

Cynulliad Cenedlaethol Cymru / National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol a'r Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol / The Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee

Ymgynghoriad ar Fil yr Undeb Ewropeaidd (Ymadael) a'i oblygiadau i Gymru / The European Union (Withdrawal) Bill and its implications for Wales

EUWB 07

Ymateb gan Cytûn / Evidence from Cytûn

- 1.1 Cytûn (Churches Together in Wales) brings together the main Christian denominations of Wales, and a number of other Christian organisations, to work together on matters of common concern. The 16 member churches have around 165,000 adult members in every community across Wales, and regular contact with many more adults, children and young people. A full list of member churches and organisations can be found at: <http://www.cytun.cymru/us.html>
- 1.2 The Wales & Europe Working Party was founded in the aftermath of the June 2016 referendum to enable the churches to work together in responding to the result and the many resulting changes in the life of the nation. All member churches of Cytûn are involved. Resources published by the Working Party can be found at: www.cytun.cymru/waleseurope
- 1.3 This response was approved by a meeting of the Working Party on 21st August 2017 and by subsequent e-mail correspondence, and may be published in full.

2.0 General response to the Bill

- 2.1 As Christian churches we are concerned above all with the principles which guide both our negotiations to leave the EU, and the impact of the legislation which follows. Withdrawing from the EU is not just a technical challenge, but also a statement about our national identity. Therefore, it should reflect the values which we want to show to the world. The following elements are of particular importance:

2.1.1 Keeping promises. If commitments were made during the Referendum campaign or in its immediate aftermath (for example, to

replace EU subsidies or to release revenue for public services), every effort should be made to carry them out.

2.1.2 Truth telling. It is important for government's credibility that the electorate is not misled by false or inaccurate information.

2.1.3 Concern for the powerless. As well as advocating for those who are the most vulnerable members of society, and who may have no say in the democratic process – such as children, migrant workers, refugees, asylum seekers or non-UK nationals – our concern extends to all those affected by decisions made elsewhere. Workers or business owners, for example, can become 'collateral damage' in losing their jobs or livelihoods due to economic downturns resulting from decisions they have not made themselves.

2.1.4 Ensuring all voices are heard. Democracy should ensure this; so it is important not to undermine it by abrogating principles or withdrawing powers which have previously been democratically agreed (such as the devolution settlement). 'Subsidiarity' is a theological as well as a bureaucratic term, requiring that decisions are made at the closest possible level to those who are affected.

- 2.2 As a Working Party, we support the UK Government's desire for as much stability in our legal framework as possible as we leave the EU. While we have some concerns regarding the scrutiny of powers given to Ministers of the Crown in the Bill, we believe that in general the legal stability which we desire with regard to Westminster legislation will be achieved by this Bill.
- 2.3 However, we have considerable concerns regarding the interaction of this legislation with the provisions of the Government of Wales Act 2006 as amended by the Wales Acts 2014 and 2017 – see sections 3 and 4 below.
- 2.4 We also remain concerned regarding the loss of the EU Charter of Fundamental Rights from domestic law and would draw the Committees' attention to our comments in a previous submission.¹ We are concerned too at the revocation by Schedule 1 paragraph 4 of individual citizens' rights to redress under the *Francovich* ruling. We note that several legal commentators believe this will weaken citizens'

¹ <http://www.cytun.cymru/waleseurope/PDFs/Ewrop-CytunEAALC-consultation-05-17.pdf> para 1.1.4

rights after exit from the EU.² The retention of the rights of citizens is an important principle for us as churches (2.1.3), and we would urge the Committees to scrutinise very carefully the potential effects of this provision.

3.0 The treatment of devolution

3.1 We support the comments made by the Chair of the Constitutional and Legislative Affairs Committee in his letter to the Secretary of State for Exiting the EU³ regarding the inequality of treatment of UK ministers and Welsh Ministers in the delegated powers proposed by the Bill, in three respects:

3.1.1 Provisions which permit Ministers of the Crown to amend devolved legislation (primary and secondary) with oversight provided by the Westminster Parliament rather than the National Assembly. This runs counter to the expectations of voters when electing MPs and AMs, and their understanding of the responsibilities of each institution. Such understanding is essential to a healthy democracy (2.1.4). We welcome the statement that “The UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority”⁴ but believe there should also be a commitment to providing a full public explanation should this power be used.

3.1.2 Provisions which permit Ministers of the Crown, in their role as ministers with responsibility for matters in England which are devolved to the other nations, to amend the law in England while ministers in Wales are restricted from amending laws in the same areas in Wales. This creates an unfairness and inequality between the nations of the UK, and could endanger the smooth functioning of the UK single market, the maintenance of which is one of the key policy aims of the Bill.

² For example Prof. Phil Syrpis <https://eutopialaw.com/2017/07/18/european-union-withdrawal-bill-paving-the-way-towards-a-very-uncertain-future/> and Joelle Grogan <http://blogs.lse.ac.uk/brexit/2017/07/17/legislation-that-is-and-is-not-the-deeply-problematic-repeal-bill/>

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<http://www.senedd.assembly.wales/documents/s65432/Letter%20from%20the%20Chair%20of%20the%20Constitutional%20and%20Legislative%20Affairs%20Committee%20to%20the%20UK%20Government.pdf>

⁴ [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20\(Withdrawal\)%20Bill.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf) para 11.

3.1.3 Provisions which restrict Welsh Ministers and the National Assembly from legislating in devolved areas covered by retained EU law without the consent of Ministers of the Crown. We believe that this runs counter to the wording on the ballot paper for the 2011 devolution referendum in Wales, which stated:

“If most voters vote “yes”, the Assembly will be able to make laws on all matters in the 20 subject areas it has powers for, *without needing the UK Parliament’s agreement.*”⁵ (our emphasis).

As we have stated in previous responses to proposed Brexit legislation⁶, and in Cytûn’s responses to the Wales Bill⁷, we believe that legislation must respect the results of both the 2011 and 2016 referendums.

We note that the UK Government has stated that this is a “transitional” arrangement⁸ and an “interim limit on competence”⁹, and that it is intended to reach agreement “rapidly”¹⁰ on the areas to become unrestricted. This being the case, we would welcome a “sunset” clause with regard to this aspect of the Bill, as already included with regard to others.

3.2 The Delegated Powers Memorandum states that the procedure envisaged for delegating legislative functions relating to “retained EU law” “adopts a similar approach to the established procedure within the devolution legislation for devolving new powers”¹¹. While there is indeed such a procedure, the “established procedure” under the reserved powers model introduced by the Wales Act 2017, and already in place in Scotland and Northern Ireland, is that all legislative powers are devolved unless explicitly reserved. Under a reserved powers model, the normal way of devolving power is to remove a reservation or restriction on the devolved parliament’s competence. The extensive

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<http://www.assembly.wales/Research%20Documents/The%20National%20Assembly%20for%20Wales%20Referendum%202011%20-%20Research%20paper-25012011-208354/11-007-English.pdf> para 3.4 box

⁶ e.g. <http://www.cytun.cymru/waleseurope/PDFs/Ewrop-CytunEAALC-consultation-05-17.pdf> para 1.1.2

⁷ e.g. <http://senedd.assembly.wales/documents/s54416/WB%205b%20-%20Cytun.pdf> para 7

⁸ <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf> para 36

⁹ Ibid, para 260

¹⁰ Ibid, para 36

¹¹ [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20\(Withdrawal\)%20Bill.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf) para 69

use of the procedure envisaged in this Bill in effect reverts to a “conferred powers” model across a swathe of devolved areas.

- 3.3 Cytûn’s member churches hold a variety of views regarding the appropriate extent of devolved legislative competence. However, we believe that – as in the 2014 and 2017 Wales Acts – any significant changes to devolved competences (whether widening or narrowing them) should be made through a transparent legislative process with appropriate scrutiny. The major changes to devolved competence envisaged in this legislation, given the time constraints involved, do not meet that criterion. This is especially obvious in the case of Wales, given the explicit wording of the 2011 referendum ballot paper (3.1.3) and the passage of the Wales Act 2017 through Parliament after the 2016 referendum result was known.

4.0 The delegation of powers and their control and the scrutiny processes and the role of the devolved legislatures

- 4.1 We have previously submitted evidence to the External Affairs and Additional Legislation Committee on these matters¹². We remain concerned at the possibility of misuse (deliberate or accidental) of delegated powers to amend retained EU legislation and domestic legislation in such areas beyond the point that is strictly necessary for their effective functioning, and would advocate the introduction of a “necessity test” on the face of the Bill to guard against this eventuality.
- 4.2 We regret that Schedule 7 purports to legislate for procedures in the National Assembly, especially as it does so in a way which requires the reader to work out the “equivalent” procedure of the Assembly to that provided for in Westminster. We do not understand why these matters of procedure with regard to devolved legislation cannot be entrusted to the National Assembly. As a matter of principle, we do not feel that Ministers should be answerable to one parliament for enacting procedures decided in another parliament, especially in cases of difficulty or dispute, as this muddies the waters of democratic accountability (2.1.4)
- 4.3 We are concerned at the power delegated under Schedule 4 Part 1 of the Bill to allow Ministers of the Crown to make new fees, charges and “tax-like charges”¹³ relating to matters previously administered by the EU. It is a democratic principle that elected legislatures should impose taxes, rather than governments (“no taxation without representation”). In devolved areas, it should therefore be the National Assembly that legislates for the imposition of taxes. However, under the current Bill, during the “transition” period of “holding powers” at Westminster level, Ministers of the Crown would be able to do so without Assembly consent. This is a fundamental alteration to the devolution settlement, and we believe that this should be amended so that the Assembly retains this power.
- 4.4 We are also puzzled at the reference in the Delegated Powers Memorandum to the need to “mitigate the burden on the general taxpayer to pick up the cost of all functions transferred from the EU to

¹² <http://www.cytun.cymru/waleseurope/PDFs/Ewrop-CytunEAALC-consultation-05-17.pdf> section 3

¹³ [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20\(Withdrawal\)%20Bill.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf) para 89

the UK.”¹⁴ It is our understanding from the referendum campaign that leaving the EU will reduce the burden on UK taxpayers rather than otherwise, so no new taxes should be necessary (2.1.1).

- 4.5 Clause 8 and Schedule 2, Part 2 give wide powers to Ministers of the Crown regarding ensuring that the UK continues to meet its international obligations following EU withdrawal. We understand the need for such provision, due to the complex interaction of UK domestic, EU and international laws and treaties. However, we are concerned that the current wording could allow Ministers of the Crown to amend domestic (including devolved) legislation to bring it into line with newly created (rather than pre-existing) international obligations, e.g. free trade treaties negotiated with countries outside the EU. We would be concerned at any such use of these powers, and doubly concerned at the use of such powers by Ministers of the Crown in devolved areas. We believe that any domestic legislative consequences to new trade agreements should be subject to the usual procedures of Westminster and (in devolved matters) the National Assembly.
- 4.6 We note that legal experts have raised a series of questions regarding the interaction of various clauses in the Bill which could extend its powers beyond the scope and time limits which appear to be envisaged¹⁵. We would expect to see such ‘loopholes’ firmly closed prior to the Bill becoming law.

¹⁴ loc cit

¹⁵ For example, <https://publiclawforeveryone.com/2017/08/14/the-devil-in-the-detail-twenty-questions-about-the-eu-withdrawal-bill/>