

September 2017

Report

The Withdrawal Bill: Destination and Journey

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Executive Summary

On Thursday 13th of July 2017, a draft of The European Union (Withdrawal) Bill (Withdrawal Bill) was laid before the House of Commons. This Bill will perform and direct much of the work needed to prepare the UK's statute book as it leaves the EU. This report sets out some of the key issues faced, and raised, for the environment by the Bill and identifies some of the problems with the current approach.

This report demonstrates that the health and integrity both of the environment and of the UK's legal system is jeopardised by the Withdrawal Bill as it currently stands. Three overarching problems exist with the current approach. It risks producing a democratic deficit, it risks a reduction in the current standard of environmental protection, and it risks creating a gap in environmental governance. These findings are outlined below together with our recommendations to fix the Withdrawal Bill and ensure the environment is protected during Brexit.

Democratic Deficit

The Bill transfers too much power from MPs and Peers to Government Ministers and the civil service. It also endangers the important roles that the public and civil society play in defending our environment and speaking up for nature. As such, the Bill risks opening up the UK Government to criticisms often levelled at the European Commission: that it is unaccountable, with important decisions made behind closed doors.

Good laws involve the public, both directly and through their elected representatives. This involvement should take place firstly in the design of laws and then in their oversight. The democratic deficit created by the Withdrawal Bill in its current form relocates aspects of both these processes away from the public (including via their MPs) to the confined corridors of Government.

The Bill bestows extraordinarily broad, vague and general powers on Government Ministers to amend EU-derived law both during and after the process of the UK leaving the EU. To compound matters, the scrutiny and consultation for Parliament over the use of these powers is inadequate. Furthermore, the Withdrawal Bill restricts opportunities for public participation in environmental decision-making currently provided by the EU.

Reduction in Standard of Environmental Protection

The Bill fails to guarantee that the UK will remain on course for improving and enhancing the health of people and nature. Not only does the Bill fail to meet its stated aim of retaining all EU environmental law, but it also fails to envisage how the future trajectory of UK environmental law and standard-setting will be formed.

Around 80% of UK environmental law originates from the EU and the UK is currently reliant on EU processes and institutions to establish and maintain high environmental standards in law and

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policy. The loss of these processes and institutions means that the retention and future establishment of these standards is under threat, and so too the health of people and of nature.

The failure to retain EU environmental law in the Withdrawal Bill arises in a number of places. In particular, the Bill fails to explicitly retain overarching principles (such as the precautionary principle) that shape and direct environmental law and policy, assist in the interpretation of environmental law, and which are currently part of EU law. Nor does it fully convert EU Directives, losing recitals and provisions including important environmental safeguards and obligations - including crucial reporting and reviewing obligations - that are currently incorrectly or incompletely transposed in UK domestic law. These will be lost after the UK leaves the EU and the parent Directives no longer apply: the Withdrawal Bill does not guarantee that the whole body of EU environmental law will be retained. In addition, the Bill does not adequately prevent Ministerial modification (either during or after the withdrawal process) of hard-won environmental laws, risking a reduction in future environmental standards.

Governance Gap

The Bill does not adequately set out a pathway for replacing the governance functions currently undertaken by EU institutions. The UK currently relies on EU institutions to oversee much of the proper implementation, compliance and enforcement of environmental law. Laws are not just pieces of paper: they come alive in courts, are upheld by regulators, and are rejuvenated by specialist agencies. Without these functions, environmental law risks fading into obsolescence.

Governance functions are essential to protecting the environment and giving nature and civil society a voice in the formation and execution of law and policy. However, the current approach in the Withdrawal Bill risks creating a system with limited accountability. Environmental law needs robust and independent means of policing government and business to ensure that they comply with their obligations.

The Withdrawal Bill contains no commitments to properly replace existing EU functions with mechanisms that have adequate resources, full independence, relevant expertise and sufficient legal powers. Not only can crucial governance functions exercised by EU institutions simply be abolished by powers in the Bill, but if they are to be replaced then Government Ministers have too much control over their relocation. This risks leading to a situation whereby Ministers are allowed to mark their own homework.

Recommendations

To move towards fixing some of the problems currently found in the Withdrawal Bill, the Government and Parliament, as appropriate, should consider the following recommendations.

Recommendation 1: The Government should acknowledge the special status of existing secondary legislation that implements EU law. The special status of this law is felt particularly strongly within environmental law since around 80% of environmental law derives from the EU.

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Recommendation 2: The Government should meet its stated aim of retaining the *whole body of existing EU environmental law*. To do this, the Withdrawal Bill must also retain, inter alia, environmental principles, incompletely transposed elements of EU Directives, and governance functions currently exercised by EU institutions.

Recommendation 3: The Withdrawal Bill should include a clause specifying that retained EU law can only be modified by an Act of Parliament once the UK has left the EU. Exceptions to this rule for technical standards and other non-essential elements of the legislation should be permissible. However, both the granting of such exceptions and the exercise of them should be subject to a high level of Parliamentary scrutiny. Paragraphs 3(1) and 5(1) of Schedule 8 Part 1 should be removed, with the scope of future delegated powers to be determined by the relevant parent Act.

Recommendation 4: The Withdrawal Bill should place an obligation to remedy incomplete and incorrect transposition of EU law before exit day. This should include an obligation to incorporate into UK law those functions and powers that are currently only located in parent EU Directives. The Bill should also contain obligations and appropriate powers to remedy incorrect and incomplete transpositions that are discovered post-Brexit.

Recommendation 5: The Withdrawal Bill must ensure that no environmental governance functions, including those currently exercised by EU institutions, are lost as a result of the UK leaving the EU. In particular, clause 7(5) must not allow for these functions to be abolished.

Recommendation 6: The Government should consult on the appropriate institutional replacement for those functions currently exercised by EU institutions. Statutory instruments transferring powers of EU bodies should undergo the most rigorous scrutiny process possible and should provide only for temporary interim measures, subject to the future creation of new mechanisms.

Recommendation 7: The Withdrawal Bill should include an obligation to consult on and bring forward proposals for the establishment of new governance mechanisms once the UK has left the EU. These new mechanisms should be established through primary legislation and must have adequate resources, full independence, relevant expertise and sufficient legal powers.

Recommendation 8: The Withdrawal Bill should explicitly retain environmental principles in UK law. Paragraph 3 of Schedule 1 should be removed as it does not represent a retention of EU law. The continued role of environmental principles should be, inter alia, to assist in the interpretation of environmental law and to set the direction of future environmental law and policy.

Recommendation 9: The existing devolution settlements and the Sewel Convention should be respected and complied with by both the Withdrawal Bill and any other Brexit-related legislation.

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Recommendation 10: Joint frameworks should be collectively developed by the four UK governments. These must properly appreciate the transboundary nature of the natural world and environmental problems, and facilitate compliance with the UK's international legal obligations.

Recommendation 11: The Withdrawal Bill should place more stringent restrictions on the use of Ministerial powers created or modified by the Bill. In particular, it should specify that any power created or modified by the Bill can only be used either (i) to ensure that retained EU law continues to operate with equivalent scope, purpose and effect, or (ii) to implement any rights or obligations of the UK that arise from a Withdrawal Agreement with the EU. The notion of 'deficiencies' should be more precisely defined and less open to Ministerial opinion, including by the specification of examples of situations that are not deficiencies.

Recommendation 12: Powers under the Withdrawal Bill should be restricted from being used in such a way that their effect is to lower the standard or restrict the scope of any protection contained within environmental legislation. A provision to this effect should be placed on the face of the Bill in clause 7(6).

Recommendation 13: The Government should immediately publish examples of Statutory Instruments that will be enabled by the powers contained in the Withdrawal Bill. In addition, guidelines for governmental departments on how to correct the deficiencies in retained EU law should be made public.

Recommendation 14: Statutory instruments made under the Withdrawal Bill should be subjected to a new 'sift and scrutinise' model of Parliamentary scrutiny. A new Parliamentary Committee should be established to perform this task along with subject specific sub-Committees. This Committee should inter alia have powers to recommend amendments to and the blocking of statutory instruments made under the Withdrawal Bill.

Recommendation 15: The four governments of the UK should co-operate and collaborate constructively and sincerely throughout the process of leaving the EU, working under the principle of parity of esteem. Co-operation should take place on both the internal task of preparing the UK's legislative frameworks and the external task of negotiating a withdrawal agreement with the EU.

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1 Introduction

The report begins by detailing some categories of both EU and UK law in order to explain the current legal landscape and proposed changes to be made under the Withdrawal Bill. It then identifies the destination the Withdrawal Bill will take us to, and what implications this has for environmental law in the UK. Finally, it gauges the suitability of the journey the Withdrawal Bill will travel down, and the democratic issues raised by the current approach.

A significant proportion of UK environmental law derives from the UK's membership of the EU. As a result, UK environmental law is deeply entwined with EU legal instruments and institutions. Leaving the EU presents the UK with the complex task of constructing a standalone legal framework which is functional from a legal point of view and effective from an environmental one. The first step on this journey will be taken by the European Union (Withdrawal) Bill (Withdrawal Bill) which will repeal the 1972 European Communities Act (ECA) whilst ensuring that "wherever possible, the same rules and law apply on the day after we leave the EU as before".¹

The Withdrawal Bill must be both adequately equipped to retain EU law and appropriately constrained from empowering substantive changes to the law in a manner that circumvents proper Parliamentary processes for law-making. However, the publication of the first draft of the Bill revealed a number of glaring weaknesses in its substance and approach. Three dangers materialise from these weaknesses: a reduction in standards of environmental protections, the emergence of a democratic deficit, and a loss of governance functions essential to environmental law. This report identifies and dissects these weaknesses by considering first the destination the Withdrawal Bill takes us to, and then the journey by which it travels.

In order to ground this analysis, it is first necessary to make some preliminary remarks regarding the nature of laws arising from both EU and UK institutions.

1.1 EU law

There are three main forms of EU legal instrument that the Withdrawal Bill should retain within domestic law. These are:

- EU Treaty law. The overarching provisions found in the EU Treaties inform future policy and legal developments. The treaties include a number of important environmental principles, such as the precautionary principle.²
- EU Regulations and Decisions.³ These EU laws are directly effective, which means that they apply directly in Member States (including the UK) without the need for Member States to introduce their own domestic legislation.

¹ Department for Exiting the European Union White Paper, 'Legislating for the United Kingdom's withdrawal from the European Union' (Cm 9446, March 2017) 14.

² Treaty on the Functioning of the European Union (TFEU) Article 191(2).

³ References to 'EU Regulations' elsewhere in this Report should be taken as also referring to EU Decisions.

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- EU Directives. These EU laws are not directly effective. Instead, they require Member States (including the UK) to introduce their own domestic legislation to give effect to them. Consequently, there are already a considerable number of pieces of UK legislation that implement (they 'transpose') EU law.

1.2 UK law

In the UK there are two main kinds of legislation.

- Primary Legislation is law made by Parliament (Acts of Parliament). These laws are enacted through a full Parliamentary process, requiring debate in - and the assent of - both the House of Lords and the House of Commons to become law. Both Houses have the ability to make amendments to the law during their passage through Parliament. Once enacted, primary legislation can normally⁴ only be amended or repealed through a subsequent Act of Parliament.
- Secondary Legislation on the other hand is law made by Government. Some Acts of Parliament give Government Ministers the power to create laws subject to certain constraints. Most, but not all, of these laws are called 'Statutory Instruments'.⁵ Secondary Legislation⁶ is drawn up and introduced by the relevant Government Minister. These laws do not necessarily require a vote in Parliament to become law,⁷ and the Houses are not able to make amendments to them before they become law. Many EU laws have been transposed through Statutory Instruments (SIs) under the ECA (there are at least 7,900 such SIs⁸). SIs can be amended or revoked by Government Ministers without necessarily requiring a vote in Parliament.

⁴ Subject to Henry VIII clauses - see <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/> (accessed 11/5/2017).

⁵ Malcolm Jack (ed), *Erskine May's Treatise on the law, privileges, proceedings and usage of Parliament* (24th edn, LexisNexis 2011) 669.

⁶ Also known as 'delegated legislation' or 'subordinate legislation'.

⁷ See *infra* §3.2.

⁸ See House of Commons Library, 'Legislating for Brexit: Statutory Instruments implementing EU law' (Briefing Paper Number 7867, 16 January 2017) 6.

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1.3 Comparison

There are important differences between primary and secondary legislation in the UK.

Primary	Product of Parliamentary debate and approval	Can only be amended/repealed by Parliament	Takes precedence over secondary legislation.
Secondary	Product of Governmental departments	Can be amended/revoked by Government Ministers	Can be overturned by a court if its creation or its provisions are considered illegal.

Secondary legislation is normally used to elaborate technical details of a law or to allow for standards to be updated easily (for example in the light of new scientific evidence). It is not normally appropriate to use secondary legislation for important policy matters.⁹

However, it has to date been acceptable to use secondary legislation to implement important EU laws in the UK because such laws have already gone through democratic debate, scrutiny and approval within the European Parliament and Council of Ministers. Furthermore, UK Ministerial powers with regards EU law are constrained: these powers can only be used to give effect to EU law in the UK.

In the words of the House of Lords Constitution Committee:

[W]hile EU law embodied in secondary legislation made under section 2(2) of the ECA will technically be secondary legislation, that is a consequence of the fact that it simply implemented law agreed at an EU level - it does not mean that the law it encompasses is not important enough to be worthy of primary legislative status.¹⁰

⁹ See Malcom Jack, *Erskine May* (n 5) 667ff; Ruth Fox and Joel Blackwell, 'The Devil is in the Detail: Parliament and Delegated Legislation' (Hansard Society 2014), especially 23-24, 28-33

¹⁰ House of Lords Constitution Committee, 'The 'Great Repeal Bill' and delegated powers' (9th Report of Session 2016-17, HL Paper 123, 7 March 2017) [58].

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And of the Delegated Powers and Regulatory Reform Committee:

The main reason why, since 1973, secondary legislation has been used to give effect to most EU law is not because the law is unsuitable for being dealt with in a bill. It is much more to do with the fact that Parliament would have been overwhelmed with the sheer volume of primary legislation that would have been necessary had it been the principal vehicle of transposition.¹¹

Statutory Instruments created to transpose EU Directives and implement other EU legal requirements are thus a special kind of secondary legislation. Their treatment therefore requires extra care and consideration.

Recommendation 1: The Government should acknowledge the special status of existing secondary legislation that implements EU law. The special status of this law is felt particularly strongly within environmental law since around 80% of environmental law derives from the EU.

¹¹ House of Lords Delegated Powers and Regulatory Reform Committee, 'Special Report: Second Submission to the House of Commons Procedure Committee on the delegated powers in the "Great Repeal Bill"' (30th Report of Session 2016-17, HL Paper 164, 27 April 2017) [11].

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2 The Destination - where the Withdrawal Bill takes us

2.1 The stated goal of the Withdrawal Bill

Prior to the publication of the Withdrawal Bill, the Government stated in its White Paper that the goal of the Bill would be to ensure that "as a general rule, the same rules and law will apply after we leave the EU as they did before".¹² More specifically, the White Paper states that the Withdrawal Bill "will ensure that the whole body of existing EU environmental law continues to have effect in UK law".¹³

The published draft Bill retains EU-derived law in three ways corresponding to the three forms of EU law identified above. Clause 2 contains a saving for domestic legislation transposing EU Directives.¹⁴ This clause retains, inter alia, all secondary legislation transposing EU Directives enabled by the ECA. Clause 3 provides for the incorporation into domestic law of direct EU legislation (ie EU Regulations etc.). Clause 4 retains the rights arising under the *directly effective provisions* of the EU Treaties.¹⁵ The Withdrawal Bill thus creates two new categories of domestic legislation. As defined in the Bill, these are:

"retained EU law" [which] means anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time);¹⁶ and

"retained direct EU legislation" [which] means any direct EU legislation which forms part of domestic law by virtue of section 3 (as modified by or under this Act or by other domestic law from time to time, and including any instruments made under it on or after exit day).¹⁷

The latter category of 'retained direct EU legislation' is a subset of the former category of 'retained EU law', and can in some ways be considered a new form of UK law. Note that the Withdrawal Act also amends the 1978 Interpretation Act to ensure that the provisions of the 1978 Act also apply to 'retained direct EU legislation'.¹⁸ However, the exact status of this new

¹² White Paper Cm 9446 (n 1) [1.12].

¹³ *ibid* 'Example 2' p17.

¹⁴ There are also some SIs that give effect to requirements of EU Regulations: these are also retained by clause 2.

¹⁵ Some other aspects of the EU Treaties, such as their interpretive function, are retained elsewhere in the Bill.

¹⁶ Withdrawal Bill s6(7).

¹⁷ *ibid* s14(1).

¹⁸ *ibid* Schedule 8, Part II, para 9.

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category of 'retained direct EU legislation' is not entirely clear, nor the future status of 'retained EU law' in general. For example, it is unclear whether 'retained direct EU legislation' always qualifies as an enactment.

Broadly speaking, the draft Withdrawal Bill does carry over the text of EU Regulations and retains existing SIs empowered by the ECA, but this does not mean that retained EU law will continue to have effect "as it has effect in domestic law immediately prior to exit day"¹⁹ or "so far as operative immediately before exit day".²⁰ As will be seen throughout this report, there are a number of issues that must be tackled to ensure that there is not a reduction in environmental standards or a loss of important governance functions.

The direction of the Withdrawal Bill thus needs to be altered to ensure that it does reach its stated destination where all retained EU law continues to apply. It is worth noting too that this destination is not a final one: UK environmental law will need to be continually adjusted and improved as we seek to further improve and enhance the conditions for life on this planet.

Recommendation 2: The Government should meet its stated aim of retaining the *whole body* of existing EU environmental law. To do this, the Withdrawal Bill must also retain, inter alia, environmental principles, incompletely transposed elements of EU Directives, and governance functions currently exercised by EU institutions.

2.2 Status of environmental laws

As identified above, a considerable amount of EU-derived environmental law in the UK takes the form of SIs enabled by powers contained in the European Communities Act (ECA). Whilst the UK has been a member of the EU, this has been an appropriate arrangement, since Ministerial powers under the ECA to make and amend laws have been appropriately constrained. Government Ministers can only use the powers provided by the ECA to implement EU laws (which have already undergone a democratic process within the EU). As such, these SIs are **not** examples of important aspects of policy being designed and legislated for by Ministers without the proper involvement of Parliament.

However, the Withdrawal Bill is not clear on what the process and rules will be for modifying 'retained EU law' (in particular those SIs originally adopted under the ECA) once the UK has left the EU. It would be unacceptable if Government Ministers were able to do this **without properly consulting Parliament** as it would give Ministers extensive discretion to alter, amend, remove and meddle with our essential environmental safeguards without proper public scrutiny, and would amount to a significant loss of Parliamentary sovereignty. As the Bar Council points out:

¹⁹ *ibid* s2(1).

²⁰ *ibid* s3(1).

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*It would be a matter of great constitutional concern if the [Withdrawal Bill] were to contemplate the possibility that repeal, or other significant change to the substantive content, of law currently deriving from EU Directives could be effected by a process similar to the making of ECA s2(2) instruments. Such a process would bring about **a significant democratic deficit** which would undermine the legitimacy of resulting legislation. It is one thing to use a secondary instrument to implement legislation that has been the subject of an extensive legislative process at European level. It is another thing entirely to use that process to implement policy which **simply emerges from ministerial decision-making within the confines of Whitehall departments or Cabinet committees.**²¹*

The Withdrawal Bill is not entirely clear on this matter.²² With regards to 'retained direct EU legislation', Schedule 8 Part 1 paragraph 3(1) provides that:

Any power to make, confirm or approve subordinate legislation which was conferred before exit day is to be read, on or after exit day and so far as the context permits or requires, as being capable of being exercised to modify (or, as the case may be, result in the modification of) any retained direct EU legislation.

And Schedule 8 Part 1 paragraph 5(1) reads:

Any power to make, confirm or approve subordinate legislation which is conferred on or after exit day may, so far as applicable and unless the contrary intention appears, be exercised so as to modify (or, as the case may be, result in the modification of) any retained direct EU legislation.

The Withdrawal Bill thus significantly expands the scope of both existing ministerial powers (under paragraph 3) and new ministerial powers (under paragraph 5) so that they may be used to modify 'retained direct EU legislation'. This means that some retained EU environmental legislation can be modified by Government Ministers without properly consulting Parliament. This goes against the Government's statement in its White Paper that "Parliament (and, where appropriate, the devolved legislatures) will be able to decide which elements of [EU-derived UK law] to keep, amend or repeal".²³ This significant alteration to the fabric of the law-making

²¹ Cited in House of Lords Constitution Committee Report (n 10) [57], emphasis added.

²² Note that this is a distinct issue from the process of 'correcting' the statute books as detailed in clauses 7-9 of the Bill and in §3.1 of this report. I am grateful to Swee Leng Harris of The Legal Education Foundation for valuable insight on this issue.

²³ White Paper Cm 9446 [1.12]. On devolution issues, see §2.6 and §3.3 below.

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process in the UK merits criticism since it increases the democratic deficit within UK law-making and risks a reduction in standards of environmental law.

The process for amending 'retained EU law' other than 'retained direct EU legislation' is less clear. At the general level, section 14 of the Interpretation Act contains an 'implied power to amend'. This sets out that when an Act confers powers to make SIs, powers to amend and revoke said SIs are also implied to exist.

However, clause 2 of the draft Withdrawal Bill does not provide powers to create 'retained EU law', but rather saves such laws from lapse. While most Acts of Parliament that save SIs include a modifying power to modify those SIs, the Withdrawal Bill does not. The process for modifying 'retained EU law' post-Brexit is not clear from the main body of the Bill.

Schedule 7 Part 3 paragraph 15 does specify that Government Ministers will have powers to modify 'retained EU law' post-Brexit. However, these powers must be made "in consequence of any other provision made by or under this Act".²⁴ If this is interpreted restrictively, in that such powers can only be exercised if necessary and simply consequentially, then there remains uncertainty as to how 'retained EU law' can be substantively modified post-Brexit aside from the usual Parliamentary processes.

On the other hand, if paragraph 15 is to be interpreted broadly, then the Withdrawal Bill is proposing another significant transfer of power from Parliament to Government that would undermine the UK's sovereign and democratic Parliament. This would be a significant flaw with the Government's approach to leaving the EU, undermining both democracy and potentially environmental standards.

Rather than its current vague approach that potentially endangers the health of both people and nature, the Withdrawal Bill should specifically set out that, once the UK has left the EU, 'retained EU law' can only be amended or revoked by primary legislation of the relevant parliament.²⁵ Laws that have been created through democratic processes must be protected from being amended or revoked on the diktat of a Government Minister. Statutory instruments implementing EU law contain important policy and represent the democratic will of the people: they must be accorded a befitting status.

Recommendation 3: The Withdrawal Bill should include a clause specifying that retained EU law can only be modified by an Act of Parliament once the UK has left the EU. Exceptions to this rule for technical standards and other non-essential elements of the

²⁴ Withdrawal Bill, Schedule 7 Part 3 para 15(1).

²⁵ Whilst allowing for the possibility of creating exceptions to this for particularly technical aspects of legislation, or those which are otherwise suitable for modification by SI. Determining how precisely to divide up retained EU law in this regard will not be easy, see [57]-[67] of the Constitution Committee Report (n 10), and consider also the notion of 'non-essential' elements of legislation contained in Article 290 of the TFEU, in which regard see Dominique Ritleng, 'The Reserved Domain of the Legislature: The Notion of 'Essential Elements of an Area'' in Carl Fredrik Bergström and Dominique Ritleng (eds), *Rulemaking by the European Commission: The New System for Delegation of Powers* (OUP 2016) 133.

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legislation should be permissible. However, both the granting of such exceptions and the exercise of them should be subject to a high level of Parliamentary scrutiny. Paragraphs 3(1) and 5(1) of Schedule 8 Part 1 should be removed, with the scope of future delegated powers to be determined by the relevant parent Act.

2.3 Incomplete and incorrect transposition

Transposition of EU Directives into UK law is sometimes lacking in timeliness, completeness and/or correctness. Consequently, UK laws do not always fully or correctly match the obligations under EU law that they seek to transpose. While this is a pre-existing problem, its impact on environmental standards will be felt more acutely once the UK has left the EU. In addition, new problems of failed transposition will arise because some EU provisions have not, to date, been needed to be transposed into UK law.

It is worth distinguishing between those problems that are pre-existing and those that will come about as a result of the UK leaving the EU. Pre-existing problems are caused by the UK's failure to properly transpose Directives or to meet transposition deadlines. Currently, the European Commission undertakes transposition monitoring to encourage full implementation and can take enforcement measures via the CJEU where necessary. For example, in Case C-530/11, the CJEU found that the UK had failed to correctly transpose Articles 3(7) and 4(4) of the Public Participation Directive 2003/35/EC.²⁶ The UK has also been issued a formal notice for late transposition of Directive 2015/1480/EU on air quality.²⁷ If failures such as these to properly implement existing environmental laws persist post-Brexit, then the UK will see a drop in environmental standards as compared to those currently enjoyed as members of the EU.

It is imperative that the UK remedies any existing instances of incorrect or incomplete transposition before it leaves the EU. This includes, but is not limited to, those issues that have already been highlighted by the European Commission. Where incorrect or incomplete transposition is subsequently discovered (ie post-Brexit discoveries of failure to properly transpose pre-Brexit obligations), the UK should seek to remedy these. The Withdrawal Bill should specifically provide for this by placing an obligation on Ministers to remedy incomplete and incorrect transposition of EU law, and by providing ongoing powers to amend UK law so that it properly transposes those obligations incumbent on the UK immediately prior to its withdrawal from the EU.

New problems of incomplete transposition will also be created as a result of leaving the EU. This is because some obligations contained in Directives do not currently need to be transposed. These include obligations on Member States, such as numerous reporting requirements on all manner of environmental matters from air quality, progress towards favourable status of protected habitats and species, and the reduction of pollution. These do not exist in UK law and would not be saved by the Withdrawal Bill. Moreover, obligations on the European Commission itself, such as those to review and bring forward proposals for future controls and standards would be lost, leaving a gap in policy progress.²⁸ Standard penalty clauses in directives -

²⁶ Infringement reference 2006/4033.

²⁷ Infringement reference 2017/0214.

²⁸ See eg Article 16 of the Water Framework Directive 2000/60/EC OJ L327/1.

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requiring effective, dissuasive and proportionate penalties for breaches of obligations - will be lost, leaving limited recourse to domestic judicial review, and without the backing of fines by the European Court of Justice.

While a member of the EU, and the parent directives are still in place, these can be considered 'correctly incomplete' transposition. However, once outside the EU, the UK will need to ensure that these obligations are not lost in order to avoid a drop in environmental standards and the creation of a governance gap for environmental law. Obligations such as reporting obligations should shift to reporting to Parliament at least as a transitional measure, and ultimately to any new institution established to monitor environmental progress.

Recommendation 4: The Withdrawal Bill should place an obligation to remedy incomplete and incorrect transposition of EU law before exit day. This should include an obligation to incorporate into UK law those functions and powers that are currently only located in parent EU Directives. The Bill should also contain obligations and appropriate powers to remedy incorrect and incomplete transposition that are discovered post-Brexit.

2.4 Institutional arrangements

UK environmental law is dependent on interaction with a number of different EU institutions. These include the European Commission, the Court of Justice of the European Union (CJEU), the European Chemicals Agency (ECHA) and the European Environment Agency (EEA). These institutions play an essential role in the implementation, enforcement and oversight of UK environmental law.²⁹ Without these institutions, important functions will be lost and the law risks becoming 'zombie legislation' - laws on paper that have little meaning in practice since nobody is tasked with actually carrying out and following up activities essential to the functioning of the law. Environmental law already suffers from poor implementation, and so the opening up of a further governance gap outside the EU is of genuine concern.

On leaving the EU, the UK needs to replace and reallocate those functions currently exercised by EU bodies. The Withdrawal Bill provides the first step towards this goal. In clause 7(5) it provides that Government Ministers may create SIs to:

²⁹ For more detail on the 'governance gap' resulting from Brexit, see Greener UK, 'The governance gap: why Brexit could weaken environmental protections' (August 2017) http://greeneruk.org/resources/Greener_UK_Governance_Gap.pdf; UKELA, 'Brexit and Environmental Law: Enforcement and Political Accountability Issues' (July 2017) <https://www.ukela.org/content/doclib/317.pdf> (both accessed 1/9/2017).

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(a) provide for functions of EU entities or public authorities in member States (including making an instrument of a legislative character or providing funding) to be -

(i) exercisable instead by a public authority (whether or not newly established or established for the purpose) in the United Kingdom, or

(ii) replaced, abolished or otherwise modified, or

(b) provide for the establishment of public authorities in the United Kingdom to carry out functions provided for by regulations under this section.

While there is some value in the implicit acknowledgement that there are functions that will need to be replaced, the method for doing so is currently inadequate and open to misuse and abuse by Ministers for a number of reasons. Firstly, under this clause, Ministers would be able to simply abolish potentially valuable functions currently performed by EU bodies. The risk of this happening is real, as exemplified by an example given in the Government's White Paper of a supposedly innocent 'correction' to the law:

*[T]he Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 ... contain a requirement to obtain an opinion from the European Commission on particular projects relating to offshore oil and gas activities ... [T]he power to correct the law would allow the Government to amend our domestic legislation to either replace the reference to the Commission with a UK body or **remove this requirement completely**.³⁰*

The removal of important reporting and compliance-based requirements like this one would significantly weaken environmental law, and would not leave the UK with the same rules that were in place before leaving the EU. On the contrary, it would lower standards of environmental protection and diminish the role of the public in the making and the policing of environmental law and policy.

Secondly, whilst it may well be necessary to create new institutions to fill the 'governance gap', the powers vested in Ministers to establish new bodies contained in paragraph (b) above are worrying. Institutions that oversee government compliance with the law should be independent from government. Allowing Ministers to create bodies that check whether the Ministers themselves are properly complying with the law could potentially lead to the creation of a circular system, lacking in proper accountability. Ministers must not be allowed to mark their own homework. In order to help prevent this situation, any new institutions should be established by primary legislation

Furthermore, while the draft Bill does allow for the creation of new bodies for environmental governance, the UK Government has stated on a number of occasions that it believes that this will not be necessary. Most pertinently, in a factsheet on environmental protections

³⁰ White Paper Cm 9446 (n 1) p20.

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accompanying the publication of the Bill, the Government points to existing environmental regulators, judicial review and Parliament when answering how it will be held responsible for ensuring compliance with environmental regulations.³¹ However, a more recent statement from Michael Gove seems to indicate that the UK Government is reviewing its thinking on this matter. He has stated that:

*[A]s we prepare to leave the EU we must give thought to how we can create new institutions to demonstrate environmental leadership and even greater ambition. Not least because we have to ensure that the powerful are held to account and progress towards meeting our environmental goals is fairly measured.*³²

Creative thought and new institutions may well be necessary here. While the existing domestic mechanisms referred to above are necessary, they are by themselves insufficient to secure full implementation, compliance and enforcement of environmental law. Existing environmental regulators have recently seen their powers and resources diminished. Consider for example Natural England's latest strategy, which indicates that they will be "passing more power and responsibility to people on the ground"³³ and becoming "conveners and enablers rather than enforcers".³⁴

While judicial review is doubtless a useful tool, it is too narrow in terms of scope and remit, too restrictive in terms of access (including with regards costs), and too limited in terms of remedies and sanctions. Existing standards for judicial review are also being weakened by a much-criticised attempt to remove certainty over costs for environmental claimants,³⁵ which the Aarhus Compliance Committee has recently declared to have moved the UK "further away from meeting the requirements"³⁶ of the Aarhus Convention. And while Parliament does have an important role to play in holding the Government to account, elected members lack the time and ecological expertise necessary to effectively uphold environmental laws.

³¹ Department for Exiting the European Union, 'The Repeal Bill. Factsheet 8: Environmental protections' https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627999/Environmental_protctions_factsheet.pdf (accessed 1/9/2017)

³² Michael Gove, 'The Unfrozen Moment – Delivering A Green Brexit' (21 July 2017) <https://www.gov.uk/government/speeches/the-unfrozen-moment-delivering-a-green-brexite>

³³ Natural England, 'Conservation 21: Natural England's Conservation Strategy for the 21st Century' (NE642, 2016) 7.

³⁴ *ibid.*

³⁵ <https://www.clientearth.org/government-facing-court-new-environmental-justice-plans/> (accessed 24/7/2017).

³⁶ UNECE Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 'Report of the Compliance Committee: Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention', ECE/MP.PP/2017/46 (2 August 2017) [103(a)].

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Any new domestic governance institutions established in the wake of Brexit must have adequate resources, full independence, relevant expertise and sufficient legal powers. Such bodies should be established by Parliament (not Government) and must make sure that nature's voices can be heard in the corridors of power. While it may be necessary to temporarily assign existing functions to domestic bodies (or to seek continued relationships with certain EU bodies where possible³⁷), the Withdrawal Bill should contain an obligation to bring forward proper proposals for the establishment of new environmental governance mechanisms by primary legislation as soon as possible.

Recommendation 5: The Withdrawal Bill must ensure that no environmental governance functions, including those currently exercised by EU institutions, are lost as a result of the UK leaving the EU. In particular, clause 7(5) must not allow for these functions to be abolished.

Recommendation 6: The Government should consult on the appropriate institutional replacement for those functions currently exercised by EU institutions. Statutory instruments transferring powers of EU bodies should undergo the most rigorous scrutiny process possible and should provide only for temporary interim measures, subject to the future creation of new mechanisms.

Recommendation 7: The Withdrawal Bill should include an obligation to consult on and bring forward proposals for the establishment of new governance mechanisms once the UK has left the EU. These new mechanisms should be established through primary legislation and must have adequate resources, full independence, relevant expertise and sufficient legal powers.

2.5 Environmental principles and other interpretive aids

The Government's White Paper stated that the Withdrawal Bill "will ensure that the *whole body* of existing EU environmental law continues to have effect in UK law".³⁸ A crucial and integral component of the law is how it is interpreted: this often requires looking outside the text of legislation. EU (and so UK) environmental law is interpreted through reference to a number of interpretive aids. These include guiding principles contained in the EU Treaties, judgments of the CJEU, preambles to EU legislation and opinions from the Commission.

The draft Bill directs future interpretation of 'retained EU law' in clause 6. The main tenet is that any judgment of the CJEU from *before* the UK leaves the EU will be binding on UK courts,³⁹ while post-exit judgments will not be (though they can be considered).⁴⁰ However, pre-exit judgments will only be binding in the interpretation of retained EU law (rather than UK law in

³⁷ Some EU bodies permit third parties to participate in their functioning, whereas others do not. See House of Commons Library, 'EU Agencies and post-Brexit options' (Briefing Paper Number 7957, 28 April 2017) 13-35.

³⁸ White Paper Cm 9446, 'Example 2' p17, emphasis added.

³⁹ Withdrawal Bill s6(3)(a).

⁴⁰ *ibid* s6(2).

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general), and even then only "so far as that law is unmodified on or after exit day":⁴¹ a potential narrowing of the scope of application of CJEU jurisprudence.

The Explanatory Notes accompanying the draft Bill suggests that clause 6(3) also provides a legal basis for courts, in interpreting retained EU law, to adopt a purposive approach, to consider the *travaux préparatoires* and recitals, to have regard to non-binding recommendations and opinions, and to rely on general principles of EU law.⁴² Note too that clause 3(4) of the Bill makes clear that the non-English language versions of direct EU legislation can still be used to interpret retained EU law. However, the Withdrawal Bill needs in general to make clearer exactly what sources UK courts should use to interpret retained EU law in the future.

The role of environmental principles, such as the precautionary principle, warrants particular attention given their potential value in directing and interpreting environmental law. In this regard, it is worth noting that many environmental principles are also included in international law by which the UK is bound, and that the recent EU-Ukraine trade deal also required the Ukraine to abide by environmental principles.⁴³ The environmental principles are contained in the Treaty on the Functioning of the EU, and are sometimes referred to in the text of directives, generally in the recitals (introductory text) which are not transposed into domestic law.

Despite the value of these principles, their future relevance within UK law will be watered down by the current draft of the Bill. Firstly, it is unclear whether the environmental principles are included within the Bill's definition of "retained general principles of EU law".⁴⁴ Secondly, even if they are, then Schedule 1 paragraph 3 severely limits what these principles can be relied on to achieve. The paragraph states that there is no right of action based on a failure to comply with the principles, nor can a court quash laws or conduct because they are incompatible with the principles. The role of the principles as a guide for future policy development and a frame for the implementation and enforcement of environmental law will be lost.

Recommendation 8: The Withdrawal Bill should explicitly retain environmental principles in UK law. Paragraph 3 of Schedule 1 should be removed as it does not represent a retention of EU law. The continued role of environmental principles should be, inter alia, to assist in the interpretation of environmental law and to set the direction of future environmental law and policy.

2.6 Devolved competences

Environmental, agricultural and fisheries policy in the UK are devolved matters.⁴⁵ This means that the devolved parliaments of Scotland, Wales and Northern Ireland have the power to make their own legislation in these areas. To date, these powers have been exercised in the context of the UK's membership of the EU, and so have resulted in largely comparable and compatible

⁴¹ *ibid* s6(3).

⁴² European Union (Withdrawal) Bill, Explanatory Notes (Bill 5-EN, 57/1) [105], [54].

⁴³ Association Agreement between the EU and Ukraine (2014) OJ L161/3, Articles 290, 292, 296.

⁴⁴ Withdrawal Bill s6(7).

⁴⁵ There will be separate Fisheries and Agriculture Bills, as announced in the Queen's speech.

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policies because they have been held together by common EU frameworks, such as the Common Fisheries Policy (CFP).

This compatibility is assured by provisions in the devolution settlements that prevent the devolved parliaments passing legislation that is incompatible with EU law.⁴⁶ These provisions have essentially restricted devolved competences in the areas of environment, fisheries and agriculture, but will no longer be necessary once the UK has left the EU and EU framework legislation no longer binds the devolved parliaments. Exactly how these powers are to be distributed in the future will be subject to (intra-UK) negotiation.

However, the Withdrawal Bill seeks to maintain a similar limitation on the devolved parliaments *after* the UK has left the EU by providing that "an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law"⁴⁷ (and the same *mutatis mutandis* for the other devolved legislatures⁴⁸). The Schedules to the Bill also contain restrictions to ensure that the devolved authorities comply with international law including trade agreements.

The approach taken in the draft Bill has been described by the Scottish and Welsh Governments as a "naked power grab".⁴⁹ They have indicated that they would not recommend the passing of Legislative Consent Motions⁵⁰ for the Bill to pass as it currently stands. Given that Secretary for David Davis, Secretary of State for Exiting the EU, has stated that the UK Government will seek consent from the devolved parliaments for the Withdrawal Bill,⁵¹ the UK Government clearly has some work to do to produce a law that is politically palatable in Wales and Scotland.

There is a need for at least some element of cross-border co-operation and collaboration for environmental management post-Brexit due to the inherently transboundary nature of the natural

⁴⁶ Scotland Act 1998 s29(2)(d), s57(2); Government of Wales Act 2006 s80(8), s108A(2)(e); Northern Ireland Act 1998 s6(2)(d).

⁴⁷ Withdrawal Bill s11(1)(b).

⁴⁸ *ibid* s11(2)(b) and s11(3)(b).

⁴⁹ Scottish Government, 'EU (Withdrawal) Bill' (13 July 2017) <https://news.gov.scot/news/eu-withdrawal-bill> (accessed 1/9/2017).

⁵⁰ Under the Sewel Convention, the UK Parliament does not normally legislate with regard to devolved matters except with the agreement of the devolved legislature - indicating approval for this is known as passing a Legislative Consent Motion. Note that the convention is political rather than legal in nature, despite its appearance in s28(8) of the Scotland Act 1998 (as amended). Indeed, the Supreme Court confirmed this interpretation in *Miller*: "The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law" *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [151].

⁵¹ HC Deb 26 June 2017, vol 626, col 374.

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world.⁵² Supranational co-ordination is also useful for the UK Government to ensure that the UK (including its devolved authorities) is compliant with its international legal obligations, to create level economic playing fields and to facilitate the functioning of a single market. There are thus ecological, legal and economic reasons why joint frameworks will be of value - though these need not necessarily be legislative in character. It may be possible for some cross-border issues to be dealt with non-legislatively, such as through the UK's Marine Policy Statement.⁵³

There is therefore a need for the UK to replace at least some aspects of the EU's common frameworks (and associated roles performed by EU institutions such as the Commission and CJEU) once outside the EU. This has been explicitly recognised by Carwyn Jones, the First Minister of Wales, who has stated that:

*We have acknowledged the need for UK Frameworks in some areas to replace those currently set by the EU, however, these should be **collectively developed** and agreed, based on **common consent** by all four Governments within the UK, and not imposed ... there is a **clear need for new governance arrangements** to support how the UK will collectively deliver on international agreements or obligations.*⁵⁴

The UK Government has already signalled its intention to bring forward UK-wide bills on fisheries and agriculture, as well as its intention to "consult widely with the devolved administrations on the appropriate extent of any legislation".⁵⁵ However, the processes for doing so have so far left the devolved governments unimpressed.⁵⁶ If devolved institutions are not properly involved in the design and establishment of UK-wide post-Brexit frameworks, then a democratic deficit will open up with respect to the devolved nations.

New channels for communication and power-sharing between the UK Government and the devolved administrations will be necessary after the UK has left the EU. A federal-style system, based on parity of esteem and composed of representatives of all four governments and relevant experts, may be necessary to allow the UK to achieve its ambition of being world-

⁵² See eg UK Government, 'Review of the Balance of Competences between the United Kingdom and the European Union: Fisheries Report' (Summer 2014) [2.13].

⁵³ HM Government, Northern Ireland Executive, Scottish Government, Welsh Assembly Government, 'UK Marine Policy Statement' (March 2011) <https://www.gov.uk/government/publications/uk-marine-policy-statement>

⁵⁴ Cited in House of Lords European Union Committee, 'Brexit: agriculture' (20th Report of Session, HL Paper 169, 3 May 2017) [181], emphasis added. See also a joint letter from the Scottish and Welsh Governments to David Davis, available at <https://beta.gov.scot/news/scottish-and-welsh-governments-write-to-brexit-secretary-david-davis/>

⁵⁵ Queen's Speech Background Notes p22, available at <https://www.gov.uk/government/publications/queens-speech-2017-background-briefing-notes> (accessed 1/9/2017).

⁵⁶ See *infra* §3.3.

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leaders, and to meet its international legal obligations whilst respecting the devolution settlements and the Sewel Convention.⁵⁷

Recommendation 9: The existing devolution settlements and the Sewel Convention should be respected and complied with by both the Withdrawal Bill and any other Brexit-related legislation.

Recommendation 10: Joint frameworks should be collectively developed by the four UK governments. These must properly appreciate the transboundary nature of the natural world and environmental problems, and facilitate compliance with the UK's international legal obligations.

⁵⁷ *supra* n 50.

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3 The Journey - how the Withdrawal Bill will get us there

It is not only the destination of the Withdrawal Bill that can be improved, the journey by which it gets there also poses risks to environmental and democratic standards. This journey will not be a straightforward one: the Withdrawal Bill must complete a number of intricate tasks within a short timeframe if it is to properly "ensure that the *whole body* of existing EU environmental law continues to have effect in UK law".⁵⁸ Both the ordering and the execution of these tasks require considerable precision, and a careful approach will be necessary in order to retain the legal landscape.

The Withdrawal Bill does not and cannot itself prepare the UK's statute book for life outside the EU in one fell swoop. Instead, it bestows powers on ministers to make the requisite legal alterations (via secondary legislation) in clauses 7-10 of the Bill. Given the short timeframe provided by the Article 50 withdrawal process, relying on the swifter law-making process of secondary legislation is an understandable approach. But doing so requires an attentive balance to be struck between efficiency and democracy.

However, the breadth, generality and vagueness of the powers currently set out in the Bill leaves them open to misuse and abuse. In addition, the current draft of the Bill (as at the time of the first reading) fails to provide appropriate scrutiny procedures for the exercise of these powers. As will be detailed below, these two weaknesses of clauses 7-10 mean that the Withdrawal Bill undermines Parliamentary sovereignty and threatens environmental integrity. The Bill is vulnerable to being used to sidestep proper democratic accountability and make amendments to our existing laws that weaken environmental standards and governance.

It is crucial that the nature and extent of the ministerial powers contained in the Withdrawal Bill are more precisely defined and clearly limited on the face of the Bill. In addition, the Parliamentary scrutiny of these powers needs to properly reflect the nature of the amendments that the statutory instruments are making: this will mean establishing and relying on enhanced scrutiny mechanisms where appropriate. Otherwise, the Withdrawal Bill will provide for an alarming and worrying transfer of power from the legislature to the executive.

3.1 Broad, general and vague powers to 'correct'

As noted above, the first phase of the conversion process is the retention of EU derived law on the UK statute books. This will be done by clauses 2-4 of the draft Bill, creating the new category of 'retained EU law' (of which 'retained direct EU legislation' is a subcategory). However, UK law will then have to be adjusted to ensure that it functions sensibly and properly once the UK is no longer a Member State of the EU. This is the second phase in a 'convert and correct' process.

The second phase is necessary because retained EU law will not be coherent if it is simply preserved as currently written within standalone UK law. Ambiguities, inconsistencies and *non sequiturs* will arise for a number of reasons, such as presumptions that the UK is a Member

⁵⁸ White Paper Cm 9446 (n 1) 'Example 2' p17, emphasis added.

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State of the EU and cross-references to EU law. The Government is aware of the scale of the challenge this presents:

It is clear that a very significant proportion of EU-derived law ... contains some provisions that will not function appropriately if EU law is simply preserved.⁵⁹

Consequently, amendments must be made to these laws to ensure that they function coherently once the UK has left the EU. The powers to make these amendments (or 'corrections'⁶⁰) are found in clause 7 of the draft Bill.⁶¹ They bestow on Ministers extraordinarily sweeping powers to modify the law as they see fit. The powers are *broad*, *general* and *vague*.

The powers are *broad* because they can be used to modify *any* UK law (both primary and secondary).⁶² The Explanatory Notes specifically spell out that a clause 7 power "could be used to amend law which is not retained EU law where that is an appropriate way of dealing with a deficiency in retained EU law".⁶³ Furthermore, clause 7 powers can be used to give public authorities the power to make legislation (clause 7(5)(a)), and so Ministers will have the power to instruct others to make delegated legislation (also potentially of a broad nature) via delegated legislation.⁶⁴

The powers are *general* because they can be used whenever there is a 'deficiency in retained EU law'.⁶⁵ However, what exactly constitutes such a deficiency is not clearly defined. A list of examples is given in clause 7(2), but this list is wide-ranging and non-exhaustive, meaning that it is unclear where the boundaries of the clause 7 powers lie. There are some restrictions contained in clause 7(6) - such as disallowing modification of the Human Rights Act 1998 - but these restrictions provide little genuine limitation on the powers likely to be exercised by the Ministers.

The powers are *vague* because they are subject to the Minister's discretion and interpretation. The illustrative list of deficiencies in clause 7(2) refers on a number of occasions to provisions

⁵⁹ *ibid* [3.5].

⁶⁰ As the Government refers to them, despite the fact that they will not really *correct* the law, but rather *adjust* it: referring to them as corrections incorrectly implies that these amendments will improve the law.

⁶¹ In addition, other clauses provide powers for slightly different situations: clause 8 aims to ensure that the UK does not breach any of its obligations under international law; clause 9 provides powers to implement any withdrawal agreement between the EU and the UK; and clause 10 bestows powers on devolved authorities. It is worth focussing on the powers to 'correct' contained in clause 7 since these are likely to be the most used powers in the Bill.

⁶² Withdrawal Bill s7(4). See also [114] and [115] of the Explanatory Notes (n 42).

⁶³ Explanatory Notes (n 42) [115].

⁶⁴ "Delegated legislation on stilts"? Mark Elliott, 'The EU (Withdrawal) Bill: Initial Thoughts' (July 14 2017) <https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/>

⁶⁵ Withdrawal Bill s7(1).

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that are "no longer appropriate" - but it is not at all clear what makes a provision appropriate or otherwise. It may be possible to tighten these definitions by instead referring to the necessity, sufficiency, possibility or permissibility of certain provisions once the UK has left the EU.

Rather than the rather permissive approach currently adopted by the Withdrawal Bill, the Bill should clearly spell out the limitations of any powers created⁶⁶ by the Bill. In particular, it must only be possible to exercise the powers for one of two purposes: (i) to ensure that retained EU law continues to operate with equivalent scope, purpose and effect or (ii) to implement any rights or obligations of the UK that arise from a Withdrawal Agreement with the EU.

Furthermore, it should be explicit that the former of these two purposes takes priority. That is, the Bill should state that retained EU law is not deficient merely because it is incompatible with the requirements of an international agreement that enters force on or after exit day. Such a statement is also necessary to prevent any amendments being made under clause 8 of the Bill (which seeks to prevent breach of international obligations) that weaken environmental standards due to new trading agreements with third parties.

There are thus a number of shortcomings in the definition of the powers contained in the Withdrawal Bill as it currently stands. Together these mean that the Government's insistence that the Withdrawal Bill "will not aim to make major changes to policy"⁶⁷ is far from guaranteed.⁶⁸ This is unnecessary: it is possible to update the UK's statute book for life outside the EU without bestowing powers that are so broad, general and vague.

Recommendation 11: The Withdrawal Bill should place more stringent restrictions on the use of Ministerial powers created or modified by the Bill. In particular, it should specify that any power created or modified by the Bill can only be used either (i) to ensure that retained EU law continues to operate with equivalent scope, purpose and effect, or (ii) to implement any rights or obligations of the UK that arise from a Withdrawal Agreement with the EU. The notion of 'deficiencies' should be more precisely defined and less open to Ministerial opinion, including by the specification of examples of situations that are not deficiencies.

Recommendation 12: Powers under the Withdrawal Bill should be restricted from being used in such a way that their effect is to lower the standard or restrict the scope of any protection contained within environmental legislation. A provision to this effect should be placed on the face of the Bill in clause 7(6).

Recommendation 13: The Government should immediately publish examples of Statutory Instruments that will be enabled by the powers contained in the Withdrawal Bill. In addition, guidelines for governmental departments on how to correct the deficiencies in retained EU law should be made public.

⁶⁶ Or modified - see above §2.2 on Schedule 8 para 3(1).

⁶⁷ White Paper Cm 9446 (n 1) [1.21], see also Explanatory Notes (n 42) [110].

⁶⁸ See also Hansard Society, 'Taking Back Control for Brexit and Beyond' (forthcoming); Constitution Committee Report (n 10) [44]-[50]; White Paper Cm 9446 (n 1) [3.13].

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3.2 Scrutinising the government's 'corrections'

A necessary accompaniment to well-defined delegated powers is proper scrutiny of their use in practice. While secondary legislation is not subject to the full Parliamentary process that an Act of Parliament goes through, MPs and peers do still have some level of control over the enactment of secondary legislation. This level of control varies as there are a number of different procedures in existence to scrutinise secondary legislation. The parent Act stipulates which procedure is to be followed.

Under the 'negative procedure', laws made by Ministers automatically become law and remain so unless either House passes a prayer motion against them within a forty day window. On the other hand, the 'affirmative procedure requires' that an SI be put to a vote by each House before it becomes law. There are also eleven other strengthened scrutiny procedures that are detailed in various Acts of Parliament.⁶⁹ These contain an array of additional requirements - such as the requirement to consult - and Parliamentary committee powers - such as the power to recommend amendments or veto the instrument.⁷⁰

Despite this plethora, existing processes for scrutinising secondary legislation are notoriously confusing, arcane, and lax: even the affirmative procedure is deceptively weak. During the 2015-16 Parliamentary session, the average Delegated Legislation Committee debate on affirmative SIs lasted just 26 minutes⁷¹ and motions to reject secondary legislation are uncommon: since 1950 the House of Commons has rejected eleven SIs (the last being in 1979⁷²) and the House of Lords five.⁷³ The Hansard Society have argued that "the approach to scrutiny should be *radically reformed* in order to address the deficiencies in the process and modernise the system for the 21st century".⁷⁴ This need is brought into sharp focus by the constitutional significance of the Withdrawal Bill, whose proposed scrutiny procedures (set out in Schedule 7) are inadequate and inappropriate for this important task.

The default position is for SIs made under the Withdrawal Bill to undergo the negative procedure. Some SIs made under the Bill will undergo the affirmative procedure (including those altering who exercises functions currently exercised by an EU body and those creating a power to legislate).⁷⁵ However, as seen above, neither of these procedures provides a particularly robust form of scrutiny of government legislative power. As well as improving the substantive

⁶⁹ See House of Lords Delegated Powers and Regulatory Reform Committee, 'Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers' (3rd Report of Session 2012-12, HL Paper 19, 5 July 2012).

⁷⁰ *ibid* 8.

⁷¹ Joel Blackwell and Ruth Fox, 'Westminster Lens: Parliament and Delegated Legislation in the 2015-16 Session' (Hansard Society 2017) 5, 20.

⁷² House of Lords Constitution Committee, 'Delegated Legislation and Parliament: A response to the Strathclyde Review' (9th Report of Session 2015-16, HL Paper 116, 23 March 2016) [13].

⁷³ Fox and Blackwell (n 9) 6; Constitution Committee (n 72) [27]-[29].

⁷⁴ Fox and Blackwell (n 9) 171, emphasis added. Their argument is made quite aside from the extra strain that will be put on Parliament as a result of leaving the EU.

⁷⁵ Withdrawal Bill Schedule 7, Part 1, paragraph 2.

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restrictions on the scope of ministerial powers on the face of the Withdrawal Bill (as seen above), there must also be better oversight of the use of these powers to ensure that no policy changes are made using the powers contained in the Withdrawal Bill.

The need for the Withdrawal Bill to improve its scrutiny procedures is rendered especially important because the Government's description of existing statutory instrument scrutiny procedures in its White Paper is **incorrect**. In particular, the White Paper states that MPs can require a debate and/or vote on SIs,⁷⁶ but this is not true - MPs may request a debate/vote, but cannot require them. For example, the Government recently used an SI to introduce a requirement for women who have been raped to provide verification of this in order to claim tax credits for more than two children.⁷⁷ This law was introduced without a debate or a vote despite 106 MPs opposing the clause.⁷⁸ The Hansard Society describes the Government's White Paper inaccuracy as "ignorance at best, deception at worst".⁷⁹

Government Ministers must not be allowed unfettered access to make alterations to important laws simply in the name of ensuring that 'Brexit means Brexit'. Recent events in the United States of America have clearly demonstrated the risks of vesting law-making powers in the executive.⁸⁰ The aim of powers contained in the Withdrawal Bill⁸¹ must be to *delegate* Parliament's responsibilities to the Government, not to *relegate* Parliament's status and authority in the pecking order.⁸²

As such, the exercise of powers created by the Withdrawal Bill must be subject to an appropriate level of scrutiny by Parliamentarians. Given the complexity of the task at hand in the Withdrawal Bill, it is unlikely that a single scrutiny procedure will suffice to provide both the efficiency and the effectiveness necessary to properly prepare the UK statute book in time for the UK's exit from the EU.

Instead, a number of procedures are needed, with an appropriate 'sifting' mechanism used to determine which procedure should be used on a case-by-case basis. For some extremely straightforward corrections, the existing negative procedure for SIs may suit. However, for other

⁷⁶ White Paper Cm 9446 (n 1) [3.21].

⁷⁷ Peter Walker, 'Tax credit 'rape clause' becomes law without parliamentary vote' *The Guardian* (London, 16 March 2017) <https://www.theguardian.com/law/2017/mar/16/tax-credit-clause-becomes-law-without-parliament-vote> (accessed 20/5/17).

⁷⁸ Early Day Motion 1078 (15 March 2017) <https://www.parliament.uk/edm/2016-17/1078> (accessed 20/5/17).

⁷⁹ Written Evidence Submitted by the Hansard Society to House of Commons Procedure Committee on the delegated powers in the "Great Repeal Bill" (GRB 032) [28], available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/procedure-committee/delegated-powers-in-the-great-repeal-bill/written/69238.html> (accessed 3/9/2017).

⁸⁰ See Avalon Zoppo and Amanda Proença Santos, 'Here's the full list of Donald Trump's Executive Orders' *NBC News* (July 24 2017) <http://www.nbcnews.com/politics/white-house/here-s-full-list-donald-trump-s-executive-orders-n720796> (accessed 20/5/17).

⁸¹ And any other Bill for that matter.

⁸² Hansard Society (n 79) [39II].

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more nuanced or contentious corrections, enhanced scrutiny will be required. A number of different options along a scale will be necessary to reflect the diverse range of SIs to be expected.

Given that SIs made under clauses 7-10 of the Withdrawal Bill will be numerous, unprecedented, and constitutional in nature, the establishment of a new Parliamentary Committee to undertake both 'sifting' and scrutiny is warranted. This Committee would have the task of (a) sifting - determining what the appropriate level of scrutiny would be for each SI brought under the Withdrawal Bill; and (b) scrutinising - establishing subject specific sub-Committee to be tasked with the scrutiny of relevant SIs.

On sifting, the Committee would be able to recommend that an SI passes via the existing negative or affirmative procedure. But it would also have the option to require enhanced scrutiny of a particular SI. In such a case, it should have a menu of options to choose from, which it could pick and choose from as it saw fit. Available features of enhanced scrutiny procedures could include:

- A requirement to lay supporting documents, including an explanation of the existing function of the law being modified and the reason why any 'corrections' are necessary;
- Debate of the instrument before a sub-Committee, including questioning of the relevant Minister;
- Power for a sub-Committee to recommend amendments to the draft instrument;
- An obligation on the Minister to consider any recommendations made by the sub-Committee;
- Power for a sub-Committee to call for further debate and approval by the appropriate legislature, including recommending that the SI should not proceed.

Allocating the right balance of power between the Committee, the Houses, and Ministers require great care and precision. For example, whilst the Minister should make a recommendation as to the appropriate scrutiny procedure in their Explanatory Memorandum for all SIs under the Withdrawal Bill, the opinion of the Committee on this matter should be binding. On the other hand, while the Committee should have the option of recommending that an SI be blocked, this should be subject to a vote in the Houses.

While the default position would be for the Committee to be able to decide the appropriate level of scrutiny, there are instances where some elements of this discretion should be removed. For example, it should be written into the Withdrawal Bill that any SI that transfers powers of EU bodies or amends the modification process for any aspect of retained EU law should undergo the most rigorous scrutiny process possible, any SI that has undergone public consultation should be subject to a vote in Parliament.

Recommendation 14: Statutory instruments made under the Withdrawal Bill should be subjected to a new 'sift and scrutinise' model of Parliamentary scrutiny. A new Parliamentary Committee should be established to perform this task along with subject specific sub-Committees. This Committee should inter alia have powers to recommend

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amendments to and the blocking of statutory instruments made under the Withdrawal Bill.

3.3 Legislative Consent Motions and Joint Ministerial Committees

It was noted above that the UK Government will seek Legislative Consent Motions (LCMs) for the Withdrawal Bill in line with the Sewel Convention, and also that the Scottish and Welsh Governments have both stated that they would not recommend the passing of LCMs for the Withdrawal Bill as it stands. This has the potential to become a politically charged and constitutionally significant issue as the Withdrawal Bill continues its passage through Parliament.

Existing mechanisms for cross-government co-operation and communication have to date been seen as inadequate by many. For example, the Joint Ministerial Committee (JMC) has been described by Carwyn Jones as “basically a Westminster creation that is designed to allow Westminster to discuss issues with the devolved administrations. It is not jointly owned... and it is not a proper forum of four administrations coming together to discuss issues of mutual interest”.⁸³ And Martin McGuinness has stated that “when Peter Robinson and I attended previous meetings of the Joint Ministerial Committee...we, along with Wales and Scotland, were underwhelmed by the seriousness with which the British Government took the views expressed by the devolved Administrations. If that is to be the mechanism, there will have to be a fundamental change of attitude by the British Government”.⁸⁴

As a result, it is unlikely that an unaltered JMC will prove adequate for the detailed levels of communication, consultation, co-operation and negotiation necessary to satisfactorily modify the UK's legislative framework. This is a distinct, though connected, process to establishing the aims and negotiating position of the UK in its discussions with the EU on the withdrawal agreement. Given that “[t]he JMC structures have never been tasked with such a detailed and politically sensitive process as that required for the Brexit negotiations”,⁸⁵ it is clear that new structures and processes will have to emerge sooner rather than later.

This inadequacy of the JMC has already been seen in the Brexit process to date.⁸⁶ Roseanna Cunningham has expressed “concerns about the agenda and priorities” of meetings between environment ministers, with a lack of discussion of “substantial issues for the future of

⁸³ House of Lords Constitution Committee, 'Inter-governmental relations in the UK: Oral and written evidence' 74. <http://www.parliament.uk/documents/lords-committees/constitution/inter-gov-relations/Evidencevolume1GR.pdf> (accessed 20/5/17).

⁸⁴ Northern Ireland Assembly, Ministerial Statement (13 September 2016), <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2016/09/13&docID=270890> (accessed 20/5/17).

⁸⁵ Richard Whitman, 'Devolved External Affairs: The Impact of Brexit' (Chatham House Europe Programme 2017) 8.

⁸⁶ See UK in a Changing Europe, 'So, what about this 'All UK Brexit'?' (30 March 2017), available at <http://ukandeu.ac.uk/so-what-about-this-all-uk-brexit/>

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environmental policy”.⁸⁷ The Scottish and Welsh Governments in a letter to David Davis have pressed for “practical steps to improve the work of the JMC (EN) [including] significantly reducing the number of attendees from the UK Government”.⁸⁸

Not only new institutions, but potentially renewed attitudes too will be required in order to ensure that the Brexit process complies with the Sewel Convention, adheres to principles of mutual respect, and observes the political will of the four nations of the UK.

Recommendation 15: The four governments of the UK should co-operate and collaborate constructively and sincerely throughout the process of leaving the EU, working under the principle of parity of esteem. Co-operation should take place on both the internal task of preparing the UK’s legislative frameworks and the external task of negotiating a withdrawal agreement with the EU.

⁸⁷ Letter to Andrea Leadsom (21 April 2017), available at http://www.parliament.scot/S5_Environment/General%20Documents/20170421_Andrea_Leadsom_MP_C_S_to_Conv_ECCLR_copied_in.pdf

⁸⁸ Scottish and Welsh Governments, letter to David Davis (15 June 2017), available at <https://beta.gov.scot/news/scottish-and-welsh-governments-write-to-brex-it-secretary-david-davis/>

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4 Conclusion

The Withdrawal Bill takes on a gargantuan task of constitutional significance. However, its current approach has gaps through which crucial environmental and democratic safeguards can slip. In particular, it needs to improve in the following areas:

- Greater clarity on the status of retained EU law and a more comprehensive conversion of EU law, including the full retention of untransposed elements of EU Directives and environmental principles contained in the Treaties. A presumption that retained EU law can only be amended by primary legislation in the future should be explicitly included in the Bill. These steps are necessary to prevent a **reduction in standards** of environmental law.
- A stronger approach to replacing all EU institutional functions. Ministers should not be allowed to reallocate these functions without enhanced scrutiny, and Ministers should also be placed under an obligation to bring forward proposals for the replacement of EU bodies via primary legislation as soon as possible. This is necessary to prevent the opening of a **governance gap** in environmental law.
- More tightly restrained, and more robust scrutiny of, all delegated powers contained in the Bill. This is necessary to prevent the emergence of a **democratic deficit** in UK law-making.

Finally, it must be emphasised that the destination of the Withdrawal Bill is not a final one. All the battles to improve and enhance environmental law and the health and integrity of the planet are as valid now as they were before the EU referendum result. However, the Withdrawal Bill fails to put the UK on a trajectory towards creating world-leading environmental law and policy. It should secure our hard-won and life-saving laws; embrace the value of internationally agreed guiding principles; and indicate a willingness to co-operate. Michael Gove has stated that he wants a 'Green Brexit', but good ecological law and governance needs co-operation and broad participation: nature does not respect political boundaries, and nor does it have a voice. To improve the state of nature we need to work creatively and collaboratively both internally amongst the four nations of the UK and externally with our friends and neighbours both nearby and further afield.

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ClientEarth is part of the Greener UK coalition of 13 major environmental organisations, with a combined public membership of 7.9 million, united in the belief that leaving the EU is a pivotal moment to restore and enhance the UK's environment
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