



Law Society
of Scotland

Exiting the EU: Scrutiny of Delegated Legislation – Further Call for Evidence

The Law Society of Scotland's Response

February 2018



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 House of Commons Procedure Committee Inquiry on Exiting the EU: scrutiny of delegated legislation. The Sub-committee has the following comments to put forward for consideration.

General Comments

1. The proposed (a) remit and (b) powers of the new sifting committee

In its Report on The Great Repeal bill and Delegated Powers (9th Report, Session 2016-17), the House of Lords Select Committee on the Constitution made various recommendations about the content of the Explanatory Memorandum which accompanies each SI 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]" and that the Explanatory Memorandum should set out clearly what the pre-exit EU law did, what effect the amendments will have on the retained EU law on and after exit day and why the amendments were considered necessary. Accordingly we believe that schedule 7 needs amendment. We note that some of the House of Commons Procedure Committee's recommendations relating to the establishment of the Sifting Committee have, following the Committee's Report Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report (HC386) been given effect to in the bill by amendments to Schedule 7 paragraphs 3 and 13. However, these amendments (welcome though they are) do not implement in full the recommendations of either the Procedure Committee or of the Constitution Committee. In particular the Constitution Committee considered that an instrument which "amends EU law in a manner that determines matters of significant interest or principle should undergo a strengthened scrutiny procedure" and that there should be an opportunity for the SI to be revised by the Minister in the light of the parliamentary debate. We echo the recommendations of the House of Lords Constitution Committee report on the European Union (Withdrawal) bill (9th Report Session 2017 – 2019) paragraph

227 which recommends that the Sifting Committee should have power to decide the appropriate scrutiny procedure for an instrument. The Procedure Committee also highlighted the need for a route for stakeholders to express to the Sift Committee their views on the political importance and/or drafting of the instrument and that there should be provision for the Committee to challenge the Government on the content or the drafting of an instrument and where necessary to recommend amendments. We hope that the Government will respond positively to these recommendations during the passage of the bill. The Procedure Committee made no recommendations regarding the House of Lords, given that it has its own structures for consideration of delegated legislation, but we echo the view that whatever structures are created by the two Houses should work constructively together.

The scrutiny of subordinate legislation under the bill needs to be improved so that MPs and Peers can adequately review the orders before they become law.

2. The resources to be available to the committee

It is crucial that the sitting Committee has sufficient resources to perform its important role. We are not able to estimate what will be needed in terms of staff until the true scale of the undertaking is known. However, one fact which is known is the time remaining before exit day. At the time of writing there are 407 days until exit day. This includes recesses and weekends so the number of sitting days could be so few as 300 days. Parliament and the Committee will need to be flexible and able to respond rapidly to the challenges which scrutiny of so many regulations will require.

3. Matters which the committee should take into account when determining whether an instrument should be proceeded with under the affirmative procedure

These should include those referred to in clauses 7, 8 and 9 of the European Union (Withdrawal) bill. They should also include those which relate to changes to devolved primary legislation.

In circumstances which the Sifting Committee considers appropriate it should have the capacity to assign an instrument to enhanced scrutiny such as the super affirmative procedure. The Hansard Society's initial reflections on the European Union (Withdrawal) bill's delegated powers and delegated legislation identify that the three most commonly used 'super-affirmative' models are those attached to the making of Legislative Reform Orders (LROs); Public Bodies Orders (PBOs); and Remedial Orders see: <https://www.hansardsociety.org.uk/blog/the-european-union-withdrawal-bill-initial-reflections-on-the-bill-s>.

4. Any other matters in relation to each instrument which the committee should consider as a matter of course with a view to reporting them to the House

We have no comment to make.

5. Information about each instrument which the Government should provide to the sifting committee

The Government needs to provide the following information:

- a) the EU legal basis of the instrument which is being amended
- b) details of the original scrutiny including summaries of the debates
- c) what the new order proposes which is different from the original
- d) how the new order complies with Human Rights and the Devolution legislation implications.
- e) environmental and equalities assessments

6. Options available to the committee and to the House should the Government disagree with a committee recommendation on the use of the affirmative procedure

We take the view that the views of the House should prevail.

7. The process whereby external stakeholders may make representations to the sifting committee and other relevant select committees on each instrument

External stakeholders should be able to comment on drafts of the orders before they are finalised. This will help to minimise problems when the order is introduced into Parliament. External stakeholders should also be able to send representations to the Committee and the Committee should be empowered to invite stakeholders to provide oral evidence if that would help the Committee's consideration.

The Committee (and other Select Committees) should ensure that their pages on Parliament's website contain details of all transposition order which are under consideration.

8. Collaboration between the sifting committee and departmental and other select committees in the scrutiny of proposed instruments

This is a matter for the Committee Chairman and the House authorities but we encourage the relevant Committees to work together.

9. Collaboration between the sifting committee and the Joint Committee on Statutory Instruments

This is a matter for the authorities in both Houses and the Committee Chairman but we encourage the Committees to work together.

10. Collaboration with relevant committees of the House of Lords

This is a matter for the authorities in both Houses but we encourage the relevant Committees to work together. It will be important that there is overall cooperation to ensure efficient and effective scrutiny is carried out.



For further information, please contact:

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