



Law Society
of Scotland

Secondary legislation and the European Union (Withdrawal) Bill – inquiry into the sifting criteria

Submission from the Law Society of Scotland's
Constitutional Law Subcommittee
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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 Secondary legislation and the European Union (Withdrawal) Bill – inquiry into the sifting criteria. The Sub-committee has the following comments to put forward for consideration.

General Comments

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 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. We welcomed the fact that some of the House of Commons Procedure Committee's recommendations relating to the establishment of the Sifting Committee were, following that Committee's Report: Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report (HC386) given effect to in the bill by amendments to Schedule 7 paragraphs 3 and 13.

We welcome that the sifting procedure has been extended to the House of Lords in terms of Schedule 7 paragraph 3.

What criteria should the SLSC apply in deciding whether to recommend that a proposed negative instrument laid under the withdrawal legislation should be upgraded to an affirmative instrument?

The Committee could consider the following criteria:

- 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

The Committee currently draws to the “Special attention of the House” any statutory instrument which it considers may be “interesting, flawed or inadequately explained by the Government”.

The criteria could reflect the Constitution Committee’s consideration that an instrument which “amends EU law in a manner that determines matters of significant interest or principle should undergo a strengthened scrutiny procedure”. The Committee should also take into account the terms of clause 4 of the bill which was added during Report Stage concerning enhanced protection for certain areas of EU Law.

Should those criteria reflect or differ from the grounds for reporting currently contained in the SLSC's terms of reference?

These criteria amplify the grounds for reporting currently contained in the Committee’s terms of reference.

Are there any categories of subject matter, aside from those stipulated on the face of the legislation (such as the creation of criminal offences or making retrospective provision), for which there should be a presumption in favour of the affirmative procedure?

Schedule 7 paragraph 1 (1) and 1 (2) sets out the terms for the application of affirmative procedure but this paragraph does not include the creation of a relevant criminal offence or the making of a retrospective provision. ‘Relevant criminal offence’ is defined in clause 19 and means “an offence for which an individual who has reached the age of 18 (or in relation to Scotland or Northern Ireland, 21) is capable of being sentenced to imprisonment for a term of more than 2 years...” Schedule 7 paragraph 1(2)(c) does however allow a statutory instrument which “creates, or widens the scope of, a criminal offence”. These different provisions concerning regulations and criminal offences could be productive of confusion and lack clarity.

The creation of a relevant criminal offence or retrospective provisions are excluded from the scope of regulations under sections 9(7) and 11(3). Although the phrasing in these subsections is that regulations *may* (rather than *must*) *not* include among other things retrospective provisions we believe that this is intended to provide that only primary legislation could effect a retrospective change.

A new category of subject matter could be that the proposed regulations create a relevant basis of action in tort or delict.

How should the SLSC collaborate with the Joint Committee on Statutory Instruments? and How should the SLSC collaborate with the House of Commons European Instruments Scrutiny Committee?

These questions invite similar answers. It is a matter for the authorities in both Houses (and may be subject to the views of the House of Lords Liaison Committee following its review of Committees) but we encourage the relevant Committees to work together by conducting closer liaison, perhaps holding joint meetings and sharing views. It will be important that there is overall cooperation to ensure efficient and effective scrutiny is carried out.

It is crucial that the Committee has sufficient resources and flexibility 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 312 days until 29 March 2019. This includes recesses and weekends so the number of sitting days could be fewer than 200 days. Parliament and the Committee will need to be flexible and able to respond rapidly to the challenges which prospective scrutiny of a large number of regulations will require.



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