further point relating to parliamentary oversight concerns the lack of clarity in the Bill about the status of retained EU law. As mentioned in our general comments on the Bill, assurance must also be provided that once all EU law is converted, it will be given a status equivalent to primary legislation. This would mean that it can only be amended or repealed by an Act from the relevant legislature. This is vital in order to ensure that important environmental protections are not left to the whim of the executive and will not be left vulnerable to future change.

COSLA
Dr Serafin Pazos-Vidal, Head of Brussels Office

1. The Convention of Scottish Local Authorities (COSLA) as the national and international voice of Scottish Local Government is pleased to provide a written response to this inquiry. It updates earlier submissions and oral evidence that we have made to this and other Committees of the Scottish and UK Parliaments.

2. COSLA's Leaders and Convention are continuing to consider the implications of Brexit for local government, local economies and communities in Scotland. From the very beginning of the discussions concerning the outcome of the EU Referendum, it was clear that the role of local government had scarcely featured in the debate. This was despite local government having a legitimate place as a sphere of democratic government in Scotland, the UK and Europe. COSLA is actively seeking a formal governance or consultative model to be developed that engages with Scottish councils.

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

3. The Bill confirms the March UK Government 'Brexit' White Paper intention to ensure that all EU law in force on March 30th 2019, will remain so (but as UK law) the day after. However, this is not straightforward. The more obvious and easier to deal with laws are the Directives, as these are already in the UK and Scottish statute books having been transposed into domestic legislation (law or statutory instruments under the ECA).

4. However, as COSLA's own position has long identified:

   - There are many pieces of legislation that are not in UK Statute that now need to be transformed into UK law – namely the Regulations and Decisions.
   - Equally there are pieces of legislation that, to work, will require reciprocity with the EU.
   - There are binding reporting obligations to the EU.
   - There are important aspects of EU regulation, such as the several State Aid Guidelines, which in some cases are effectively by-laws of the Commission, that do not appear to be covered by the Bill. This implicitly leaves full discretion to Ministers to change or scrap them.
   - Finally, there are shared competencies on single policy issues (e.g. food safety) that are now spread between Local, Scottish, UK and EU laws and regulations.

5. As was expected, the difficulty with this draft Bill is that it is not just an amending bill, but an "omnibus bill". This is not unusual with EU law. The Commission often uses one new piece of EU law to amend ('recast') several other pre-existing ones. The result is difficult to read as the text approved is just a collection of paragraphs that are to be amended elsewhere. In the case of the Withdrawal Bill, this is virtually unavoidable as it tries to cope with landing the implications of many thousands of pieces of EU law.

6. This raises a number of issues:

- It places the main power for repatriating and adapting these sources of EU law into the hands of UK ministers, with only consultation allowed for Scottish Ministers. This risks excessive ministerial discretion and a lack of accountability for powers that are currently shared between the EU and the devolved administrations (often with Local Government input).
- Parliamentary scrutiny is limited. In the case of the Scottish Parliament its main contribution would be at the beginning of the process with the issuing of a Legislative Consent Motion.
- The Bill incorporates most of the "EU acquis". What it particularly lacks is a statutory mechanism for negotiation and policy coordination for areas of shared or devolved competencies with devolved bodies or local government. The lack of an intergovernmental or interparliamentary arrangement (including councils) for the returned powers does not feel like 'bringing the powers home'.
- As things stand we will have less local government influence on existing EU Policy areas than we do now. The excessive discretion that could be given to UK and Scottish ministers without a challenge over subsidiarity and proportionality would be a backward step.
- The Bill makes no provisions for policy areas that might need to remain shared with the EU 27, or could be covered by the future trading agreements with other countries or the post-Brexit EU. This is despite the UK Government's "future partnership" position papers which see the possibility of the UK opting into some EU programmes or being associated with some EU policies.
- Also the UK position paper on jurisdictional and dispute resolution matters tabled last August leaves the door open for the UK to opt into the jurisdiction of the EFTA Court or an equivalent arrangement.

7. COSLA believes in principle that the currently devolved and local powers should remain where they are, even if new co-ordinating arrangements are needed to manage competencies that are currently shared with other EU member states. This point in time presents an opportunity to address the imbalances and piecemeal approach of the last 20 years of devolution where shared competencies rarely feature due mostly to the clear separation of policy areas into either reserved or devolved areas. We need consideration to be given as to how constructive and cooperative intergovernmental / interparliamentary decision making can be achieved across the UK. Our preference is that the arrangements to do this should be in the Bill.

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;

8. 'Brexit' will be a significant change to the UK constitution. We could develop distinctive governance approaches not tied to our current UK wide arrangements. The unique position (compared to many federal states) of the UK devolution model, where powers were devolved in full to Scotland, is quite unlike the EU central structures in, for instance, Germany and Austria were most

MENU

powers are shared with the federal government which sets most of the basic legislation. The same could be said of Italy and Spain.

9. From a local perspective, many powers are presently seen as being exclusively managed by either Scotland or the UK. This is misleading as the reality is that many are in fact also shared with the EU through the development and implementation of policy frameworks, in which all spheres of Government have a role to play. These shared powers will still need to be shared in many cases. This matter is covered in different parts of the Bill.

10. In that respect the initial detailed list of 111 powers identified by Scottish ministers in their correspondence (on 19 September) to this Committee is accurate. But it is also the case that many of the powers do not singly concern the devolved arrangements. Environmental and energy legislation, state aid, procurement and trading standards currently concern local government as well as the Scottish Parliament..

11. Brexit provides a challenge to the existing constitutional and political settlement of the UK. While Scotland has not had an issue with the existing model of asymmetric and piecemeal devolution of powers – other countries may be less content. The Prime Minister's observation is that this model has so far been one of "Devolve and forget" by Westminster. But even now Westminster has shown little interest in creating an inclusive UK wide policymaking process more involving devolved and local government. If the 'United Kingdom' is to count for anything Brexit offers an opportunity for, perhaps even requires, a joined-up partnership based, coproduced and owned UK multi-level system that maintains the unity across the 4 countries in many of the current EU policy areas while allowing local discretion.

12. So far it is apparent that there will be some current EU powers that should be managed at a UK level and other that could be fully devolved. We simply need to apply the same logic which saw some powers transferred to the EU as they had impacts beyond local and national levels. Matters with a UK dimension include issues such as state aid that requires co-ordination to avoid damaging our internal market. But we would question the right of the UK Government alone to define such an issue and believe it should be done in partnership with devolved and local administrations.

13. The "Proposed Amendments to the European Union (Withdrawal) Bill" document outlined by the Scottish Government on September 19 would change the Bill's provisions, with Scottish Ministers being consulted to Scottish Ministers giving their consent. This would introduce a new constitutional settlement closer to a federal model by introducing a form of multi-level governance, something that it is sorely lacking in the UK. A limitation is a risk of a "joint decision trap" - or mutual veto, delivering a political stasis. It would be better if a more holistic approach could be agreed to deliver a consensual, intergovernmental decision making mechanism. Further, below we suggest a range of other possibilities that could be considered.

14. From a local government perspective, we are currently being left on the side-lines as arguments are made over which part of central government has the upper hand. There is no mention on how powers could be shared on a tri-partite bases between the UK, Scottish and Local Government. The amendments we are aware of do not appear to touch directly on the Scottish Parliament. Scottish Parliament scrutiny and consent powers (compared with Scottish Government) are not significantly changed.

Towards a UK subsidiarity settlement

15. Under the EU Treaty principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Such a principle does not currently exist in the UK or Scottish constitutional arrangements.

16. However, it is worth noting that the UK Government January 2017 White Paper "The United Kingdom's exit from and new partnership with the European Union" covers this area (without calling it Subsidiarity) saying that

"3.5 As the powers to make these rules are repatriated to the UK from the EU, we have an opportunity to determine the level best placed to make new laws and policies on these issues, ensuring power sits closer to the people of the UK than ever before. We have already committed that no decisions currently taken by the devolved administrations will be removed from them and we will use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved…

3.8 We will also continue to champion devolution to local government and are committed to devolving greater powers to local government where there is economic rationale to do so."

17. Also, the second White Paper (published in March), "Legislating for the United Kingdom's withdrawal from the European Union", contains a similar undertaking

"As we leave the EU, we have an opportunity to ensure that returning powers sit closer to the people of the United Kingdom than ever before".

This is reprised in the main text:

"4.5 This will be an opportunity to determine the level best placed to take decisions on these issues, ensuring power sits closer to the people of the UK than ever before."

Local Government

18. There is no statutory constitutional protection for local government in any of the local government jurisdictions of the UK. This is at odds with the European Charter of Local Self Government which the UK Government signed. This has

MENU

repeatedly been the source of concern as the Council of Europe's Congress of Local and Regional Authorities monitoring reports (the last one in 2014). Local Government engagement in the UK side EU policy formulation has been characterised as ad hoc, and heavily influenced by the ethos of a given policy department, as well as changing political circumstances.

19. One aspect of this was addressed as a by-product of the Localism Act 2011. It concerned the EU fines being passed down to a council where they are deemed liable. Both the English (LGA) and Scottish (COSLA) Local Authority Associations made the 'natural justice' case that a punitive approach needed to be preceded by our engagement in an early local-central EU policy formulation mechanism, so by better designing the policy and its application we could avoid EU fines for infringement later on. This resulted in the UK Government "Policy Statement on Part 2 of the Localism Act 2011". The Scottish Government belatedly produced similar guidance[1]. While both sets of guidance require Local Government to be actively involved in the formulation of UK and Scottish Government EU positions neither is used proactively by them to guide civil servants, although occasionally the texts are cited by us as local government counterparts.

20. There is a strong case to revisit arrangements to ensure that Devolved and Local Governments participate as equals in the Brexit withdrawal process as far as their competencies are concerned. There is a similar case for our engagement in the negotiation of future Trade and other international agreements, and in the development of what may be called the 'UK Shared Prosperity Fund' to replace existing EU funding programmes. We should be able to build on the good work of Local Government with Devolved and UK Ministries (BEIS, DEFRA, CLG) to draft a UK Partnership Agreement as a basis to develop these new frameworks.

21. This would both build on the good practice and know how accumulated in designing and delivering EU frameworks over several decades, and also acknowledge that the large UK local authorities have their own significant budgetary and regulatory weight, particularly in providing the right business climate for SMEs, who collectively are the largest employers in the country. Any new UK place-based policy and funding arrangements needs to be developed with local government to ensure they are sufficiently place-specific and draw from all the territorial capital (resources, infrastructure, know how) of a given area.

Apportionment of returned powers:

22. Powers should be allocated following the principles of subsidiarity and proportionality and homemade equivalents to matters such as EU competition law (perhaps including a "UK internal market test"). Essentially local or Scottish policy differentiation should be the norm when there is unlikely to be a distorting effect in other parts of the UK, or a failure to fulfil the intended outcomes of UK policy or commitments. We also need to avoid the dead hand of bureaucracy where it is disproportionate to the effect of the regulation. Procurement

[1] Scottish Government (2016) "Influencing EU Policy A guide for Scottish Government officials".

regulation is a case in point with wide application. Only 3.5% of procurement contracts above the EU thresholds are awarded on a cross-border basis (for services it is even lower at 2%), yet all contracts above the threshold are tied up in red tape. We run a risk that similar effects being achieved if powers are returned without clear criteria for apportioning them. Criteria on allocation of powers should be based on proportionality, a demonstrable UK wide dimension and subsidiarity. All need to be explicit in the Bill.

23. Local government would like to take a more nuanced view on the regional and local devolution of EU competences. Some legislation could clearly benefit from being lift and dropped as is, amended to ease implementation, and some simply being dropped. What we will want is to be able to participate in framing the new UK and Scottish legislation and to seek flexibilities in line with the principles of subsidiarity and proportionality.

24. Using again the procurement example, current EU rules make it very difficult to introduce “Buy Local” clauses in public tenders. Equally they set detailed limits on how and when to share local public services through joint working between councils. During the passage of the present EU Directives we argued that such detailed provisions were disproportionate for the overall goal intended (to enable competition from the rest of the EU) when applied to local government. The Withdrawal Bill and process provide opportunities to revisit this.

Whether there is a need to establish common UK frameworks to replace EU frameworks in devolved policy areas such as agriculture and environment; the appropriateness of the arrangements for these suggested by the European Union (Withdrawal) Bill; and alternative models for discussing, agreeing and operating any common frameworks that may be required;

25. Yes - there is. The existing principles of robust, transparent and fair rules should continue to underpin the returned EU powers on environmental legislation, trading standards, energy efficiency, state aid and procurement regimes post UK withdrawal. The ´Brexit´ process allows us to rethink whether the regulatory regime is proportionate, consistent and manageable in a way that prevents unfair competition but stimulates local economic development.

26. After withdrawal, there will be market and regulatory issues that need to be dealt on a UK-wide basis to maintain the single internal market. The notion that this should be done by restoring pre EU -membership Westminster-only arrangements seems unreasonable as devolution and multi-level governance has changed the constitutional and legal landscape in the intervening period. New models of intergovernmental policy coordination are needed.

27. The UK Government’s ´Brexit´ White Papers and position papers, as well as the Explanatory notes of the European Union (Withdrawal) Act, leave the option to set up an UK-wide regulator that oversees and issues rules to prevent unfair competition and discriminatory subsidies given by public authorities across the UK. Given the integration of the UK’s own internal market this approach may seem sensible, but the extent of the regulation could become problematic if the bodies lack effective democratic accountability and start replicating the

MENU

bureaucracy that has gone on before. An example is over the current State Aid regime where the Commission acts as a political executive and not just a market regulator.

28. Transposing such a system to the UK so that one tier of government would be both regulator and beneficiary would not be desirable, the more so given the increasingly divergent policy and political landscape across the UK. A more, independent, partnership based regulator than what is currently proposed seems more in line with the political and constitutional realities of the UK.

29. There would be benefit in considering establishing a UK-wide competition body whose oversight is independent of UK, Devolved and Local Governments, but with the aid and other guidelines being drafted by a partnership of the UK, Devolved and local government representatives. The same arguments apply to an independent regulator overseeing many other issues from Energy standards, to trading standards to atmospheric pollution, environmental impact assessment.

30. We expect that some of the existing EU reporting obligations (ie on environmental performance) would be retained though simplified and mainstreamed into domestic reporting duties so they can be shared with the EU and the UN. The latter is a case in point given the commitment of the UK & Scottish Governments to the United Nations Sustainable Development Goals. The Bill sets out the 3 options for reporting obligations (already outlined in the White Paper back in March):

- Some information to continue to be shared with the EU as at present.
- Others will be reported to a UK body.
- the reporting obligations that double up with UK ones will be scrapped.

31. The problem with this is that the reporting elements of the Bill does not say if and when this will be done. It would end up allowing Ministers to decide unilaterally in each individual case. Once again, this would amount to excessive arbitrary ministerial discretion.

The suitability of current inter-governmental relations structures for a post-Brexit environment, and alternative processes and structures that may improve the effectiveness of intergovernmental relations, in light of the process of EU withdrawal and the development of common frameworks;

32. The Miller and Dos Santos Supreme Court Ruling earlier this year showed the weaknesses of the existing parliamentary and intergovernmental negotiations. The devolved administrations do not have any formal international presence and there are no proposals now to change the weak and informal nature of the JMC arrangements. Given the growing importance of shared competencies a review of where we all are is needed. It should cover the provisions of the Localism Act and its Policy Statement as well as the existing MoU as regards to UK-devolved government relations.

33. Some benefit in deciding how to proceed could be had if we consider other national arrangements

- **Formal Intergovernmental bodies** – unlike the JMC there are highly formalised ministerial bodies such as *Conferenza Statio Regione* in Italy and the Inter-ministerial Commissions in Spain. It would be a good option for Devolved Administrations but unlikely to address Local Authorities' engagement

- **Joint Central Local Team** – Dutch Model underpinned by a political *Code of Inter-governmental relations*. While the UK consults widely when drafting legislation, the Dutch Model is much more open and crucially is based on a partnership between central and local level. As elected representatives during policy formulation councils are not lumped in with civil or private stakeholders. It is a model of much larger joined up approach than the MoU for Devolved Administrations or the Scottish & Local Government Concordat.

- **Political Forum of ministerial coordination:** similar to the JMC another example is the Austrian *Landeshauptleutekonferenz* but could be seen as a more effective arrangement than the UK's. This is not due to the mechanism itself but because of the different party political structures there. Still the Welsh Assembly Government proposal on reinforcing the JMCs should be explored further but including local government representatives.

- **Parliamentary Chamber** – the Bundesrat is the upper legislative chamber in Germany. It represents regional governments. In the UK, this would mean having a 3rd chamber, where a delegation of MSPs, AMs, English MPs and local government representatives would sit to consider UK wide legislation and foreign trade or other agreements affecting devolved and local powers.

- **Parliamentary Hearing and Mandate:** If following the (Denmark) model the UK Parliament would consult widely including Local government before giving a formal negotiating mandate to the national government. It would take the Legislative Consent Motion and apply it more widely, including at the start of international negotiations. Something that successive UK governments have refused as outwith our constitutional model.

- **Local and Devolved Representatives at Lords:** one of the functions of Lords is to provide a forum for a range of interests (churches, universities) to be implicitly involved in legislative and scrutiny. Therefore, instead of a stand-alone structure, Lords could house representatives from Local Authorities and MSPs.

Mechanisms that could be put in place to ensure that the Scottish Parliament has sufficient oversight over the process of negotiating and legislating

34. As said earlier, the powers of UK and Scottish Parliaments to scrutinise the use of the repatriated powers need to be enhanced if decisions making is to be

MENU

brought closer to the people. The current provisions of the Bill are weaker than the existing EU arrangements. Where the Commission is acting as an executive, it is legally empowered by European Parliament and the Councils of Ministers by them delegating aspects of legislation on their behalf (the so-called Delegated and Implementing Acts). However, MEPs and Member States have the possibility to scrutinise each and every piece of legislation that is managed in this way before it is approved.

35. Equally the UK Parliament and indirectly the Scottish Parliament currently have the power to scrutinise draft EU legislation under the Early Warning System to ensure its compliance with the EU Subsidiarity Principle

    Clearly, given the amount of legislation that will have to be amended it is very likely that either Parliament would make extensive use of these powers. However, if these provisions were included in the Withdrawal Bill, it would provide minimum guarantees that some scrutiny can be applied to Ministers, thus reducing the risk of their acting arbitrarily.

University of Dundee
Professor Colin Reid
Professor of Environmental Law

Evidence submitted by Professor Colin T. Reid, (Dundee Law School) on behalf of the Brexit & Environment Network.[1] This network of academics is working on the implications of Brexit for the future of United Kingdom (UK) and European Union (EU) environmental policy (www.brexitenvironment.co.uk), and is funded by the ESRC's UK in a Changing Europe programme. Our evidence is given and phrased in the context of our specific concerns over environmental governance.

1. The European Union (Withdrawal) Bill (the Bill) envisages Ministers (initially largely at UK level) having broad powers to legislate in order to deal with the consequences of the UK leaving the EU, both securing continuity of the existing legal rules and making the adjustments necessary for legal frameworks to operate in the absence of the EU layer. We wish to comment on three issues:

a) Division of powers
b) Collaborative mechanisms
c) Scrutiny

A. Division of Powers

2. The well-publicised controversy over the division of competences between the UK and devolved administrations reveals a fundamental difference of view over the extent of power transferred by the devolution settlement. The Bill embodies the UK government's view that the power devolved is circumscribed by EU competences and activities, so that what has been transferred thus far was not power over environmental law (or any other devolved area), but only over those areas of environmental law not regulated by EU law. On this view, it follows that in providing that any powers held in Brussels revert (initially at least) to London, the Bill does not make any change to the extent of power enjoyed in Edinburgh; the Scottish authorities will enjoy exactly as much freedom of action as at present. Indeed by envisioning competences subsequently being passed on to the devolved authorities, the Bill is actually opening the way to an extension of their powers.

3. The alternative view is that in areas not reserved to London under the devolution legislation, the default position is that all power rests with the devolved authorities. On this view the fact that elements of that power are to some extent subservient to the EU at present does not alter the starting point that all matters not explicitly reserved are properly regarded as belonging in Edinburgh. Accepting the supremacy of EU rules, that represent wider consensus and are made by very distinct procedures, is something quite different from direct control by UK Ministers. The removal post-Brexit of the EU layer should therefore mean that all non-reserved powers are devolved and the proposal in the Bill that they should be exercisable in

[1] Prof. Charlotte Burns, (University of Sheffield), Prof. Neil Carter (University of York), Prof. Richard Cowell (University of Cardiff), Dr Viviane Gravey (Queens University Belfast), Prof. Andy Jordan (University of East Anglia) and Prof. Colin Reid (University of Dundee).

London alone (unless and until London agrees to pass them on) represents a major incursion into devolved competences.

4. The reason for spelling this out is to emphasise three points:

- The first is that the dispute is an inherently political one, which must be resolved by political discussion (recognising the ultimate legal supremacy of the UK Parliament embodied in the Scotland Act) and is not amenable to any legal or administrative "technical fix".

- The second is that resolution of this matter is essential for many of the further issues raised in responding to Brexit to be finally settled, such as the nature of future collaborative mechanisms, since the way forward is inherently dependent on a clear understanding of where formal legislative power resides.

- The third is to note that in areas such as the environment which cross borders and policy sectors, it is impossible to isolate all matters into distinct categories, so that issues will unavoidably straddle reserved, devolved and (in due course, "retained") EU issues, wherever these boundaries are drawn.

The second and third points together mean that there is an urgent need to start devising a portfolio of collaborative mechanisms to fit whatever constitutional solution is ultimately reached. Such mechanisms are going to be required regardless of the ultimate pattern of legal powers, and identifying at this stage possible ways of working together will not only enable rapid progress once the deeper constitutional dispute is resolved but may also point towards ways of mitigating some concerns about the future operation of any constitutional settlement.

B. Collaborative Mechanisms

5. The devolution agreements post-date the UK's membership of the EU and were crafted in the light of the multi-level governance structure that has evolved at EU level. The EU rules provided a framework and in some areas a minimum benchmark that all EU (and by extension UK) states have to abide by. There is divergence in environmental policy within the UK but within the context of the EU frameworks and standards. Brexit raises the prospect of further divergence and fragmentation emerging across the UK, as devolved administrations exercise powers freed from the requirement to comply with EU law.[2]

6. However, it is essential both for the successful operation of the UK economy and market, and for the meaningful protection of the environment, to have co-ordinated and ambitious environmental standards across the UK. Brexit should not be seen as an opportunity for a race to the bottom within the UK. For many areas (such as chemicals) there is likely to be a continuing need to conform with EU standards for trade related reasons.

[2] Reid: "BREXIT and the Future of UK Environmental Law", (2016) 34 Journal of Energy and Natural Resources Law 407.

MENU

7. Given the need for future policies to be coordinated and negotiated by the devolved administrations together with the UK government, the lack of explicit and detailed consideration of how those administrations and, crucially, their legislatures can be involved in both the transfer and future development of policy is a significant weakness in the present Bill and associated proposals. This gap also undermines the principle of participation that underpins good environmental governance.

8. Turning to formal models for co-operative working, the Scotland Acts already allow for some mechanisms for working together, but these concentrate on bilateral arrangements between the UK and Scottish authorities, not on frameworks for working between all four administrations in the UK:

- concurrent powers: This is the position in relation to the implementation of EU law, where legislative powers can be exercised by Ministers in either London or Edinburgh (Scotland Act 1998, s.57; see also the Scotland Act 1998 (Concurrent Functions) Order 1999, SI 1999/1592).

- jointly exercised powers: In a limited range of circumstances, e.g. in relation to some statutory bodies, it is provided that powers are to be exercised jointly by UK and Scottish Ministers (Scotland Act 1998, s.56(3)).

- executive devolution: It is possible for UK Ministers to give Scottish Ministers the power to act in certain areas within reserved powers, without altering the fundamental reserved/devolved boundary. The powers may be exercisable by Scottish Ministers alone, by them with the consent of or after consultation with UK Ministers, or concurrently (Scotland Act 1998, s.63).

- agency agreements: Either set of Ministers can provide that powers within their competence (other than powers to make subordinate legislation) can be exercised by the other, but responsibility remains with the original authority (Scotland Act 1998, s.93).

- legislative consent: The devolution settlement did not diminish Westminster's ultimate power to legislate on any matter its chooses (Scotland Act 1998 s.28(7)) but this is tempered by the process of legislative consent or "Sewel motions", whereby approval from the Scottish Parliament is normally obtained before such legislation is made (Scotland Act 1998, s.27(8)). As was made clear in the Miller case (*R (Miller) v Sec. of State for Exiting the European Union* [2017] UKSC 5), this does not provide a legal obstacle to legislation by the UK Parliament, but does provide a vehicle for encouraging co-operation.

9. Other models also exist and go beyond the bilateral approach above. The Joint Ministerial Council is supposed to provide a forum for discussion and agreement between the various administrations in the UK. As a recent House of Lords inquiry concluded, this is not working effectively at present,[3] but a re-vitalised

[3] House of Lords European Union Committee, *Brexit: Devolution* (4th report of 2017-19, HL 9).

structure (as supported by the Welsh Government)[4] might be appropriate. There is also potential in the British-Irish Council.[5]

10. An alternative is the establishment of separate, technical bodies that can bring together representatives of the various statutory bodies across the UK to discuss particular topics and make recommendations, which are then left to be implemented by the competent legislative authorities. An existing example is the Joint Nature Conservation Committee (Natural Environment and Rural Communities Act 2006, s.34 and Sched 4), which as well as providing advice and recommendations, e.g. on the lists of plants and animals to be given legal protection, is charged with establishing common standards across the UK for the monitoring of and research into nature conservation and the analysis of resulting information. The cross-border bodies created under the Good Friday Agreement (e.g. the Loughs Agency) provide a further example. In the establishment of any such bodies, questions over funding and accountability arise.

11. The potential of these and further mechanisms and their suitability for particular subject matters should be actively considered at this stage, but there are two significant obstacles. The first is that just as strong co-operation can work regardless of the structural arrangements when there is goodwill on all sides, no formal structure can work effectively in its absence, and the current constitutional dispute appears to be standing in the way of mutual goodwill. More must be done at all levels to establish a culture of working together. The second is that the discussions over the Bill have highlighted the question of parliamentary scrutiny. If new forms of joint working are to be created, there is a question over how such activities are going to be overseen.

12. Concern has been expressed over the limited extent to which there will be parliamentary scrutiny over the exercise of ministerial legislative powers under the Bill. One general observation is that in view of the bulk of legislation that will be necessary in a short timescale, considerable use of the existing streamlined mechanisms for scrutiny (such as the negative procedures for Statutory Instruments) is unavoidable, and has been accepted in wide areas of legislative activity for decades. In particular, at present there is very little parliamentary scrutiny of measures made under the European Communities Act 1972 to give effect to EU law, although it can be argued that there is a qualitative difference between the rapid introduction of a large volume of legislation as expected under the Bill and measures implementing elements of EU law which have emerged through a prolonged consultative and participatory process.

13. A more specific issue is scrutiny over any existing and new forms of joint working. At present the legislative consent process at Holyrood gives the Scottish Parliament a say over when primary legislation is to be made at Westminster within a devolved area, but there is no process for the Parliament to be informed, far less to intervene, when it is decided that delegated legislation on devolved matters is to be made in Whitehall rather than Victoria Quay. At present this occurs most commonly

[4] Welsh Government and Plaid Cymru: *Securing Wales' Future: Transition from the European Union to a new relationship with Europe*, p.28.
[5] Ibid., p.23.

under the European Communities Act 1972 in order to implement EU law, and in such circumstances the participative process through which EU law is produced and the timescales for implementation may at least provide opportunities for Scottish institutions and stakeholders to be aware of and potentially contribute to the outcomes. That may not be the case in the exercise of powers under the present Bill.

14. Moreover, if there is to be effective joint working between the administrations, should there also be joint working between the Parliaments? Is there potential for joint commissions established by all four elected bodies to scrutinise the operation of whatever collaborative arrangements are put in place? Or are there lesser ways of securing co-ordination and collaboration to achieve the desired level of parliamentary oversight in an efficient manner? The oversight of the mechanisms for co-operation and collaboration must be a major factor in establishing the new ways of working.

15. The specific issue of parliamentary oversight is, of course, just one aspect of the wider issue of governance. The design of collaborative mechanisms must ensure not only that they can do their job effectively and efficiently, but do so in accordance with the principles of good environmental governance, including accountability, transparency

NFU Scotland
Clare Slipper, Political Affairs Manager

- NFU Scotland (NFUS) welcomes the opportunity to submit evidence to the Finance and Constitution Committee's inquiry on the European Union (Withdrawal) Bill.

- Scottish agriculture plays a pivotal role in the rural economy. It is the bedrock of Scotland's £14.4 billion food and drink industry – which now exceeds the oil and gas industry in returns to the Scottish economy. Scottish farming and crofting supports 65,000 jobs in agricultural production, and 360,000 jobs in the wider food and drink industry.

- Scottish and UK agriculture has operated under the EU regulatory framework and Common Agricultural Policy (CAP) for over 40 years and the negotiations to leave the EU will have significant consequences for the industry.

- As the largest representative body for Scottish farmers and crofters who have operated under EU regulations over the last forty years, NFUS understands the importance of ensuring continuity and legal certainty in the immediate aftermath of 'exit day'. NFUS considers the European Union (Withdrawal) Bill to be a technical and procedural piece of legislation in order to ensure that 'the wheels do not come off' in the short-to-medium term. However, it is vital that all political implications of this landmark Bill are understood.

- The primary concerns of NFUS from the legislation pertain to the transposition of policy frameworks from the EU into UK law – namely, the CAP – and ensuring that governments establish a sensible regulatory framework after Brexit that allows Scottish agriculture to thrive.

The CAP and Scotland

1. The 1998 devolution acts have radically altered the balances of power in the UK from when the UK first joined the European Economic Community in 1973. Since 1999, the Scottish Government along with the other devolved authorities have had the ability to make implementation decisions on agricultural policy within the confines of the EU CAP framework, as well as decisions on implementing various environmental directives.

2. The EU CAP framework operates to deliver financial stability to food producers whilst allowing them to remain productive and deliver on environmental outcomes. It has also set high standards for animal health and welfare, environmental protection, and food safety – all obligations which UK farmers are proud to exceed.

3. It is also valid to outline that there are various elements of the CAP which have not worked for Scottish and UK agriculture; a common complaint is that its proscriptive and top-down nature has stifled innovation, with one-size-fits-all areas of regulation being poorly applied and having counterproductive

MENU

results for productivity and the environment. NFUS considers that leaving the EU presents a valuable opportunity to develop a new agricultural policy and regulatory framework that is much better fitted to the differing contexts of agriculture across the UK.

4. It is the position of NFUS that devolution of agricultural policy has worked very well for Scottish agriculture as it has allowed decisions on the implementation of the CAP to be made closer to the businesses it impacts. Under this arrangement, Scotland has been free to implement agricultural policy in different ways to its neighbours elsewhere in the UK. There are several examples where different approaches to agricultural policy have been taken in the four parts of the UK based upon what is deemed right for each region.

Post-Brexit Policy Frameworks

5. The European Union (Withdrawal) Bill amends section 29, clause (2)(d) of the Scotland Act 1998 so that the Scottish Parliament:

   "*Cannot modify, or confer power by subordinate legislation to modify, retained EU law"* (section 11, clause (1)).

6. This suggests that from 'exit day' onwards, the Scottish Parliament has its powers to amend EU law relinquished, which in effect stops the automatic flow of EU powers to devolved competence.

7. Whilst NFUS understands that the Bill is technical and procedural in nature, it is a concern that there is no built-in mechanism to determine exactly where overarching EU frameworks – such as the CAP – will be returned to on 'exit day'.

8. The UK Government's White Paper[1] on the (formerly titled) Great Repeal Bill, published in March 2017, outlined that the UK Government intends to replicate existing EU frameworks (such as the Common Agricultural Policy) in UK legislation whilst starting intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary. It is suggested that in that interim period, no changes will be made to the common frameworks. In other words, the UK Government's forthcoming Agriculture Bill will address the long-term administrative settlement on the successor policy to the CAP.

9. The accompanying explanatory notes to the subsequently-published European Union (Withdrawal) Bill[2] state the following:

   - "The Bill does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are necessary to

[1] https://www.gov.uk/government/publications/the-repeal-bill-white-paper
[2] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf

ensure the law continues to function properly from day one. The Government will introduce separate primary legislation to make such policy changes which will establish new legal frameworks." (Page 7)

- "The UK Government hopes to rapidly identify, working closely with devolved administrations, areas that do not need a common framework and which could therefore be released from the transitional arrangement by this power. This process will be led by the First Secretary of State and supported by the relevant territorial Secretary of State and will begin immediately following the Bill's introduction." (Page 13)

10. NFUS is equally aware of the Scottish Government's contrasting position, which it understands to be that all powers over agricultural policy should be transferred to the Scottish Parliament on 'Brexit day', as this is where they have sat since the Scotland Act 1998. The Scottish Government would then enter into discussions with the UK Parliament as to which areas of agricultural policy are best served on a UK-wide framework.

11. It is therefore significant that the UK Parliament seeks to engage the legislative consent of the Scottish Parliament for such a measure via the Sewel Convention. However, if the Scottish (and/or Welsh) Parliament(s) do not grant a Legislative Consent Motion to the UK Government, NFUS understands that vote has no formal recourse to veto the application of the European Union (Withdrawal) Bill. Whilst there would be no legal consequences, NFUS is concerned about the political implications such a situation would bring about in terms of relations between the UK Government and the devolved administrations.

NFUS Position

12. In the first instance, NFUS is urging UK Government to ensure that there are 'appropriate levels of Parliamentary scrutiny'. This includes consideration of introducing new procedures to deal with the volume of forthcoming secondary legislation.

13. NFUS also considers that the Bill should include provisions to allow the courts to interpret UK law created by it. This would avoid the possibility that in transferring EU law into UK law mistakes will be made. Such mistakes may make some laws inoperable, or the regimes they govern fail to operate as intended in the same way as they did under EU law.

14. As regards to the transposition of the CAP, NFUS' long-standing position is that any future policy must have significant in-built flexibility for the devolved administrations to be able to use the agricultural budget to develop policies and tools that are fitted to the unique agricultural characteristics of the different parts of the UK. It is also accepted that as part of that process, a common regulatory framework is sensible for major issues that cross across borders such as animal welfare, food standards, and pesticide regulation. NFUS suggests that such a model would operate in entirely the same way

MENU

that the CAP has for Scotland since the inception of devolution – a 'commonly agreed framework, with devolved delivery'.

15. NFUS is clear that any approach which drops a one-size-fits-all policy on all four nations of the UK will not work for farmers, crofters and growers anywhere across the UK. NFUS will continue to engage UK Government to determine what mechanisms will be put in place to ensure Scotland has the flexibility to design and use tools that are appropriate to the Scottish agricultural context.

16. Article 50 is irrevocable, so not withstanding legal recourse and fallout from the LCM process, the UK will leave the European Union. This means that it is vital consensus is found on the transpositions of policy and regulatory frameworks so that governments can ensure the correct policies are in place after 'exit day'.

17. NFUS agrees with the suggestion from a range of commentators that the simplest way to ensure all the devolved administrations have input is via a strengthened Joint Ministerial Committee, rebuilt into a UK Council of Ministers covering the various aspects of policy for which agreement between all four UK administrations is required. As part of this process, it is also important that all governments undertake meaningful consultation with interested stakeholders.

18. NFUS considers this to be the only realistic way in which constructive detail can emerge from UK Government and the devolved administrations on how differing farming systems can be supported in different ways across the UK after Brexit.

Scottish Environment Link
Daphne Vlastari, LINK Advocacy Manager

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

MENU

"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 though 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.

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

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:

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.

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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.