EUROPEAN UNION (Withdrawal) BILL AND IMPLICATIONS FOR SCOTLAND

This is a submission by Open Scotland to the Scottish Parliament’s Finance and Constitution Committee in regards to the call for evidence on the European Union (Withdrawal) Bill.

About Open Scotland

Open Scotland is the sister organisation in Scotland of Open Britain, the pro-European organisation established after the 2016 EU referendum. We are campaigning for the UK to continue to have a continuing close relationship with the European Union, including by staying in both the Single Market and the Customs Union and should seek to retain current co-operation on security, research and in a range of other areas. Open Scotland believes the best outcome of the Brexit negotiations would be one which protects the UK’s and Scotland’s prosperity, people, and partnerships across Europe. Although we are not campaigning for a second referendum, we do believe that it is important to keep an open mind on Brexit - and the vote to leave the EU - as the negotiations unfold. More information about our campaign can be found on our website.

Our Submission

In response to the call for evidence, Open Britain would note that Brexit is a wide-ranging subject which will have implications for the entire UK, including Scotland. Since the call for evidence, further negotiating positions have been published by both sides. Whilst Open Scotland has chosen to comment on some of these papers in more detail, in other cases we have commented more generally on the underlying issues at hand.

Since the United Kingdom Government’s European Union (Withdrawal) Bill was published in July, Open Britain has undertaken an assessment of this document and other papers provided by the Government about the bill, including an impact assessment. More contentiously:

- The bill could grant Government ministers broad ‘Henry VIII clause’ powers to change laws as they see fit through secondary legislation in the form of statutory instruments. These Henry VIII powers are not subject to normal Parliamentary scrutiny. For more information on secondary legislation, see Open Britain’s assessment from earlier this year (http://www.open-britain.co.uk/great_repeal_bill_secondary_legislation). The Vote Leave slogan from the referendum of ‘Take Back Control’ must not be transformed into an excuse for a Government power-grab that puts at risk the hard-won rights and freedoms of Scottish citizens.
- This includes, in a no-deal scenario, the possibility for ministers to take away the rights of EU nationals in the UK, without full scrutiny.
- Questions will be raised over whether the Government, Parliament and the Civil Services have the capacity to deal with the sheer volume of legislation which will need to be debated as part of the withdrawal process.
- The bill will remove the Charter of Fundamental Rights, raising huge concerns over existing rights enjoyed by British citizens and crossing the red lines of Labour and the Liberal Democrats, despite the Government’s claim to be seeking greater consensus.
- The Government has conceded that it has not been able to cost the impact of the withdrawal bill on businesses, providing further uncertainty for employers, employees, shareholders and investors.
In Detail

**General:**

“The Bill repeals the ECA. It is important to repeal the ECA to ensure there is maximum clarity as to the law that applies in the UK, and to reflect the fact that following the UK’s exit from the EU it will be UK law, not EU law, that is supreme.

The Bill will convert existing direct EU law (including EU regulations and decisions) into UK law as it applies in the UK at the date of exit. It will also preserve the laws we have made in the UK to implement our EU obligations (such as laws made to implement EU directives).

The Bill will…give ministers temporary powers to correct retained EU law which does not function effectively. The corrections will be made by statutory instruments made under the power(s) in the Bill, and these will need to have passed through the appropriate parliamentary procedures before we exit the EU.”

- Open Britain notes that estimates suggest around 12,000 EU regulations will be transposed into UK law as a result of this Bill, while Parliament has passed 7,900 statutory instruments implementing EU legislation and 186 acts which incorporate a degree of EU influence. This Bill has been described as "one of the largest legislative projects ever undertaken in the UK".
- Open Britain would query whether the Government even has the capacity to manage the procedure of the Bill through Parliament alongside its other business.
- Parliament must have the time and opportunity to scrutinise the potential consequences of this Bill in full detail. Furthermore, Parliament must not be side-lined during the process of ‘correcting’ retained EU law. The Government estimates that it will need 800-1,000 statutory instruments (otherwise known as ‘Henry VIII clauses’) for this purpose. These Henry VIII clauses are not subject to normal levels of Parliamentary scrutiny. Open Britain is clear that Brexit must not be transformed into an unprecedented Government power-grab.

**EU Charter of Fundamental Rights:**

“The Charter of Fundamental Rights is not part of domestic law on or after exit day.

The Government’s intention is that the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK.”

- Open Britain condemns the Government’s refusal to retain the EU Charter of Fundamental Rights. An ‘intention’ on the part of the Government to retain the rights and freedoms enshrined in the Charter is not good enough.
- These rights and freedoms must be enshrined in law, otherwise they are vulnerable to being stripped away in future.
- The Charter of Fundamental Rights guarantees all rights protected by the EU, including the European Convention of Human Rights, as well as forward-looking rights on issues like data protection. These must not be trifled with.
**Citizens’ Rights:**

“One element of EU law is reciprocal arrangements between states including reciprocal rights of citizens. As a matter of international law, those obligations will fall away for the UK at the point where the UK leaves the EU. At the same point, EU states’ obligations to the UK and its citizens will also fall away. Any such obligations beyond that time would only exist if they were agreed between the EU and the UK as part of the negotiations that have recently commenced. However, without a correction, the UK’s law would still include recognition of the EU citizens’ rights. The power to deal with deficiencies can therefore modify, limit or remove the rights which domestic law presently grants to EU nationals, in circumstances where there has been no agreement and EU member states are providing no such rights to UK nationals.”

- Open Britain condemns this shocking admission that the rights of EU citizens living legally in the UK, working, paying taxes and contributing to our society, could be callously stripped away in a no-deal scenario.
- The Government’s offer on citizens’ rights has already been condemned as insufficient. Today’s admission rubs further salt into the wound and creates more uncertainty for EU citizens living in the UK, as well as UK citizens living in the EU. The Government should unilaterally guarantee the rights of EU citizens living in the UK immediately.

**Environmental Protections:**

“The UK has a long history of environmental protection and we are committed to safeguarding and improving this. This Government is committed to build on this and be the first generation to leave the natural environment in a better state than we inherited it.

Our rivers, beaches and air are cleaner than they were 50 years ago and household recycling levels have quadrupled in the last 15 years.”

- Again, a ‘commitment’ by the Government is not enough. EU regulations on environmental protection are underpinned by EU law. According to this bill, a future UK Government could change its mind on environmental protections and simply strip them away as they saw fit.
- Before the UK joined the EU, it was often referred to as ‘the dirty man of Europe’ in terms of environmental protections because of its high levels of air and water pollution. EU legislation and regulation has helped the UK drastically improve its environmental standards and the Bill must not be seen as an excuse to undermine existing standards.

**Workers’ Rights:**

“The Government is committed to ensuring that all the protections in the Equality Act 2010 and equivalent legislation in Northern Ireland will continue to apply once we have left the EU. This will ensure the continued protection of people’s rights not to be discriminated against, harassed or victimised in the provision of goods, services and public functions, housing, transport and education.”

- Once again, a general ‘commitment’ to ensuring workers’ rights are protected after the UK leaves the EU is not good enough. As an EU member state, workers’ rights are
underpinned by EU law. With this Bill, after the UK leaves the EU, it should not be seen as an opportunity to undermine existing standards.

**Consumer Protections:**

“UK consumer protections that are based on EU law will be retained. This means that, when buying from traders in the UK, British consumers will be able to rely on the same rights they have now after we leave the EU.

“The way consumer protections apply internationally in future is a matter for negotiations, and Government will carefully consider how best to work on these issues with our EU partners after we leave the EU.”

- Although there will be no changes on day 1 post-Brexit for UK consumers making domestic purchases, this will not be the case for consumers making purchases in the EU, causing disruption and uncertainty for businesses large and small and impacting on the ability of consumers and investors to make both medium and long-term purchasing and investment decisions.
- Leaving the Single Market and the Customs Union will be bad enough for the UK economy without greater uncertainty caused by this Bill. Open Britain calls on the Government to swiftly provide clarity in the area of consumer protection law.

**Court of Justice of the European Union:**

In leaving the EU we will bring an end to the jurisdiction of the European Court of Justice (CJEU) in the UK, and the Bill provides that UK courts and tribunals will not be bound by CJEU decisions made after exit.

- The Government’s own Brexit negotiating position paper published today recognises that, in a certain number of pending cases that began before the UK’s withdrawal from the EU, “it may well be right that such cases continue to a CJEU decision.”
- However if, as stated in this Bill, UK courts and tribunals will not be bound by any CJEU decisions made after Brexit, how will the decisions made in such cases be enforced? More clarity is needed from the Government on this issue.
- This degree of pragmatism on pending cases is welcome, insofar as it departs from this Government’s needless, self-imposed red line on ending the jurisdiction of CJEU in the United Kingdom under all circumstances, whatever the economic, regulatory and security cost.

**Impact Assessment**

“In some cases EU law is based on reciprocal arrangements, with all member states treating certain situations in the same way. If such reciprocal arrangements are not secured as a part of our new relationship with the EU, it may not be sensible or workable to continue to operate those arrangements on a unilateral basis. These problems with the law will be corrected using a power in
the Bill, via secondary legislation, helping make sure we have put in place the necessary corrections before the day we leave the EU.”

- Given that the retention of some existing EU rules will be subject to the outcome of the Brexit negotiations, Open Britain requests that the Government provides an overview of precisely which rules fall under this category.

“The Government has been clear that the European Union (Withdrawal) Bill does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those that are necessary to ensure the law continues to function properly from day one. This means the Government will bring forward a number of further bills during the course of the next two years to ensure we are prepared for our withdrawal – and that Parliament has the fullest possible opportunity to scrutinise this legislation.”

- Open Britain asks why the Government has set itself a timeframe of bringing forward new bills “to ensure we are prepared for our withdrawal” when withdrawal will have taken place in the next 20 months and the ratification process will most likely have to begin in about 15 months’ time?

“The direct cost to business of the provisions within the Bill is unknown because the way in which the powers will be exercised has not been determined in all cases - in some instances because it will be dependent on the outcome of our negotiations with the EU.”

“...it is not possible at this stage to set out in detail the scale of the impact the powers in the Bill will have.

“The Government does recognise that, even where there is minimal or no change to existing practice following our exit from the EU, there may be some familiarisation or transitional cost to business, for example, where functions are transferred from an EU regulator to a UK regulator.”

“Where the proposals in this Bill have an impact on business, that impact will affect all businesses whose activity is in some way regulated or affected at present by EU law, irrespective of the business’s size. A micro (up to 10 employees) or small (up to 50 employees) business might find it more difficult to adapt to any changes brought forward under the power in the Bill simply because of the business’s size.”

- Open Britain believes that it is simply unacceptable that the Government have not undertaken an impact assessment on what the costs to business will be of the Repeal Bill.
- The Government needs to provide further information on the costs of transition for small business.
- Open Britain urgently calls on the Government to provide further clarity in this area, much needed for businesses, investors employers and employees across Scotland.

The Ratification Process
Open Scotland believes that, alongside the devolved Assemblies and Parliament, the UK Parliament needs to be closely involved in the negotiations and that the final deal should be presented to both Houses of Parliament at the same time as it is presented to the European Parliament (likely to be October 2018), which will provide enough time for scrutiny and further negotiation if required.
Open Scotland is also of the opinion that the UK Government should look to extend the negotiations if it becomes apparent that reaching an agreement will not be possible within the two-year timeframe allowed by Article 50.

**Conclusion**

Open Britain and Open Scotland strongly believe that the UK, and Scotland, are best served by staying in the Customs Union and the Single Market and are campaigning for us to do so. The UK Government need to provide a lot more information on the Brexit talks as these unfold and to take the long-term economic needs of the country into consideration, the consequences of which will be felt by future generations for years to come.

Representatives from Open Britain and Open Scotland would be available to provide any further evidence - oral or written - if required to do so by the committee.