

Wildlife and Countryside Link Submission to the Procedure Committee Inquiry into Delegated Powers and the Great Repeal Bill

24th February 2017

Introduction

Wildlife and Countryside Link brings together 45 environment and animal protection organisations to advocate for the conservation and protection of wildlife, countryside and the marine environment.

Our members practice and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together we have the support of over eight million people in the UK and manage over 750,000 hectares of land.

This response is supported by the following 20 organisations:

Members of Wildlife and Countryside Link

- Bat Conservation Trust
- Buglife
- Butterfly Conservation
- Campaign for National Parks
- Campaign to Protect Rural England
- ClientEarth
- Friends of the Earth England
- Greenpeace UK
- Institute of Fisheries Management
- National Trust
- Open Spaces Society
- Plantlife
- The Wildlife Trusts
- Whale and Dolphin Conservation
- Wildfowl and Wetlands Trust
- Woodland Trust
- WWF-UK

Other organisations

- Green Alliance
- The Real Farming Trust
- UK Green Building Council

Submission

1. A [stated aim](#) of the “Great Repeal Bill” (GRB) is for it to preserve EU law where it stands at the moment before the UK leaves the EU. Ensuring that this takes place properly is crucial to the environment since around 80% of UK law protecting our environment is currently shaped by EU laws. This submission highlights potential issues and gives suggestions with that in mind. In particular, it identifies that the powers bestowed by the GRB on the Government must be clearly delimited both in terms of substantive scope and temporal application, and it must have clear provisions to ensure that future substantive changes to environmental law will not be possible without the proper involvement of Parliament.



Wildlife and Countryside Link
89 Albert Embankment
London
SE1 7TP

T: 020 7820 8600
F: 020 7820 8620
E: enquiry@wcl.org.uk
W: www.wcl.org.uk

‘Wildlife and Countryside Link is a unique coalition of voluntary organisations concerned with the conservation and protection of wildlife and the countryside.’

Chair: Dr Hazel Norman Director: Dr Elaine King

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2. Environmental law requires a high level of scrutiny and safeguards. While in some policy areas, public opinion is divided about the benefits of the status quo, there is [strong public support](#) for retaining or building on existing environmental standards. Environmental protection is a public good, and environmental laws safeguard both nature and people's wellbeing. The Scottish and Welsh Governments have also called for environmental standards to be retained, and the UK Government made a manifesto commitment to "be the first generation to leave the environment in a better state than it found it." Achieving this commitment is dependent on the GRB properly retaining environmental legal standards.
3. EU-derived environmental law is currently found in both Acts and Statutory Instruments (SIs) in the UK. Amending these two different types of legislation requires different procedures. In particular, SIs (ie secondary legislation) can normally be amended or repealed by Government ministers, whereas Acts (ie primary legislation) can normally only be amended via a process of Parliamentary scrutiny. As a first step, the GRB will ensure that all SIs transposing EU law are saved (ie are not repealed). It must also make provisions to ensure that directly applicable EU laws (such as EU Regulations and Decisions) are brought across into UK law. Furthermore, the GRB should also contain an obligation for non-regression regarding environmental standards and provide proper safeguards against environmental laws being weakened by executive action (ie without proper Parliamentary scrutiny) in the future.
4. Some **technical** amendments (for example regarding *some* cross-references to EU Institutions and Instruments) will be needed to ensure that UK environmental law continues to be coherent and meaningful as standalone law. Some EU-derived legislation may be relatively easy to retain where there is only a need for purely technical amendments. But the Government has indicated that around [one third](#) of an [estimated 1100 pieces](#) of EU environmental legislation will be difficult to retain in UK law.
5. There is a need to both legislate quickly to avoid legal black-holes (such as a failure to render EU Regulations meaningful in domestic law) and a need for Parliamentary scrutiny to ensure standards are retained following Brexit. In order to move fast enough, it is likely that ministers will need to be given some powers for making **technical** amendments to existing legislation. However, the GRB must make it clear that existing environmental law can only be amended or repealed by Parliament, and not by ministers, where such an amendment or repeal, technical or otherwise, is likely to have a **substantive** effect on the existing law.
6. To aid in this process, the Government should as a matter of urgency publish a list of EU-derived environmental legislation identifying where technical amendments will need to be made as well as those areas that will require extra legislation in order to retain legal rules once the UK has left the EU.
7. The GRB has been described as a "[giant Henry VIII Clause](#)". A Henry VIII clause is a provision that allows the Government to amend or repeal a law after it has become an Act of Parliament. This type of provision enables primary legislation to be amended or repealed by subordinate legislation with or without parliamentary scrutiny. Any executive powers contained in the GRB must be precisely defined. If Henry VIII or similar powers are to be used to effect any technical amendments to environmental law (ie allowing the law to function practically outside the EU, such as replacing references to EU Institutions or Instruments where necessary), then they must be clearly delimited, specifically designed to retain the legal landscape only. In any event, ministers should also be placed under an obligation to prepare necessary technical amendments by a certain date before the UK leaves the EU. Any changes to environmental law that significantly alter its original scope, or intended purpose, must be made by primary legislation, giving a proper role to Parliament as the sovereign law maker to prevent deeply undemocratic alterations to law. In addition, equivalent oversight and safeguarding processes must be ensured within devolved legislatures where relevant. Where the competence for areas such as biodiversity and agriculture is devolved, the relevant national Assembly or Parliament must be given a proper role and Henry VIII powers not used to circumvent the proper legislative process.

8. Procedures that could be required by the GRB in order to safeguard EU-derived legislation from alterations that would substantively alter the legal landscape include: (i) treating saved SIs as primary legislation – such law could only be amended by further primary legislation; (ii) establishing parliamentary committee(s) to oversee and review any amendments made by ministers under the GRB to ensure that they do not substantively alter the law; or (iii) a blanket provision that all EU-derived law must continue to be interpreted in line with the intention of the underlying Directive/Regulation. The same process need not apply in every instance. In the event that a minister wishes to amend legislation, some instruments could be dealt with on a fast track basis via a Committee, while other instruments may require conversion into new primary legislation, for example. Some areas of legislation should be subjected to greater Parliamentary scrutiny, such as those that are particularly complex or sensitive. Adequate scrutiny procedures will require increased Parliamentary resources simply to manage the levels of work required.
9. The powers contained in the GRB must also not hamper future environmental protection. Environmental law is constantly evolving due to its relationship with developing scientific knowledge and understanding of threats to ecological health. For example, in many areas, legislation refers to dynamic lists that are periodically updated. After the UK has left the EU, there will be ongoing changes and developments in EU law to reflect such developments. Therefore, arrangements will be needed to ensure UK legislation continues to protect the environment effectively by at least keeping up-to-date with the latest standards. The GRB should contain provisions that clarify how EU-derived legislation can continue to be updated to ensure proper protection of the environment and people's health. To avoid becoming so-called 'zombie legislation' the GRB could include executive powers to amend EU-derived law to reflect post-Brexit changes in the EU law it was based on (including rulings and interpretations of the Court of Justice of the European Union (CJEU) and technical/legislative amendments) as long as these do not lower standards for environmental protection and public health. This will assist in retaining market access and ongoing collaboration with the EU in policy areas of mutual interest.
10. There is thus a need to take great care over both **which** powers ministers can exercise and **when** they can exercise them in order to ensure UK environmental law continues to be both functional and fit for purpose.
11. Other issues that must be addressed by the GRB that are of particular importance to environmental law include:
 - a. Ensuring that [principles](#) important to environmental law currently found in EU Treaties (such as the precautionary principle) continue to guide environmental law. These principles have been central in securing significant environmental improvements over the past 40 years. This could be achieved by incorporating the principles directly in the text of the GRB.
 - b. The existing jurisprudence of the CJEU interpreting EU-derived legislation must also be retained within the UK legal framework in order to prevent legal uncertainty and/or alterations.
 - c. The GRB must ensure that governance and institutional arrangements are up to the task of implementing and enforcing environmental law once the UK is outside the EU. Any transitional provisions giving new powers to UK agencies and institutions should be subject to a review within a specified time-limit involving full Parliamentary scrutiny to ensure that any future institutional framework has adequate powers and resources to fulfill the tasks currently undertaken by EU agencies and institutions.
12. The recent report of the House of Lords European Union Committee 'Brexit: environment and climate change' [<https://www.publications.parliament.uk/pa/ld201617/ldselect/ldEUcom/109/10902.htm>] highlighted the crucial role of the EU institutions in providing expertise, corraling support and ensuring progress towards environmental outcomes. The committee concluded that "The importance of the role of the EU institutions in ensuring effective enforcement of environmental protection and standards, underpinned as it is by the power

to take infraction proceedings against the United Kingdom or against any other Member State, cannot be overstated.” It is essential that the GRB or subsequent legislation addresses this erosion in accountability. To achieve equivalence the solution must be more flexible and open to public engagement than solely relying on parliamentary accountability. At least one new regulatory body will be needed if the same standard of legal protection is to be retained once the UK has left the EU.

13. Environmental law deserves special attention in the GRB process because of its long-term impact, public importance and the way it is intertwined with EU law in form and in practice. The powers in the GRB should only have effect insofar as they allow the UK to retain the status quo in relation to environmental protections. The GRB must expressly prevent ministers from using any powers bestowed by the GRB to enact substantive changes to UK environmental law unless these are in line with the non-regression principle, and should have clear provisions to ensure that future substantive changes will not be possible without primary legislation.