



Law Society
of Scotland

The European Union (Withdrawal) Bill

The Law Society of Scotland's Briefing Summary for
Second Reading

August 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee welcomes the opportunity to consider and respond to the European Union (Withdrawal) bill. The Sub-committee has the following comments to put forward for consideration at Second Reading in the House Commons on 7 and 11 September 2017.

General Comments

This document provides a summary of the issues which we have identified arising from the bill. The Second Reading Briefing contains further analysis and commentary on each clause in the bill.

The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since 1945. The UK's exit from the EU has so many significant aspects including economic, financial, legal, social, and cultural, which will affect every person living in the British Isles and it has as much potential to affect people living in the EU in some ways which are known and understood and in other ways which are currently unpredictable. The impact of the change however will also have a breadth, depth and far reaching effect for the immediate future and for several years to come.

Accordingly the European Union (Withdrawal) Bill is perhaps the most constitutionally significant measure to come before Parliament for many years. The long title of the bill implies that the bill is relatively simple it states that the bill is to *Repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU*. This is however no short or easily understood bill. In our view it is very complex, sometimes difficult to interpret, and often lacking in clarity. This bill will deconstruct the supranational legal order to which the UK has belonged since 1972 and reconstruct in the domestic legal order many aspects of that accumulated body of EU law. Parliament will have a difficult task in properly scrutinising the bill in the time allowed. The Government should be generous and permissive with suggestions to improve or clarify its clauses as the bill passes through Parliament.

We also recommend that the Government commence an early programme of consultation on the draft subordinate legislation which will be needed under the bill. The large number of orders and the relatively short period for scrutiny means that early consultation will be important in ensuring that the transposition of EU law into UK law can be as efficient as possible.

Clauses 2 to 6 - Retention of existing EU law

Clauses 2, 3 and 4 will achieve the desired objectives under the bill of retaining EU derived domestic legislation and maintaining its effect after exit day (clause 2) and converting direct EU legislation into domestic law and after exit day (clause 3). Clause 4 will ensure that any right not covered by clauses 2 or 3 will continue to be recognised and available in UK law. Our observations on clauses 2 and 4 are:-

- (a) Clauses 2 (and 5) refer to “an enactment passed or made before exit day” This appears to be intended to refer to enactments which are enacted or made before exit day – (Paragraph 96) of the explanatory notes states that an Act is passed when it receives the Royal Assent. However this is not the case in the case of an Act of the Scottish Parliament (ASP). An ASP is passed by the Scottish Parliament if it is approved at the end of its final stage but then normally 4 weeks have to elapse before it can be submitted by the Presiding Officer for Royal Assent during which time the bill can be referred by the Advocate General, the Lord Advocate or the Attorney General to the Supreme Court and to the ECJ. It is only enacted when it receives Royal Assent – see sections 32, 33, 34 and 36(1)(c) of the Scotland Act 1998. As worded it is therefore suggested that it should be clarified whether it is intended only to apply to ASPs which have been enacted before the exit day and not just passed before that day.
- (b) We question how clause 4 will apply to directly effective rights such as those relating to free movement of persons, goods, capital and services as expressed in the treaties. The explanatory notes state that it is “the right itself that is converted not the text of the article itself.” (paragraph 88). In our view it is very difficult to divorce the right from the text which creates it. Ministers should explain how this actually will work in practice.
- (c) Ministers should explain how the rights which are referred to in clause 4 relate to the general principles of EU law and, to the extent that they consist of, or fall within, those general principles, how it is envisaged that those rights will be available and able to be enforced in domestic law.

Clause 5 excepts the principle of the supremacy of EU law and the Charter of Fundamental Rights from the savings and incorporation provisions.

Our observations are:-

- (a) Clause 5(1) which states that “the principle of the supremacy of EU Law does not apply to any enactment of rule of law passed or made on or after exit day”. What is the actual effect of this provision? There is a particular difficulty with the application of this principle to retained EU law because it is difficult to interpret to what law the principle in fact applies.
- (b) Clause 5(4) provides that the Charter of Fundamental Rights is not part of domestic law on and after exit day. It makes sense for the Charter to form part of retained EU law because it only applies in areas to which EU law applies. It is therefore suggested that the Government should reconsider its decision not to include the Charter as part of domestic law on and after exit day. It would at least be helpful to our domestic courts to rely upon its terms when determining the validity, meaning and effect of retained EU law.
- (c) Clause 5(5) provides that clause 5(4) does not affect the retention in domestic law of any EU fundamental rights or principles which exist irrespective of the Charter. These fundamental rights or principles are not defined or identified.

It would be helpful if the Government could identify what are the fundamental rights or principles it considers are retained in domestic law and whether, or to what extent, they are included in the definition of “retained general principles of EU law” in clause 6(7). We recommend that the Government should reconsider the removal of the Charter of Fundamental Rights from UK Domestic Law and take stock of concerns which are held by many about the potential for erosion of human rights which may occur as the result of the removal of the Charter and the creation of difficulties for the UK Courts interpreting retained EU law in the absence of the Charter.

Clause 6 provides for the interpretation of retained EU law after exit.

Our observations on clause 6 are:-

- (a) We welcome the recognition by the Government that the High Court of Justiciary is the highest criminal court in Scotland from which there is no right of further appeal in criminal matters to the UK Supreme Court (although there can be applications to the UK Supreme Court concerning ECHR compatibility and devolution matters referred to in clause 6(4)(b)(i) or (ii)).
- (b) There is no provision in this clause which expressly deals with the situation where there are pending cases before the domestic courts on exit day. But, given that clause 6(1)(b) appears to be quite absolute in its terms, it could be argued that it would apply to such pending cases and prevent such a court from referring a matter to the ECJ on or after that day even although it could have done so on the previous day. There is also no provision in this clause which deals with the issue of cases pending before the European Court on exit day. This is an issue which is the subject of negotiation between the UK and the EU. We urge both the UK and the EU to come to an agreement which respects the rule of law, the proper administration of justice and is in the interests of litigants.

Clauses 7 to 9 - Main powers in connection with withdrawal

Clause 7 provides order making power to Ministers of the UK Government to deal with deficiencies in retained EU law. Clauses 8 and 9 provide order making power for UK Ministers in connection with international obligations and implementing the Withdrawal Agreement.

Our observations on these clauses are:-

- (a) We recognise that it is necessary (a) to adapt retained EU law to enable it to function on and after exit day and (b) given the scale of the amendments required and the limited time in which to do it, to confer wide ranging powers, including Henry VIII powers to amend Acts and ASPs, on the UK Government and devolved Governments. The House of Lords Select Committee on the Constitution pointed out, in its Report on “the Great Repeal bill and Delegated Powers” (9th Report, Session 2016-17), the challenge is how to grant such.

“relatively wide delegated powers for the purpose of converting EU law into UK law, while ensuring that they cannot also be used simply to implement new policies desired by the Government in areas which were formerly

within EU competence....We consider that Parliament should address this challenge in two distinct ways. First, by limiting the scope of the delegated powers granted under the Great Repeal bill, and second, by putting in place processes to ensure that Parliament has on-going control over the exercise of those powers...”

We endorse this approach regarding the scope of the regulation making powers. The Committee considered there should be an express provision that the powers should be used only “so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework”. The bill does not contain any such provision and the powers are not restricted as the Committee suggested. The Government should consider limiting these powers by amending the bill in line with the suggestions by the House of Lords Select Committee. As the regulation power in clause 7 is similar to that in clauses 8 and 9 we suggest that the powers should be placed in into one clause in the bill. This would simplify the bill and make it easier to understand.

Clauses 10 to 11 - Devolution

Clause 10 provides devolved administrations with similar powers as UK Ministers under clause 7 – 9.

Our observations on clause 11 (and schedule 2) are:-

- (a) At present, section 29(2)(b) of the Scotland Act 1998 provides that a provision in an ASP is “not law” if it is incompatible with EU law. The new provision does not simply replace the reference to EU law with a reference to retained EU law so that the Scottish Parliament would be

required to legislate in conformity with retained EU law. What it does do is to prohibit the Scottish Parliament from modifying or conferring power by subordinate legislation to modify retained EU law. In our view, repealing the requirement to legislate compatibly with EU law is not the same as legislating in such a way as to modify that law.

(b) The effect of the proposed section 29(4A) is to remove from the legislative competence of the Scottish Parliament any matter in retained EU law (i.e. which was subject to an EU competence) even although that matter, as such, would not have fallen within a reserved matter under schedule 5 of the Scotland Act 1998 e.g. agriculture, fisheries, environmental protection etc. There are a number of alternative options in addition to the one in the bill for dealing with the complexities of retained EU law and the competence of the devolved jurisdictions. This is an area of political debate and we offer the following alternatives without endorsing any particular one:

(i) Adopt the provisions in the bill on a transitional basis only and subject to a specific cut-off date. At the expiry of the transitional period, powers in devolved areas would revert to the devolved legislatures, unless specific alternatives had been put in place. This would allow the UK Government the opportunity to work out what has to be done in light of the UK's future relationship with the EU, but acknowledge that the devolved legislatures will obtain the additional powers within a defined timescale.

(ii) Repeal the EU law constraint leaving EU competences to fall as determined by schedule 5, and any new common frameworks to be established by agreement between the UK Government and the devolved administrations.

(iii) Replace the cross-cutting EU constraint with new cross-cutting constraints, for example to protect the UK single market and/or to comply with international obligations. These might be more or less extensive than the EU law constraint in practice, but would have the benefit of (a) an underpinning principle and (b) catering for unforeseen cases.

(iv) Repeal the EU law constraint and amend schedule 5 to re-reserve specific competences to the UK level to enable UK Government to establish common frameworks.

Clause 13 – Publication and rules of evidence

We agree that the Queen's Printer must make arrangements for the publication of EU law that has been published before exit day. This provision will be of significant assistance to those to whom this body of law will apply and to their advisers. We also agree with Schedule 5 concerning the rules of evidence. It is important that where it is necessary in legal proceedings to decide a question as to the meaning or effect of EU law, the treaties or any EU instrument, that will be a question of law rather than a question of fact. This is sensible and will save time and expense in future litigation.

Schedule 1 – Further provision about exceptions to savings and incorporation

Schedule 1, paragraph 3(1) does not allow any challenge to be made on and after exit day, or allow any court to quash, any enactment or rule of law on the grounds that it does not comply with the general principles of EU law. It would be helpful if the Government could explain and clarify the reasons for this provision and how it will apply to pre-exit enactments.

Schedule 7 – Regulations

The House of Lords *Select Committee on the Constitution* made various recommendations about the content of the *Explanatory Memorandum* which accompanies each Statutory Instrument amending the retained EU law. For example, they recommended:

- that the Minister making the regulations should sign a declaration stating that:

“the instrument does no more than necessary to ensure that the relevant aspect of EU law will continue to make sense in the UK following the UK’s exit from the EU, or that it does no more than necessary to implement the [withdrawal agreement]”

- that the Explanatory Memorandum should set out clearly what the pre-exit EU did, what effect the amendments will have on the retained EU law on and after exit day and why the amendments were considered necessary; and
- that the Minister should indicate in its Memorandum what level of scrutiny the Minister considered appropriate for each instrument.

We consider that it would be helpful if these recommendations were given effect to in the bill or, if not, if the Government could give commitments to comply with them. We also consider that these recommendations should also be followed by Scottish Ministers when they make regulations under Part 1 of Schedule.



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