Wildlife and Countryside Link and Greener UK response to the House of Lords Secondary Legislation Scrutiny Committee ("SLSC") inquiry into the sifting criteria to be applied to secondary legislation and the European Union (Withdrawal) Bill

18th May 2018

1. Wildlife and Countryside Link and Greener UK welcome the opportunity to respond to the House of Lords Secondary Legislation Scrutiny Committee ("**SLSC**") inquiry into the sifting criteria to be applied to secondary legislation and the European Union (Withdrawal) Bill ("**EUWB**"). This is a joint response by the two coalitions.

2. Wildlife and Countryside Link is a coalition of 48 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Its members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Greener UK is a coalition of environmental organisations tracking Brexit to make sure that environmental protections are not weakened or lost. It is also using the unique moment that Brexit offers to recommend ways to improve and enhance the UK's environment. Taken together, the members of Link and Greener UK have a combined membership of 8 million and manage more than 750,000 hectares of land.

3. We give our views below on the factors the SLSC should be considering when deciding whether to recommend that a proposed negative instrument should be subject to at least the affirmative procedure. In the below, any recommendations that an instrument should be subject to the affirmative procedure should be taken as a minimum, with the possibility of a super-affirmative procedure not precluded.

   Question: What criteria should the SLSC apply in deciding whether to recommend that a proposed negative instrument laid under the withdrawal legislation should be upgraded to an affirmative instrument?

   Purpose and function

4. The UK Government's ambition for the EUWB is for the same rules and laws to apply after the UK leaves the EU as they did before. Where statutory instruments alter the purpose or function of the retained law they apply to, such statutory instruments should at least be subject to the affirmative procedure, and in some cases the super-affirmative procedure may be appropriate. Delegated powers should only be used to ensure equivalence and operability of the law is achieved on exit day. They should not be used to enact policy changes by the back door. Where statutory instruments have the potential to enact policy changes, such instruments must be subject to the affirmative procedure, if not found to be out of scope of the powers conferred by the EUWB. This test should be applied across all areas, but particularly to environmental law. Given that 80 per cent of environmental law stems from the EU, poor democratic oversight in the 'correction' process could lead to significant damage to our environmental legislation. The "corrections" made to retained EU

law by statutory instruments should properly reflect and incorporate established case law on the relevant legislation.

Environmental principles

5. The delegated powers under the EUWB should not be used to legislate incompatibly with the environmental principles. Environmental principles, such as the precautionary principle and the polluter pays principle, must be applied by the Government in its decision making. They form an essential component of environmental law. These principles are not unique to EU law, they are principles of environmental law in general, and are also found in a number of international environmental treaties to which the UK is a signatory. This includes the Convention on Biological Diversity, the Convention on Climate Change and the Convention on the Law of the Sea. Currently, the UK gives effect to these obligations to the international community through its membership of the EU and, in particular, the appearance of these principles within the Treaty on the Functioning of the European Union.

6. Environmental principles are key to the interpretation of EU law and should, therefore, be key to the interpretation and "correction" of retained EU law as it becomes domestic law. If the UK government's stated aim of achieving equivalence on day one of Brexit is to be achieved, the environmental principles need to be a part of domestic law on day one and all use of delegated powers under the EUWB must be compatible with the environmental principles. Delegated powers under the EUWB should not be used to legislate incompatibly with the environmental principles, but where the SLSC finds that they have, such statutory instruments must be subject to the affirmative procedure, if not the super-affirmative procedure.

Environmental standards

7. Where the SLSC has reason to believe that there is a risk that a statutory instrument made under the EUWB has the potential to lower environmental protections or standards, such statutory instrument should be subject to the affirmative procedure. Such weakening of environmental protections includes the replacement of a function of an EU body to provide oversight and enforcement of the Government's obligations to comply with legislation, such as the role of the EU Commission, or removing references to EU technical standards and specifications, such as the where the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003/3242 require the Environment Agency to characterise river basic districts in accordance with Annex II to the Water Framework Directive.

8. During the substantial process of converting all EU law into standalone domestic legislation, there is a possibility that there will be unintended consequences for retained law, such that its effectiveness or the standards it imposes are compromised. Where the SLSC identifies such a risk, the relevant statutory instrument should be subject to the more rigorous and democratic affirmative procedure to ensure maximum opportunity is given for such consequences to be identified and corrected.

EU institutions

9. Clause 7(6) of the EUWB provides for regulations to be made to replace, abolish or otherwise modify functions of EU entities and make such functions exercisable by a public authority in the United Kingdom. EU derived legislation frequently refers to EU institutions and agencies, which play a number of vital roles in the UK, including regulatory enforcement and oversight. The abolition of such functions, or their transfer to an inappropriate domestic body, could have significant impact on the regulatory regime of the UK, particularly in relation to environmental protections.

10. Where a statutory instrument abolishes a function of an EU body, such a statutory instrument should be subject to the affirmative procedure. The SLSC should also closely scrutinise statutory instruments that transfer such functions to UK bodies and ensure that such bodies are capable of effectively carrying out their functions. In some circumstances, where a statutory instrument transfers a function of an EU body to a UK body, such statutory instrument should also be subject to the affirmative procedure. Whether it is appropriate for the transfer of a function to be subject to the negative or affirmative procedure will depend on the nature of the function transferred. For example, the transfer of powers to approve exemptions from compliance with environmental regulations should be subject to the affirmative procedure, but the SLSC may find that the negative procedure would be appropriate for other functions.

Power to legislate

11. The delegated powers under the EUWB should not be used to grant domestic bodies a power to legislate in areas previously covered by EU legislation. However, where a statutory instrument does propose to grant such powers, the instrument should be subject to the affirmative procedure.

Cross references

12. Statutory instruments which replace cross references to existing EU legislation must be checked to ensure the substantive functionality and purpose of the legislation both being "corrected" by the statutory instrument and referenced by the legislation are not compromised by the statutory instrument. It is common for existing domestic legislation and EU legislation that will be retained by the EUWB to make references to EU legislation.

13. Richard Macrory[1] identifies that references to substantive obligations in EU legislation need to be analysed carefully as the exact wording is important. For example, an obligation to "comply with the requirements of a directive" is different to an obligation to "implement the obligations of the United Kingdom under a directive". The former wording can be kept with no legal change, since it is possible for UK law to require compliance with provisions located elsewhere. However, the latter wording will become empty, since the United Kingdom will no longer have any obligations under EU Directives. Where statutory instruments "correct" such cross references, the SLSC scrutiny procedure should ensure that the obligations on the Government to comply with the retained EU law do not fall away due to the way in which

[1] https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-environment-climate-change/Brexit-Environment-Climate-Change-Written-Oral-Evidence-Volume.pdf

the obligation is referenced. Where statutory instruments remove any obligation to comply with international commitments or remove a duty to comply with pre-Brexit legislation, such statutory instruments should be subject to the affirmative procedure. However, we accept that where the operability and substantive functionality of legislation is retained, the cross references could go through the negative procedure.

EU context

14. A number of provisions of EU legislation assume that the law is applying to all member states in the EU. Some of these provisions will not make sense when standing alone within UK law. This could either be because the provision refers to the interests of member states and assumes the UK is one of them, or because the provision requires co-ordination and co-operation between member states, again assuming that the UK is one. Where the UK currently has obligations to co-operate with EU member states, such obligations should be retained.

15. Where statutory instruments amend such references, the practical impact on the effect of the provision and the obligations it imposes must be assessed. There may be cross border issues where applying the provision in the UK alone and removing it from the EU context, seriously impacts the effectiveness of the provision.

Question: Should those criteria reflect or differ from the grounds for reporting currently contained in the SLSC's terms of reference?

16. The above criteria on the situations in which statutory instruments should be subject to the affirmative procedure should be applied in addition to the criteria at paragraph 2 of the SLSC's terms of reference.

17. The process of the UK leaving the European Union is a new, unique situation that was not anticipated when the terms of reference of the SLSC were agreed. The ground at paragraph 2(c) "that it may inappropriately implement European Union legislation" still stands, but the issue is now much wider than implementation. The process of 'correcting' retained EU law, by necessity as a result of Brexit, cannot use the same existing methods of implementation or rely on the same EU institutions. In some situations, obtaining equivalence in law may not be possible, but the process of converting EU law into the standalone domestic legal framework must not be used to enact policy changes, remove rights or weaken enforcement mechanisms. Where any of these are at risk of happening, such statutory instruments should be subject to the affirmative procedure. When dealing with statutory instruments made under the EUWB, the grounds at paragraph 2 of the terms of reference should be extended to include the grounds detailed in this response.

Question: Are there any categories of subject matter, aside from those stipulated on the face of the legislation (such as the creation of criminal offences or making retrospective provision), for which there should be a presumption in favour of the affirmative procedure?

18. As 80 per cent of our environmental legislation stems from the EU, the delegated powers to be created under the EUWB may have a greater impact on our environmental statute book than in other areas. As currently drafted, the EUWB contains extremely broad, general and vague powers to be exercised by ministers to alter legislation with minimal democratic oversight. The bill allows ministers to make substantive modifications to retained EU law without adequate scrutiny after the UK has left the EU. This is why the work of the SLSC is so important.

19. EU environmental law was created using the democratic processes of the EU where it was subject to significant scrutiny. The powers created by the EUWB will be exercisable without the constraints of EU law. Retained EU law may deal with matters of such importance that they would in a domestic context be dealt with in primary legislation. However, under the EUWB they can be amended by secondary legislation. It is inappropriate to allow modification of retained EU law without undergoing the appropriate parliamentary process, particularly with those aspects of EU law that detail important protections for the environment and people's health and well-being.

20. One such area where a presumption in favour of the affirmative procedure may be appropriate is the transfer of functions of EU institutions to new or existing domestic bodies.

21. It is essential that in order to avoid a democratic deficit in UK environmental law, the SLSC pays particularly close attention to those statutory instruments that amend retained EU environmental law in order that Brexit does not inadvertently lead to unintended consequences for our environment.

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