

News Briefing: 30 November 2017

Advocacy on the EU (Withdrawal) Bill

Key points:

- This briefing summarises CIfA and CBA's advocacy position on the EU (Withdrawal) Bill, currently in Parliament
- The Bill is a major piece of legislation which seeks to ensure the UK's 'smooth transition' in terms of the function of law when the UK leaves the EU
- Key pieces of legislation, such as the Environmental Impact Assessment and Strategic Environmental Assessment Directives, will be transposed into domestic law, with the aim that planning policy will continue to function as it currently does
- But the Bill does not directly reference some important overarching principles established in EU treaty, potentially weakening environmental protections which underpin planning-led archaeology
- The Bill also lacks clarity on how EU powers will be reserved or devolved to Governments in Northern Ireland, Scotland, and Wales; and on how case-law which refers to EU institutions which contributes to the functioning of the planning system will apply
- CIfA and CBA are working with colleagues in the historic and natural environment sectors and will be presenting government with constructive options for appropriate protections which we hope to see reflected on the face of the Bill

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1. Introduction

From November, Parliamentary debates on the EU (Withdrawal) Bill – formerly known as the Great Repeal Bill – are taking place in Parliament. The Bill is the statutory implement which will ensure that the body of EU law that currently exists will be transferred into UK law when the UK leaves the EU.

The Bill sets out the process by which European powers, including the Environmental Impact Assessment Directive and Strategic Environmental Assessment Directive, will be transferred.

However, at the time of the Bill's publication, this complex process was beset by difficulties – not least because there are perceived weaknesses in the Bill which may prevent its stated ambition of ensuring a 'smooth transition' and to 'avoid a black hole in our statute book' on the day of the UK's exit from the EU, which could be as soon as 29 March 2019.

2. What CifA and CBA want

CifA and CBA's current priorities on Brexit reflect a wide range of potential risks and opportunities presented by the structural, legal, and constitutional implications of leaving the EU.

Our organisations are committed to ensuring that the implications for the historic environment of a UK exit from the EU (Brexit) are fully understood and addressed, seeking, in particular, to;

- retain at least equivalent provision for environmental protection in domestic legislation and policy
- compensate for the loss of EU funding to the historic environment with domestic funding
- ensure free movement of skilled and accredited archaeologists between EU and UK
- promote archaeology as a means for sharing understanding that cultures are different and all Europeans are migrants

The EU (Withdrawal) Bill is one of the important means by which these aims will be achieved in the medium term. In addition, CifA and CBA are engaged with issues relating to the replacement of the Common Agricultural Policy, securing appropriate provisions to mitigate Brexit-driven impacts on the demand for archaeological skills, and mitigating impacts on higher education institutions.

We are working with colleagues in the historic and natural environment sectors in how we approach lobbying on these issues. We have responded to a number of consultations, are engaged with actions being taken forward in a variety of fora and working groups including Wildlife and Countryside Link, The Archaeology Forum, Historic England's Brexit evidence gathering group, Heritage Alliance's Rural Heritage Advocacy and Spatial Planning Advocacy Groups, Heritage 2020 working groups, and Built Environment Forum Scotland's Brexit Task Force.

3. Key issues

With specific regards to the EU (Withdrawal) Bill, there are a number of key issues with which CifA and CBA are concerned:

- The *de facto* weakening of Environmental Principles enshrined in the European treaty, which are not within the scope of the Bill, as proposed,
- The loss of supranational jurisdiction to provide opportunities to bring legal challenges on Environmental principles

- The uncertainty over the status of case law which refers to EU principles not transcribed in the Withdrawal Bill,
- The uncertainty over how government will use so-called Henry VIII powers to amend technical aspects of the EU law when transposed, in order to ensure that they remain workable in a domestic context,
- The uncertainty over the how previously-held EU powers brought back to the UK after Brexit will be reserved or devolved to Scotland, Northern Ireland, and Wales.

4. Technical discussion

Of the above key issues, it is the first that has captured the attention of many within the sector in recent weeks. The issue of the environmental principles enshrined in Article 191 of the Treaty on the Foundation of the European Union (TFEU) are ones which do prompt serious questions about environmental protections after Brexit.

This is of concern to archaeology in particular because two of the principles – the ‘polluter pays’ and ‘precautionary’ principles are the basis for the policy which underpin how development-led (commercial) archaeological excavations have been undertaken since 1990.

The current policies which enable this archaeological work are the National Planning Policy Framework (NPPF) in England, Planning Policy Wales, Scottish Planning Policy, and the Strategic Planning Policy Statements for Northern Ireland. These policies do not directly rely on the TFEU, but the argument is that the TFEU provides a safeguard against any future government would may be minded to overhaul these policies and put in place a system with weaker environmental principles.

Since it is relatively easy for a government (with a strong majority) to push through policy changes, it is argued that the UK should put a commitment to the TFEU’s environmental principles in UK statute. This, although possible to change through amendments, would be an additional barrier to the erosion of environmental safeguards in a post-Brexit UK.

Without such a clear UK statutory commitment, these environmental principles would remain statutory in a limited sense, as they ‘hard-wired’ into many pieces of EU law which are being transposed by the Withdrawal Bill, as well as in various domestic statutory and policy instruments, such as within planning policy documents.

However, without a broader statutory commitment, there is clear potential for a weakening of safeguards, both due to the loss of an overarching requirement for all government departments to adhere to environmental principles, and because the possibility of environmental bodies to bring legal cases to quash decisions which do not respect these principles would no longer be possible.

5. Recent events

On November 15, in day 2 of the Bill’s first committee stage, in the House of Commons, a number of amendments on environmental principles were debated, including amendment 67 which most clearly defined an approach to enshrining the environmental principles from Article 191 of the TFEU in the Bill.

The amendment was voted down, by a majority of 313 to 295.

This stage of the Bill’s passage represents the first major point at which the Bill can be scrutinised, debated, and amended. This stage tends to be a place for ‘probing’ amendments – ie an opportunity to test what the government is proposing, discuss issues, secure commitments, and highlight points to

address again at future stages. While ClfA and CBA supported these amendments, they were never expected to pass at this stage.

The Government also recently announced its intention to ‘explore the scope and content of a new policy statement to ensure environmental principles underpin policy making’, following the advice of legal experts.

6. Our position & future advocacy

ClfA and CBA’s opinion is that the debate on November 15 was mostly positive, as

- a significant amount of time was spent debating the importance of environmental protections and there was a universal acceptance of their value
- a cross-party consensus that there is a need for statutory protections for these principles was evident
- discussion of ways that this could be achieved included
 - a new environmental protection act, to be brought forward before exit-day
 - a national policy statement to support such legislation
 - substantial powers for the recently announced new environmental regulator to hold government to account on environmental principles

It is also useful to note that DEFRA Secretary of State Michael Gove MP had a positive meeting with the Heritage Alliance last month, and others in the natural environment sector have been encouraged by other changes in Government’s stance which have occurred since Mr Gove became Secretary of State.

There are opportunities to take forward effective advocacy with the present Government to secure archaeological interests on this issue. However, recent Conservative-led Government reforms to ‘streamline’ planning have demonstrated how easy it is to introduce provisions that, apparently unwittingly, undermine historic environment protections. Particularly as these governments have shown a clear preference for reform based on weaker policy provisions, over stronger statutory approaches.

ClfA and CBA’s approach to advocacy on this aspect of Brexit will be

- to continue to pursue amendments to the EU (Withdrawal) Bill or alternate legislative opportunities (eg an Environment Bill) which will ensure that
 - principles are enshrined in law (and not only policy) and therefore require consultation and Parliamentary scrutiny before reform
 - legislation is comprehensive and inclusive of binding duties for government
 - outcomes are sensitive to devolved governments and adopted across the UK
- to push for the explicit acknowledgement of archaeology and the historic environment in any appropriate national environmental policy
- to help to shape the suite of environmental protection vehicles currently mooted by Government and champion the benefits of a holistic approach to the environment.

ClfA and CBA will be briefing MPs, Peers, and civil servants on these issues at appropriate times, working with colleagues within the archaeology and environment sectors.

7. What you can do

ClfA and CBA members are encouraged to contact their MPs to ask them about these issues and exert pressure on parliament to recognise the potential impact that any weakening of environmental protections could have on archaeology and the wider environment.

There are useful guidelines on writing to MPs from the [Council for British Archaeology](#), [Rescue](#), and the [Built Environment Forum Scotland](#).

Rescue has also produced an 'open letter' to parliamentarians which is collecting signatures and aims to highlight the issue of and scale of support for environmental protections and their importance to archaeology. You can sign the open letter [here](#).

(Please note, signing the open letter is no substitute for an individual letter to you own MP, so members are encouraged to consider doing both.)

This joint briefing is part of ClfA's News Briefing series:

Do you have specialist knowledge of this policy area? Volunteer to be a consultant on ClfA policy in this area and help us shape our advocacy. Email rob.lennox@archaeologists.net for details.

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