

# **Consultation response: The European Union (Withdrawal) Bill and its implications for Wales**

**4 September 2017**

## **1. About the IWA**

1.1 The Institute of Welsh Affairs is an independent think-tank. Our only interest is in seeing Wales flourish as a country in which to work and live. We are an independent charity with a broad membership base across the country. We aim to bring people together from across the spectrum in a safe space where ideas can collide and solutions can be forged in our five priority areas: the economy, education, governance, health and social care, and the media in Wales.

## **2. IWA Governance Policy Group**

2.1 The IWA Governance Policy Group guides and informs our policy priorities. Its members include practitioners, academics and policy professionals with expertise across a diverse range of governance issues. A list of members is available on request.

## **3. General response**

3.1 This Bill represents an opportunity to widen and reinforce devolution that has not been taken. It can also be viewed as a roll-back on devolution. It is no-one's interest for a Withdrawal Bill not to be enacted and provide a legal safety net when the UK leaves the jurisdiction of EU law. However, in its current form, this Bill fails to respect the power already granted to the elected governments in Scotland and Wales, and to respect the democratic legislatures in Northern Ireland, Wales and Scotland.

3.2 Politically, this is another missed opportunity to develop a strategic approach to a UK constitutional settlement, in which devolution is recognised as a strong feature. It follows the pattern of ad hoc, uneven, constitutional interventions that have defined the devolution journey in the UK (especially in Wales), and which continue to have a significant impact on relations between the nations of the UK. This Bill can legitimately be viewed as a threat to the stability of the union.

3.3 The changing nature of Wales' devolution settlement under the Wales Act 2017, coupled with the now uncertain foundations of retained EU law and the effective freeze on devolved power proposed through this Bill, gives significant cause for concern about the future of Wales' devolution settlement and the ability of our Government and Assembly to exercise their right to act in Wales' best interests.

#### **4. The treatment of devolution**

4.1 Common UK frameworks are certainly required to replace EU frameworks in some areas that are presently devolved. However, it cannot be right for the UK Government to decide any new policy regime across the UK for matters that are not reserved when it is the de facto Government of England. Clearly at times the interests of England and other nations will not align, for example in our vastly different agricultural landscapes and sectors. How will the UK Government distinguish common interests from the narrower interests of England? We are concerned that there is no recognition of this issue in the Bill, and would advise that any durable solutions need the consent of all the nations.

4.2 The [explanatory notes](#) accompanying the Bill explains that it will work with the devolved administrations to identify areas of retained law where no pan-UK approach is deemed necessary (section 36). But decision-making on the content of Orders in Council to bring this into effect will rest ultimately with the UK Government. This is unsatisfactory. We consider that there should be exploration of new mechanisms to develop consensus and garner the consent of all the nations, taking account of the pressing time constraints in this process. We note that Orders of Council will be approved by Parliament and devolved legislatures. However, this formal process does not mean meaningful positive scrutiny during policy development. Urgent, focused consideration should be given to mechanisms that can be put in place to build confidence in this process and ensure effective and meaningful engagement with the devolved nations.

4.3 Devolution, and the amendments to current devolution settlements in Wales, Scotland and Northern Ireland, are primarily dealt with in Schedule 3. According to the explanatory notes (para 195), this Schedule has been published in an incomplete form and will need to be amended as the Bill passes through Parliament. It is wholly unsatisfactory that the details affecting the devolution settlements are contained in

Schedules, which are unlikely to have the same full parliamentary scrutiny as the main clauses of the Bill. It is even more unsatisfactory that the Schedule is incomplete in the Bill as introduced. We consider there is a good case for joint examination of the Schedule by Parliament and the devolved legislatures, and that this should be pursued at the earliest opportunity to positively influence the provisions of the Bill.

## **5. The delegation of powers and their control, and the scrutiny processes and the role of the devolved legislatures**

5.1 The arrangements for parliamentary oversight throughout this Bill, whether by Parliament or the devolved legislatures, are inadequate. We accept that the UK exiting the EU presents a unique challenge, in which the speed of decision making will be a key concern. However, the broad powers afforded to Ministers and the lack of control exercisable by Parliament with regards to delegated legislation created under this Bill risks unbalancing the power dynamic between the executive and legislature, and presents a key constitutional concern.

5.2 The balance between timely decision making and effective scrutiny is key. Given the wide-ranging impact that exiting the EU will have on areas of life in Wales and the UK, it is likely that we can expect vast quantities of regulations to pass through Parliament, affecting diverse and significant areas of policy. This raises concerns about the time available for scrutiny of such important delegated legislation. There is also the issue of quality: current scrutiny arrangements in the House of Commons are very unsatisfactory, and there is always a preference by the executive to avoid such scrutiny mechanisms. Even the affirmative procedure does not provide any opportunity for scrutiny in depth. The categories of regulation which attract the affirmative procedure are very narrow (Schedule 7 (1) (2)). This is likely to result in highly significant policy choices being subject only to the negative process, protecting them from any effective parliamentary scrutiny.

5.3 The delegated powers conferred on UK Government Ministers within the Bill are broad and substantial. For example, Clause 7(4) expresses that the power granted by clause 7(1) can be used to enact regulations that make “any provision that could be made by an Act of Parliament”. If it is possible for regulations made under this Bill to do anything that could be done by an Act of Parliament, then that must extend to amending or repealing any kind of law, including provisions in other Acts of Parliament. There is

certainly nothing in this Bill that would prevent these powers being used in ways which further impact on devolved policy areas, contrary to the spirit of the current devolution settlement.

5.4 Corresponding powers are conferred on devolved institutions by clause 10 and schedule 2, meaning that Welsh Government Ministers could also take Henry VIII powers under this Bill should they wish. It would of course be unsatisfactory to see this power replicated in Wales, without action to rebalance the scrutiny mechanisms available to the National Assembly for Wales. Defects in parliamentary scrutiny ought not to be replicated in Cardiff. It is our position that the National Assembly for Wales should be responsible for legislation, and only delegate powers to Welsh Ministers where it considers it appropriate.

5.5 There is also a fundamental tension between the legal purpose of these broad delegated powers and the uncertain political negotiations that are ongoing. Clause 7 (1) allows a Minister of the Crown to make regulations they consider appropriate to “prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law”. These powers come into force on the day the Bill is enacted, and the meaning of “operate effectively” is left open. The dynamic, political nature of negotiations with the EU mean that it will not be possible to judge the appropriateness of retained EU law, and so the use of these delegated powers, until the terms on which we leave the EU are known. There is a fundamental question about how far it is possible to exercise delegated powers effectively in advance of the UK leaving the EU.

5.6 Extraordinary times call for extraordinary measures, and there is an increasingly strong case for a renewed scrutiny process that balances and responds appropriately to the enhanced Ministerial powers proposed by this Bill. The National Assembly for Wales Committees should seek urgent, focused dialogue with Commons and Lords Committees on the Bill and establish formal and ongoing liaison mechanisms to support effective scrutiny of the Bill and of the delegated legislation made under it, which do not depend solely on the goodwill of individuals involved. These are issues that transcend any possible or perceived tensions between Westminster and Cardiff Bay. Such mechanisms could and should support both effective scrutiny and timely decision making, by ensuring that regulations presented to both Parliament and the National Assembly are more likely to secure approval from both legislatures. Similar

arrangements should, of course, apply for the Scottish Parliament and Northern Ireland Assembly.

5.7 It is our considered opinion that the proposals in this Bill fall far short of the transparency and robust scrutiny the people of Wales - and the UK as a whole - deserve. Effective scrutiny by Parliament and the devolved legislatures provides a focus for national debate, airing public concern in an open forum and helping inform Government decision making. There is a strong case for the National Assembly for Wales and the UK Parliament to develop improved mechanisms for liaison and collaborative scrutiny, and we believe this should be pursued as an immediate priority.

## **6. Contact details**

Thank you for your consideration of our response. For further information, please contact:

Rhea Stevens

Policy, Projects and External Affairs Manager

IWA, 56 James Street, Cardiff CF10 5EZ

T: 029 2048 4387 / 07841 017 567 | E: [rhea.stevens@iwa.org.uk](mailto:rhea.stevens@iwa.org.uk)