



Wildlife and
Countryside



Environment Links UK response to the Great Repeal Bill White Paper

June 2017

Environment Links UK brings together environment and animal protection organisations to advocate for the conservation and protection of wildlife, countryside and the marine environment. The network comprises the combined memberships of Wildlife and Countryside Link, Scottish Environment LINK, Wales Environment Link and Northern Ireland Environment Link. Taken together, Environment Links UK members have the support of over eight million people in the UK and manage over 750,000 hectares of land.

This response is submitted on behalf of Environment Links UK, along with 24 of our member organisations listed below. It sets out our collective view on the 2015 UK Government's White Paper, 'Legislating for the United Kingdom's withdrawal from the European Union' and implications for the proposed Repeal Bill, in relation to issues relevant to the protection of the UK environment (including wildlife) and animal welfare.

- Northern Ireland Environment Link
- Scottish Environment Link
- Wales Environment Link
- Wildlife and Countryside Link

- Bat Conservation Trust
- Born Free Foundation
- British Ecological Society
- Buglife
- Butterfly Conservation
- Campaign for National Parks
- ClientEarth
- Environmental Investigation Agency
- Friends of the Earth
- Institute of Fisheries Management
- Open Spaces Society
- Freshwater Habitats Trust
- Marine Conservation Society
- National Trust
- Plantlife
- RSPB
- RSPCA
- Salmon & Trout Conservation UK
- Whale and Dolphin Conservation
- Wildfowl and Wetlands Trust
- Wildlife Gardening Forum
- Woodland Trust
- WWF-UK
- ZSL

It is our view that to ensure the Government can demonstrate equivalence with EU legislation, to meet the UK Government's aspiration to be a world leader in environmental protection and animal welfare, and leave the environment in a better condition than we inherited it, the Great Repeal Bill must:

1. Bring over the whole body of EU environmental law and related laws required to be coherent with environmental law; including the relevant parts of the Common Agricultural Policy, Common Fisheries Policy and energy policy, in line with a principle of non-regression¹.

This means:

- effectively converting all existing EU environmental law (including preambles, principles and jurisprudence) into domestic law;
- ensuring that domestic laws made through secondary legislation to implement EU obligations are saved.

2. Allow no opportunity for gaps in domestic environmental protections to open up without full parliamentary scrutiny.

This means:

- confining any delegated powers to the purpose of faithful conversion and putting time limits and appropriate parliamentary scrutiny on such powers, ensuring any non-technical changes (ie. changes beyond those necessary for the legislation to continue to operate, post-Brexit) are made by primary legislation only, and giving a full and proper role to the relevant legislatures in each of the four nations;
- once faithfully converted into domestic law, the entirety of the UK's EU derived environment laws should be granted a status equivalent to statute (primary legislation), that can be amended or repealed only by an Act of Parliament in the relevant legislature.

3. Make sure the law is properly implemented and enforced.

This means:

- introducing new domestic governance arrangements to ensure equivalent provision of the regulatory, monitoring, oversight, accountability, enforcement and other functions currently provided by EU institutions.

The 2017 UK Government's White Paper, *'Legislating for the United Kingdom's withdrawal from the European Union'* brought some clarity as to how the Government planned to bring over the entirety of the 'acquis' into UK law at the moment the European Communities Act 1972 is repealed, through the Repeal Bill. This Bill is of huge significance to our environmental and animal welfare protections - a significant proportion of our environmental legislation has its roots in EU law. Whilst we welcome some of the certainty that the White Paper brought, it also raised a number of questions and concerns, particularly with regards to the points made above:

1) Securing EU environmental and animal welfare acquis

We welcome the commitment within the White Paper that the proposed Bill will *"ensure that the whole body of existing EU environmental law continues to have effect in UK law"*. It is of particular importance that **all** environmental legislation is converted from EU to domestic law due to the interconnected nature of many of these laws. However, the White Paper is, more broadly,

¹ The non-regression principle means that governments will not backtrack once an environmental protection has been established in law.

inconsistent, stating elsewhere that it will convert EU law into domestic law “*wherever practical and appropriate*”. It is unclear whether this applies to environmental legislation. This, combined with the Environment Secretary’s evidence to the Environmental Audit Committee (October 2016) where she stated that roughly a third of environmental law requires more than just simple technical changes to be brought over², means clarity is urgently needed. The status of animal welfare legislation is also unclear. Whilst we recognise the enormity of the task to separate the existing reliance of UK legislation on EU legislation and its institutions, we are deeply concerned that these phrases may be used to justify significant changes to, or the loss of existing requirements and procedures. In our view, there must be no regression in environmental and animal welfare laws.

The White Paper also makes no reference to the status of important environmental principles found within the EU Treaties including the polluter pays, precautionary and integration principles, making their status unclear. Likewise, the White Paper makes no reference to the status of the preambles to EU legislation. These preambles contain vital context and information on the application of regulations and directives and alongside the aforementioned legal principles, set out aims, objectives and requirements for that EU law. It is our view that the Repeal Bill must convert the relevant Treaty principles, and provide for the conversion of all preambles to ensure that the UK Government is able to demonstrate equivalence and that UK legislation is fit for purpose.

In many cases, the UK has relied entirely on its membership of the EU and its legislation to ratify, transpose and implement international commitments. Whilst there is a consideration in the White Paper regarding international commitments³, it gives no specific reassurances that the Government will ensure that important international environmental and related commitments will not be weakened either during the process of domesticating EU derived law, or in subsequent changes after we exit the EU. We seek such reassurance.

It is our view that the Repeal Bill must bring over the whole body of EU animal welfare, environmental and related laws required to be coherent with these laws; including the relevant parts of the Common Agricultural Policy, Common Fisheries Policy, climate and energy policy, in line with a principle of non-regression. This must include effectively converting all existing EU environmental and animal welfare law (including preambles, principles and jurisprudence) into domestic law and ensuring that domestic laws made through secondary legislation to implement EU obligations are saved.

2) Preventing gaps in environmental and animal welfare legislation

a. The use of delegated powers and appropriate parliamentary scrutiny

The Repeal Bill will give ministers significant powers to amend EU-derived law through delegated legislation. However, it is crucial that these powers are strictly limited; confined only for the purpose of faithful conversion and time limited to lapse at the point the UK leaves the EU. At present, the White Paper offers no such assurances, only stating that the Government will ensure that the power is appropriately time limited to enact the required changes, without providing any additional details as to when this might be.

² <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/the-future-of-the-natural-environment-after-the-eureferendum/oral/42022.html>

³ para 2.13 “We will, of course, continue to honour our international commitments and follow international law”

Any non-technical changes⁴ to these laws, either before or after our exit from the EU, should be made only by primary legislation, allowing for Westminster Parliament and the devolved legislatures to take a full and proper role in scrutiny.

As for the technical amendments, a single scrutiny procedure may not be enough to provide both the speed and the oversight necessary to prepare the UK and devolved countries' statute books. A range of scrutiny procedures may be needed, with an appropriate sifting mechanism in place to determine the appropriate procedure, on a case-by-case basis. For some extremely straightforward corrections, the existing negative procedure for statutory instruments may suit. However, for other more nuanced or contentious corrections, a strengthened scrutiny procedure will be required. A strengthened scrutiny procedure must be outlined in the Repeal Bill and it must ensure, at least, the following:

- a requirement to carry out a public consultation on any new proposals and changes, including draft changes to the relevant legislation themselves;
- a requirement to lay supporting documents before the appropriate parliament, including an explanation of the existing function of the law and the reason why corrections are necessary;
- power for a relevant committee to block or amend any proposals before they are laid before the appropriate parliament; and
- power to call for further debate and approval by the appropriate legislature.

It is worth considering the special arrangements put in place following the weight of opposition against the 2010 Public Bodies Bill's proposed powers to abolish, combine or amend public bodies including through use of Henry VIII powers to deal with any primary legislation establishing those public bodies. Special measures were proposed to prevent any abuse of the powers suggested in the Bill including safeguards to preserve the independence of public bodies from ministerial interference, a statutory consultation requirement before changes could be made and following that public consultation a revised procedure for enhanced parliamentary scrutiny introduced. We would suggest that such measures may be required in relation to the Repeal Bill.

In addition, we are concerned by the suggestion within the White Paper that delegated powers will include provision to implement the contents of the withdrawal agreement reached with the EU, giving flexibility to respond to all eventualities of the Article 50 negotiation process. Changes made to reflect the contents of any withdrawal agreement will set the future UK legislative framework and as such they should be subject to full parliamentary scrutiny. Our concerns would be minimal if this flexibility was limited to introducing new measures, arrangements or procedures and if measures were put in place to restrict the use of any powers granted, meaning they could not be used to change existing EU derived legislation (as recognised by the Constitution Committee's 9th Report)⁵.

It is vital that the Repeal Bill is not used as a precedent for the use of delegated powers in the future and that safeguards are put in place to limit government's use of these potentially extensive delegated powers. We would oppose an unlimited extension of the use of delegated powers to implement the contents of the withdrawal agreement with respect to environmental and animal welfare laws.

We have some serious concerns with the example ('Case Study 2') given in the White Paper of technical changes to legislation in order to make it fit for purpose domestically as this example

⁴ 'Non-technical changes' are changes other than those necessary in order for the legislation to continue to operate, following the removal of EU institutions

⁵ The 'Great Repeal Bill' and delegated powers', Lords Select Committee on the Constitution, 9th Report of Session 2016-17, 7 March 2017, pg 16 <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/123.pdf>

includes changes that we would not consider to be simply technical in nature. The case study refers to the requirement within the Offshore Petroleum Activities (Conservation of Habitats Regulations) 2001 to obtain an opinion from the European Commission on particular projects relating to offshore oil and gas activities. This case study suggests that the law will allow the Government to amend domestic legislation to either replace reference to the Commission with a UK body or remove the requirement to gain an opinion altogether. The need to gain this independent opinion allows for proper scrutiny of decisions that permit deviation from vital legal protections and is an important part of the consenting process. Whilst we recognise that there may be a need to make changes (for example to reallocate the role of the Commission to a different independent institution), it is vital that the provisions for scrutiny remain. We do not consider the removal of the need to seek an opinion as merely a technical change to allow conversion of EU law to domestic law.

b. The current and proposed status of EU derived law

The White Paper does not make clear what the status of the UK's environmental and animal welfare laws will be following our exit from the European Union. Many EU directives have been transposed into domestic law solely by way of secondary legislation (for example; the Environmental Impact Assessment and Ground Water Directives (see House of Commons research paper⁶)). The proposed status of EU Regulations once converted into domestic law is also uncertain.

Without a guarantee that, once converted, they will be given equivalent status to primary legislation, major laws governing the environment and animal welfare in the UK (either in totality or in one or more of the devolved countries) could be amended or repealed without the higher standard of scrutiny afforded to primary legislation. Unlike the present situation where much EU-derived environmental legislation is dealt with in secondary legislation, in future, Ministers' actions will not be constrained by their obligation to give effect to EU law. Therefore the vulnerability of these laws to sudden unscrutinised change is much greater. The Repeal Bill should not put the country in a position where we could be left with substantially weakened environmental protections and animal welfare standards.

Therefore, to maintain equivalence with current levels of protection, the Repeal Bill must state that statutory instruments created to convert EU law under the Repeal Bill, and existing statutory instruments given continuing legal force by the Repeal Bill, can only be amended or repealed by primary legislation. This would ensure that our environmental protections remain strong after the UK leaves the EU.

We recognise that, following the UK's exit from the EU, the UK Government and/or devolved governments will no doubt wish to make legislative changes, in areas which were formerly within EU competence. However, it is vital that any amendments to existing laws are undertaken with full parliamentary scrutiny. We would be concerned should a government seek to amend this legislation using delegated powers which were granted for the purpose of converting the body of EU law into UK law. We would be similarly concerned if the Repeal Bill sought to secure delegated powers for governments for the broader purpose of altering legislative provisions post-Brexit. EU law should initially be faithfully converted into domestic law with as few changes as possible. If the UK or devolved Governments subsequently wish to make changes of a substantive nature then those changes should be brought forward as primary legislation and be subject to the usual degree of parliamentary scrutiny.

With that in mind, we welcome the Constitution Committee's recommendations to ensure that any amendments to make legislation "*practical*" & "*possible*" in a purely domestic context through the

⁶ <http://researchbriefings.files.parliament.uk/documents/CBP-7943/CBP-7943.pdf>

normal use of Ministerial powers is restricted both now and after Brexit. If this legislation is to remain secondary, additional parliamentary scrutiny arrangements are required (as set out above) for subsequent amendments along with a statutory requirement for public consultation.

It is our view that the Repeal Bill should allow no opportunity for gaps in domestic environmental and animal welfare protections to open up without full parliamentary scrutiny. This means confining any delegated powers to the purpose of faithful conversion by putting time limits and appropriate parliamentary scrutiny on such powers, ensuring any non-technical changes (i.e. changes other than those necessary for the legislation to continue to operate, post Brexit) are made by primary legislation only, and giving a full and proper role to the relevant legislatures in each of the four nations; once faithfully converted into domestic law, the entirety of the UK's EU-derived environment and animal welfare laws should be granted a status equivalent to statute (primary legislation), that can be amended or repealed only by an Act of Parliament in the relevant legislature.

3) Securing appropriate governance arrangements

The White Paper makes no reference to the replacement domestic governance arrangements that will need to be put in place once we exit the EU. European institutions including the European Commission and the Court of Justice of the European Union (CJEU) carry out an important watchdog function, helping to ensure compliance of all Member States with the EU's environmental standards and requirements. Whilst the White Paper makes clear that the repeal of the European Communities Act 1972 will end the jurisdiction of the CJEU, it does not make clear what domestic governance arrangements will be put in place to replace this or indeed any of the vital roles that EU institutions provide to secure the effective implementation of environmental and animal welfare legislation.

The failure to recognise the need to replace these mechanisms is a cause for great concern exacerbated by the Government response in April this year to the House of Lords EU Energy and Environment sub-committee in which it was suggested that Judicial Review will form an adequate substitute for current EU Commission Complaints and Infraction proceedings, alongside the role of Parliament. We do not believe this to be the case and stress the need for governance mechanisms that will ensure that environmental and animal welfare standards are upheld, especially due to current costs and remits of Judicial Reviews and statutory challenges.

Although not specifically mentioned, we assume that some of the existing EU Commission functions will be passed to government departments, Secretaries of State, Ministers and government agencies. We have significant concerns about both the capacity and suitability of existing UK agencies to take on such roles. The absence of suitable replacement domestic governance arrangements, including independent and sufficiently resourced environmental regulators, will result in a de facto erosion of environmental protections, following our exit from the EU. As a result, proposals should be put forward on how this governance gap will be addressed. These should include the opportunity for Parliament and/or the devolved legislatures to approve or reject ministerial proposals for substituting current EU institutions, bodies and agencies with domestic institutions during the conversion process.

Confirmation within the White Paper that historic jurisprudence of the CJEU will have the same status in our courts as that of the Supreme Court (until and unless altered by the Supreme Court) is welcome. However, the Government needs to confirm whether or not relevant UK courts will be obliged to take account of future CJEU case law in relation to the environment.

In our view, this obligation would ensure minimal divergence and maintain legal clarity and certainty.

Therefore, the Repeal Bill must ensure the law is properly implemented and enforced. This means introducing new domestic governance arrangements to ensure equivalent provision of the regulatory, monitoring, oversight, accountability, enforcement, effective remedies and other functions currently provided by EU institutions.

4) Interaction with devolution settlements

Environmental matters are largely devolved. To date, the common framework provided by EU environmental law, which accounts for much of the law on such matters in the UK, has limited the scope for substantial divergences to arise and has arguably allowed “*a more permissive and asymmetrical devolution settlement*”⁷ to emerge than might otherwise have been possible.

The White Paper does not make clear to what extent the Repeal Bill will affect the current devolution settlements because it contains confusing statements on the matter. It states that the UK Government “intends to replicate the current frameworks provided by EU rules through UK legislation” whilst giving no further details on what these frameworks may need to cover, in addition to existing arrangements. Confusingly, the same paragraph states the need to consider whether all frameworks are necessary and the subsequent paragraph states that it “*is the expectation of the Government that the outcome of this process will be a significant increase in the decision-making power of each devolved administration*” .

There are a number of clear justifications for seeking at least some degree of post-Brexit alignment on environmental matters between the four nations. Environmental issues do not respect borders and assuming that environmental matters will remain devolved post-Brexit, it will be important for the UK Government and the devolved administrations to work collaboratively to maintain high standards of environmental protection and effectively address cross-border environmental issues, in line with the UK’s international obligations. In recognising the potential environmental benefits of the UK Government and devolved administrations seeking to reach a consensus on the joint development and agreement of common UK ‘frameworks’ (i.e. common standards and approaches), in at least some policy areas, in order to replace the loss of the common ‘frameworks’ provided by EU law (and associated governance arrangements-see above), we also recognise that new, more effective mechanisms for intergovernmental coordination and cooperation will need to be established.

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For further information:

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⁷ The UK in a Changing Europe. (2016). [Brexit and Beyond: How the United Kingdom Might Leave the European Union](#) A report by the UK in a Changing Europe for the Political Studies Association of the UK.