



Law Society  
of Scotland

# The Lords Amendments to the European Union (Withdrawal) Bill House of Commons Consideration

Briefing by the Law Society of Scotland

June 2018



## Introduction

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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.

Our Constitutional Law sub-committee welcomes the opportunity to consider the House of Lords Amendments to the European Union (Withdrawal) Bill.

The amendment references are to the list amending HL Bill 79, the bill as first printed for the House of Lords.

The sub-committee has the following comments to make which relate only to specific clauses in which we had a particular interest.

### After Clause 3 Amendment 4

This clause requires that retained EU law in Employment and Equality Rights Health and Safety Entitlements Consumer Standards and Environmental Standards and Protection can only be amended, repealed or revoked by primary legislation or where the changes are technical in nature by subordinate legislation.

#### Our Comment

We welcomed the amendments to the sifting procedure for regulations which were introduced by amendments to Schedule 7 paragraph 3.

We believe that if Amendment 4 is accepted into the bill by the House of Commons there may need to be changes to the procedural arrangements in the Sifting Committees both in the House of Commons and the House of Lords.

### Clause 5 Amendment 5

This amendment retains the EU Charter of Fundamental Rights in domestic law after exit day.

#### Our Comment

Clause 5(4) provided that the Charter of Fundamental Rights is not part of domestic law on and after exit day. Paragraphs 103 and 104 of the explanatory notes argued that it was unnecessary to include it as part of retained EU law because the Charter merely codifies rights and principles already inherent in EU law and would therefore form part of that law when it becomes retained EU law. However even if this was the case (and this is arguable), it would then make no difference if the Charter did form part of the retained EU

law. This does not, therefore, appear to be a sufficient reason for excluding the Charter from forming part of retained EU law in the same way as other pre exit EU law.

It makes sense for the Charter to form part of retained EU law because it only applies in areas to which EU law applies. The Government should reconsider its decision not to include the Charter as part of retained EU law which would then form 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. The Charter is part of EU law applicable at present to the UK and, as with any other aspect of EU law, should form part of retained EU law on exit day, subject to whatever modifications as may be necessary.

### **Clause 6 Amendments 6 - 8**

This Government amendment clarifies how the UK Courts treat the judgements of the Court of Justice of the European Union after Exit day.

#### **Our Comment**

We welcome these amendments which have improved the clarity of Clause 6.

### **New Clause Amendment 9**

This Government amendment seeks to clarify the status in domestic law of different categories of retained EU law.

#### **Our Comment**

Although these amendments are necessarily complex they do clarify the status of retained EU Law and we consider them to be improvements to the bill.

### **Clause 7 Amendment 10**

This amendment changes the wording in Clause 7 which considers the scope of the correcting power by replacing the text “the Minister considers appropriate” with the words “is necessary”.

#### **Our Comment**

We had argued for this change since the bill was introduced. We hope that the House of Commons will accept this amendment.

### **Clause 7 Amendment 15**

These Government amendments mean that regulations under Clause 7(1) cannot be used to amend the Scotland Act 1998 or the Government of Wales Act 2006.

#### **Our Comment**

We had argued for this amendment since the Committee stage in the House of Commons and we welcome the Government’s Decision to bring forward amendment 15 and the relevant consequential amendments.

## Clause 11 Amendment 26

This amendment removes the original clause 11(1) – (3) – the original provisions on restricting the competence of the devolved legislatures.

The amendment provides that there is a presumption that the competency of the devolved legislators is not restricted unless the UK Government makes specific regulations in areas where a common framework is required.

The amendments to Clause 11 are very complex and have been opposed by the Scottish Government and do not have the consent of the Scottish Parliament they do however have the consent of the Welsh Assembly.

In conjunction with amendments to Schedule 3, there is a mechanism for introducing a consent decision under amendment 85 which is

- (a) Decision to agree a motion consenting to the laying of the draft;
- (b) Decision not to agree a motion consent to the laying of the draft or
- (c) A decision to agree a motion refusing to consent to the laying of the draft.

## Our Comment

We have considered the government amendments and have the following comments to make:

- a. There is an extremely complex group of amendments which may give rise to interpretational difficulties in the future. For example, the definition of “consent decision” which occurs in amendment 89DA at new section 30A(3) and (4) is drafted in such a way that a “consent decision” can include a “decision not to agree a motion consenting” and a “decision to agree a motion refusing to consent”. To define “consent decision” as including a failure or refusal to consent is a drafting approach which is lacking in clarity. We think that the government should explain its thinking on these provisions and should consider ways in which to improve the drafting. Perhaps “decision on consent” or “decision relating to consent” would perhaps have more accurately captured what is meant and this could be expressed in a consequential amending order.
- b. We note the terms of new section 30A (7) and (9) and the corresponding amendments to Schedule 3. We have argued for a sunset provision in relation to clause 11 since the Bill was at committee stage in the House of Commons. The terms of new section 30A(7) and (9) are time limits on the effectiveness of new section 30A and regulations made under that section and to that extent we welcome their inclusion in 30A. Section 30A(9) does not provide that the regulations restricting the competence of the Scottish Parliament will be automatically revoked at the end of the period of 5 years after they come into effect. It provides that the regulations do not apply to any Act of the Scottish Parliament (ASP) which receives the Royal Assent after that date. This means that the Bill for such an ASP will be outside the legislative competence of the Parliament when it is introduced into Parliament and during its Parliamentary progress for up to a period of 7 years. It could even lead to the conclusion that it would be referred to the United Kingdom Supreme Court by the Law Officers for that reason. The Government should clarify if this outcome is its intention.

There are analogous provisions applicable to the executive competence of the Scottish Ministers in Schedule 3 paragraphs (10),(11) and (12). Schedule 3 Part 1 also deals with analogous provisions for the other devolved administrations.

- c. We note the terms of Schedule 3 Part 2 and the reference in paragraph 4 (1)(b) to how the “principles agreed between Her Majesty’s Government and any of the appropriate authorities...have been taken into account...” It was helpful to have clarification that these principles relate to “common frameworks”

agreed in connection with the intersection of EU Law and devolved powers. We recommend that Parliament have sight of the frameworks by their publication in the Library of each House. However the bill is silent on what should happen if there is no agreement between the Government and the appropriate authorities. Should the Minister not also be obliged to send a copy of the report to the Presiding Officer of the Scottish Parliament and the other devolved legislatures?

### **Schedule 1 amendments 52 and 53**

#### **Our comment**

Amendments 52 and 53 delete parts of schedule 1 including paragraph 1(2)(b) and (3).

We had concerns about the clarity and efficacy of these paragraphs in particular schedule 1, paragraph 3(1) which would 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. We suggested the deletion of schedule 1 in earlier stages of the bill.



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