

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 12

Ymateb gan RSPB Cymru / Evidence from RSPB Cymru

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

### **Introduction**

1. RSPB Cymru welcomes the opportunity to participate in this consultation. The debate around Wales' future post-Brexit has huge implications for the wildlife and natural environment of Wales. As 80% of the UK's environmental protections originate from EU law, the European Union (Withdrawal) Bill is of vital importance to ensure some of our most important environmental protections are fully converted into domestic legislation. The RSPB is asking all UK Governments to commit to retaining important environmental protections post-Brexit, and to ensure that any future changes are subject to full scrutiny by the appropriate legislature. It is vital that the UK Government and the devolved administrations work constructively together to secure an approach which guarantees common environmental standards, governed in a way that respects the devolution settlements.

### **General thoughts on the Repeal Bill**

2. We have several general concerns with the Bill in its current form and these are summarised in a joint environmental NGO briefing – the Greener UK Repeal Bill briefing which outlines our three main concerns:

3. The Bill is not at all clear whether important environmental principles embedded in the EU Treaties including the precautionary principle, the polluter pays principle, and the integration principle will be converted into domestic law. These principles set the aims, objectives and requirements for certain EU laws and have helped to shape the direction of travel for our environmental legislation. It is vital that they continue to do so upon exit from the EU, to provide a foundation for future legislation in all parts of the UK, including any jointly agreed frameworks between the UK Government and devolved administrations. This is particularly important because in some cases (including the Wellbeing of

Future Generations (Wales) Act 2015), these principles were not included as it was considered unnecessary due to their overarching presence in EU treaties.

4. We have concerns about the scope and scrutiny of use of delegated powers which we outline in more detail in response to question 3.

5. The Bill does not clearly address the ‘governance gap’ that will emerge without the functions currently carried out by the EU institutions, including regulatory, monitoring, oversight, accountability and enforcement. Whilst the Bill includes a clause to enable the creation of new public bodies, this is not an express requirement. We are also concerned such creation would be through secondary legislation meaning that the creation of any new public bodies, taking on significant and important duties would receive limited parliamentary scrutiny. Furthermore, we have been concerned by continued assertions by the UK Government that there is no need for additional environmental governance regimes, relying instead solely on judicial reviews and parliamentary processes (for example, within Repeal Bill Factsheet 8: environmental protections). Whilst the Welsh Government has recognised the governance gap that will be created from our exit from the EU, as outlined in the “Securing Wales’ Future” White Paper and discussed further in the First Minister’s “Brexit and Devolution” position paper, neither the UK nor any devolved government has yet made any firm commitments to introduce any new governance regimes once we have left the European Union.

6. European institutions including the European Commission and the European Court of Justice play a vital role in ensuring effective and robust implementation of our environmental legislation. We are concerned that post-Brexit, a reliance on existing domestic agencies, judicial review and parliamentary processes fails to recognise both the breadth of functions EU institutions perform and the limitations of judicial review. They are therefore insufficient to meet the requirements comparable to the current level of protection.

7. We remain concerned about the status of retained EU law post-Brexit. Without a guarantee that this legislation will be afforded a status equivalent to primary legislation, important environmental legislation could be amended or repealed without the higher standard of scrutiny afforded to primary legislation. This risks weakening, or leaving vulnerable, much of our environmental legislation and the Bill (as currently drafted) leaves these important environmental protections to the whim of the executive. Therefore, the entirety of our EU-derived environmental

laws should be given a status equivalent to primary legislation, by only being amended or repealed by an Act of the relevant legislature.

### **The treatment of devolution**

8. Powers relating to most environmental matters are currently devolved. To date, however, these powers have been exercised in the context of the UK's membership of the EU.<sup>1</sup>

<sup>1</sup> i.e. its shared competence for environmental matters between the EU and the Member States and applies in relation to a range of areas that includes agriculture, fisheries (with the exception of marine biological resources under the common fisheries policy which is an exclusive competence of the EU), and the environment.

9. Considering the need for a coordinated transboundary approach and the maintenance of a level playing field for the effective protection of the environment, these areas are currently strongly governed by EU policy and legislation.

10. The importance of a coordinated transboundary approach and the maintenance of a level playing field will not diminish post-Brexit. Indeed, the principles justifying EU-level cooperation and regulatory alignment on environmental matters apply equally if not more strongly to intra-UK cooperation and regulatory alignment. The loss of these common frameworks would risk a significant regulatory divergence between the four countries of the UK and a less coordinated approach to tackling cross-border environmental challenges. In addition, it would risk resulting in an environmentally damaging process of competitive deregulation across the UK's different jurisdictions.

11. In the case of the Birds and Habitats Directives, for example, their recent comprehensive 'fitness check' clearly demonstrated the added value that they provide both in terms of a 'level playing field' for economic operators and a more effective, coordinated, and consistent approach to achieving nature conservation objectives. In both cases, this has been achieved thanks to the role they have played in establishing a common set of standards/processes for the designation and management of protected areas and the conservation of priority habitats and species across the UK's (and the EU's) multiple jurisdictions.

12. Maintaining a common UK-wide approach to environmental governance in future will therefore be vital if we are to effectively protect our shared natural

heritage and common resources. The UK and devolved governments will need to work closely together to agree on how the current common EU environmental standards are retained in domestic law post-Brexit through the Bill process, and governed in a way that respects the devolution settlements. Each nation should be free to raise (but not lower) these standards post-Brexit, as is currently the case under existing arrangements (subject to avoiding any barriers to intra-UK trade etc).

### **The delegation of powers and their control**

13. The Bill gives the UK and devolved governments delegated powers to change EU derived laws via statutory instruments under three clauses, allowing them to: deal with deficiencies arising from withdrawal (clause 7); make amendments to ensure that we can continue to comply with international obligations (clause 8); implement the withdrawal agreement (clause 9). The UK Government also gains consequential powers meaning Ministers can make changes that they '*considers appropriate in consequence of this Act*' (clause 17).

14. We recognise that there is a vast array of legislation that needs to be converted into domestic legislation and that modifications will be needed to ensure that it is functional when converted. We welcome the statement within the Bill that the law is '*not deficient merely because a minister considers that EU law was flawed prior to exit*' meaning that these powers can only be used to correct deficiencies that arise as a result of our withdrawal from the European Union (e.g. because they ascribe duties to EU institutions that will no longer have jurisdiction in the UK) as opposed to being used more widely. However, we are concerned about the scope of the delegated powers and the type of modifications that may be made to legislation to make it functional on exit day and beyond.

15. It is our view that the use of delegated powers should be limited to the faithful transposition and implementation of EU law into domestic law and should therefore only be used to make technical changes to our legislation to achieve this (i.e. changes necessary to ensure the functionality of our legislation on exit day). Any non-technical changes should be made using primary legislation at a later date.

16. Furthermore, we are concerned by the sorts of actions that may be taken to correct deficiencies. The Bill's explanatory notes cite an example of the sort of modification which may be used to correct a deficiency: '*for example, the law requires the UK to obtain an opinion from the European Commission* [in certain

circumstances] ..... *the power to correct the law would allow the Government to amend UK domestic legislation to either replace the reference to the Commission with a UK body, or remove this requirement completely.* Whilst we appreciate that it may no longer be appropriate to refer to the Commission for an opinion, the removal of this requirement entirely fails to recognise the reasons for and importance of seeking such opinions. Its removal would therefore be completely inappropriate and go far beyond what should be considered technical changes to ensure that the legislation continues to be functional on exit day. It is vital that these sorts of changes are not made through the use of delegated powers given within this Bill.

17. We also have concerns that the scope of the delegated powers is quite broad, giving Ministers the potential to make significant and wide-ranging changes with limited parliamentary oversight. Furthermore, whilst the use of the powers is restricted to, at most, two years after 'exit day', 'exit day' itself is undefined. Whilst this is for practical reasons to allow for any potential transitional arrangement, it does mean that ministers may have the use of these wide-ranging powers for potentially extensive periods of time.

18. We are also concerned that the Bill gives ministers delegated powers to make legislative changes that they consider appropriate to implement the withdrawal agreement. We would oppose the use of these powers with respect to non-technical changes to legislation which should only be made through the use of primary legislation. This is particularly important as any changes made to legislation to reflect the contents of the withdrawal agreement will set the future legislative framework.

### **The scrutiny processes and the role of the devolved legislatures**

19. Clarity is needed on the role the Welsh Government and Assembly will play in processing Statutory Instruments to convert EU derived law into Welsh law. Consideration should be given to whether the Welsh Government currently has the capacity required to oversee this process. However, our current assumption is that the Welsh Government and Assembly will (and should) have an equivalent role to the UK Government and Parliament in this process.

20. Whilst we recognise that a vast amount of legislation is being converted through the Bill in a relatively brief time frame, it is important that the UK Government and devolved administrations do not act as the arbiter of

justification for the use of delegated powers. Independent oversight on the use of such powers should be put in place.

21. This should be in the form of a Parliamentary or Assembly Committee which has the powers to determine the form and duration of parliamentary and public scrutiny for statutory instruments (SIs) laid before the legislature as a result of this Bill. The Committee should have powers to:

- Require a draft of proposed SIs to be laid before the appropriate legislature;
- Require the relevant minister to provide further evidence or explanation as to the purpose and necessity of the proposed instrument;
- Make recommendations to the relevant Minister in relation to the text of draft SIs;
- Recommend that Parliament or the Assembly does not proceed with a draft SI.

22. Furthermore, the relevant minister should be required to have regard to any recommendations made by the Committee, or results of public consultation (where appropriate), before laying a revised draft SI before the relevant legislature.