



Law Society  
of Scotland

# Response by the Law Society of Scotland

The White Paper on Legislating for the Withdrawal  
Agreement between the United Kingdom and the  
European Union



September 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.

The Society's Constitutional Law Sub Committee welcomes the opportunity to respond to the Inquiry by the UK Government White Paper for Legislating for the Withdrawal Agreement between the United Kingdom and the European Union. The Sub Committee has the following comments to put forward for consideration.

## General Comments

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### Chapter 1: Introduction

The publication of the White Paper on *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union* is something which we commend. It is useful to see what the UK Government is considering in terms of the shape of the European Union (Withdrawal Agreement) bill which would be expected to be introduced following agreement with the EU and approval of the Withdrawal Agreement in the House of Commons and debate on the motion in the House of Lords under Section 13 of the European Union (Withdrawal) Act 2018. (the 2018 Act).

The 2018 Act Section 1 provides that the European Communities Act 1972 (ECA) will be repealed on exit day, 29 March 2019 at 11pm and seeks to ensure that EU law as then applies in the UK will be converted into UK law as retained EU law.

The EU (Withdrawal Agreement) Bill will seek to give effect in UK law to the Withdrawal Agreement with the EU. The Withdrawal Agreement provides in Article 121 for a transitional period during which EU law will continue to apply until 31 December 2020.

The proposed White Paper does not propose to achieve this by amending the date of exit day to 31 December 2020. Instead it states that this should be achieved by “[amending the EU Withdrawal Act] so that the effect of ECA is saved for the time limited implementation period” [paragraph 60]. In other words, by means of transitional provision the proposed EU (Withdrawal Agreement) Act will both preserve the effect of the ECA during the implementation period and ensure that its effect comes to an end on 31 December 2020.

This will mean

- that the relevant provisions of EU law will continue to have direct effect and be supreme over Acts of the UK Parliament;
- that the UK will remain bound to implement any new non-directly effective EU law during the transition or implementation period and even although it may be scrutinised by the UK Parliament or by the Devolved Legislatures the UK will not have any part to play in its making because it will no longer be a member of the EU.
- that, as the White Paper puts it, the EU Withdrawal Agreement bill “will amend the EU (Withdrawal) Act 2018 so that the conversion of EU law into “retained EU law”...can take place at the end of the implementation period” [paragraph 69] and not on 29 March 2019. In other words, the Bill will need to extend the regulation amending powers contained in the EU (Withdrawal) Act 2018 to 2 years after the end of the implementation period, that is until 31 December 2022. The Statutory Instruments and Scottish Statutory Instruments which are being drafted at present to take effect on 29 March 2019 will also have to be extended to take account of EU law as it exists on 31 December 2020.

It is important to remember that the Withdrawal Agreement and its implementing legislation does not take place in isolation from other aspects of the Withdrawal. These include:-

1. The approval of the Withdrawal Agreement by the European Parliament under Article 50.
2. Where aspects of the European Union (Withdrawal Agreement) bill engage with the Sewel or Legislative Consent Convention the consent of the devolved Legislatures in Scotland, Wales and Northern Ireland.
3. Compliance with the European Charter of Fundamental Rights and the Human Rights Act 1998.
4. The need for consultation with stakeholders throughout the UK.

We have proposed since the referendum that a Whole of Governance approach should be adopted by the Government when proposing legislative or policy changes in connection with the UK’s withdrawal from the EU. We reiterate that this is the best way to achieve legislation which is workable, practical and will achieve its objectives.

One issue which is missing from the White Paper (which is acknowledged in paragraph 14) is that of the consequences of there being no Withdrawal Agreement in place by 29 March. Notwithstanding the publication of Technical Notes which set out the Government position regarding withdrawal without a Withdrawal Agreement being in place, we expect that the Government will, in the event that negotiation for the Withdrawal Agreement have failed, take immediate steps to consult on the contingency arrangements which will need to be put in place in the early part of 2019 in advance of exit day. These include important areas included in “ongoing processes and arrangements” which the White Paper notes include ongoing police and judicial co-operation in criminal civil and commercial matters e.g. pending criminal, civil and

family cases which impact on the rule of law and the interests of justice and impact significantly on the Human Rights of those involved.

The provisions of the European Union (Withdrawal) Act 2018 Section 13(4) only apply if there has been a Withdrawal Agreement which has been rejected.

## **Chapter 2: Citizens' rights**

### **2A: Rights related to residence**

#### **Our Comments**

In the Society's response to the UK Government's paper: *The United Kingdom's Exit from the European Union: Safeguarding the position of EU Citizens living in the UK and UK Nationals living in the EU* we stated "Although issues of reciprocity between the UK and the EU 27 and the EU Institutions are matters of political negotiation, it is however important that the agreed reciprocal position should be backed by legal rules that are enforceable across the EU and the UK". We are pleased that this reciprocation of rights is recognised in the White Paper and will be legislated in respect of EU citizens residing in the UK in the EU (Withdrawal Agreement) Bill. As the White Paper states "The Bill, as a piece of domestic UK legislation, will only legislate for EU citizens lawfully resident in the UK. The Agreement requires EU Member States to implement arrangements around residence for UK citizens currently living in the EU. They must do so in conformity with the terms of the Withdrawal Agreement, ensuring that the rights of UK citizens in the EU will be protected" [paragraph 24]. We welcome the acknowledgement in the White Paper [paragraph 18] that the EU (Withdrawal Agreement) Bill will give effect in UK law to part 2 of the Withdrawal Agreement which covers:-

- a. rights related to residence;
- b. equal treatment;
- c. mutual recognition of professional qualifications;
- d. coordination of social security systems and
- e. protections for rights and monitoring authority

We note the terms of the *EU Settlement Scheme: Statement of Intent*. The detail provided in this document is very welcome.

### **2B: Equal treatment**

#### **Our Comments**

We agree with the approach being taken by the UK Government. We note that in paragraph 35 the White Paper states "The UK already provides significant equal treatment protections. The Bill may include

additional provisions required for those in scope of the Withdrawal Agreement. These changes are likely to be technical in nature”. It would be helpful to know what changes may be in contemplation.

## **2C: Mutual recognition of professional qualifications**

### **Our Comments**

We note the terms of paragraphs 37 and 38 concerning the recognition of professional qualifications and that the Withdrawal Agreement will “also cover decisions enabling lawyers to practise under the host state’s professional title under the Lawyers Establishment Directive”.

The White Paper notes that “it will be for the EU and its Member States to implement these arrangements as they relate to UK citizens living in the EU and they must do so in conformity with the Withdrawal Agreement” [paragraph 38].

It is in our view highly important that those reciprocal rights are implemented in the EU27 specifically as we have detailed them in previous responses to Withdrawal documents. We believe that the focus on citizens’ rights was the correct approach to take in connection with the Withdrawal Agreement. However providing citizens with rights without providing them with the capability to obtain legal advice may render these rights useless. That is why we believe that it is important that citizens have proper access to their lawyers so they can obtain advice about the enforcement of the rights which are recognised in the Agreement.

### **Cross Border Supply of Legal Services**

The regime to regulate the cross-border supply of legal services and the rules designed to facilitate the establishment of a lawyer in another Member State have been in force for a number of years. There are three key pieces of legislation that affect the legal profession:

*Lawyers’ Services Directive of 1977 (77/249) implemented by the European Communities (Services of Lawyers) Order 1978.*

The Lawyers’ Services Directive 1977 governs the provision of services by an EU/EEA/Swiss lawyer in a member state other than the one in which he or she gained his or her title - known as the ‘host state’. Its purpose is to facilitate the free movement of lawyers, but it does not deal with establishment or the recognition of qualifications. The directive provides that a lawyer offering services in another Member State - a ‘migrant’ lawyer - must do so under his or her home title. Migrating lawyers may undertake representational activities under the same conditions as local lawyers, save for any residency requirement or requirement to be a member of the host Bar.

However, they may be required to work in conjunction with a lawyer who practises before the Judicial Authority in question. For other activities the rules of professional conduct of the home state apply without prejudice to respect for the rules of the host state, notably confidentiality, advertising, conflicts of interest, relations with other lawyers and activities incompatible with the profession of law.

*Lawyers' Establishment Directive of 1998 (98/5) implemented by the European Communities (Lawyers Practice) (Scotland) Regulations 2000.*

The Establishment Directive 1998 entitles lawyers who are qualified in and a citizen of a Member State to practise on a permanent basis under their home title in another EU/EEA member state, or Switzerland. The practice of law permitted under the Directive includes not only the lawyers' home state law, community law and international law, but also the law of the Member State in which they are practising – the 'host' state.

However, this entitlement requires that a lawyer wishing to practise on a permanent basis registers with the relevant Bar or Law Society in that state and is subject to the same rules regarding discipline, insurance and professional conduct as domestic lawyers.

Once registered, the European lawyer can apply to be admitted to the host state profession after three years without being required to pass the usual exams, provided that he or she can provide evidence of effective and regular practice of the host state law over that period. We note that in terms of the Withdrawal Agreement this means that in order to be admitted under this route the period of 3 years must expire before 31 December 2020. If the Withdrawal Agreement is not agreed only those who have been admitted before 29 March 2019 will be able to follow this route.

*Recognition of Professional Qualifications Directive (2005/36) implemented by the European Communities (Recognition of Professional Qualifications) Regulations 2016.*

Re-qualification as a full member of the host State legal profession is governed by the Recognition of Professional Qualifications Directive. Article 10 of the 1998 Lawyers' Establishment Directive is essentially an exemption from the regime foreseen by the Recognition of Professional Qualifications Directive.

The basic rules are that a lawyer seeking to re-qualify in another EU/EEA member state or Switzerland must show that he or she has the professional qualifications required for the taking up or pursuit of the profession of lawyer in one Member State and is in good standing with his or her home Bar.

The Member State where the lawyer is seeking to re-qualify may require the lawyer to either:

- a. complete an adaptation period (a period of supervised practice) not exceeding three years; or
- b. take an aptitude test to assess the ability of the applicant to practise as a lawyer of the host member state (the test only covers the essential knowledge needed to exercise the profession in the host Member State and it must take account of the fact that the applicant is a qualified professional in the Member State of origin). Has the Government taken into account the Human Rights Implications relating to lawyers and their clients who may have their livelihoods and their rights disrupted by Brexit?

In addition, Directive 2006/123/EC on Services in the Internal Market which regulates the provision of services in the European Union also touches on the legal profession is implemented by the provision of Services Regulations 2009.

## **2D: Coordination of social security systems**

### **Our Comments**

We have no comments to make.

## **2E: Protections for rights and monitoring authority**

### **Our Comments**

We note that the EU (Withdrawal Agreement) bill will enable EU citizens to rely directly on the rights in the Withdrawal Agreement and reflect the principle that those rights will take precedence over any inconsistent provision in domestic law. See our comments on the residence provisions in relation to chapter 2A. We had proposed an amendment to the EUWB that the rights provided for under the Withdrawal Agreement should be reflected in that bill. The amendment was debated on the first day of the Report stage in the House of Commons although it was not incorporated in that bill (Hansard 16 January 2018 Volume 634, col 754), and we are pleased that the Government intends to legislate for the Bill to ensure that the Withdrawal Agreement, including EU law underpinning it, is interpreted consistently in the UK and the EU. We note that the power to refer cases concerning the Withdrawal Agreement to the CJEU will now continue until 2028.

The White Paper should detail the additional procedural step which would need to be taken before there were a repeal of any part of the primary legislation. The reference to the European Union Act 2011 suggests that the additional step will be the exercise of additional parliamentary control of certain decisions under the (now repealed) section 10. In the light of the doctrine of Parliamentary Sovereignty, how effective will procedural steps be in providing any guarantee of those citizens' rights under the Withdrawal Agreement? How would Parliament be legally obliged to follow those procedural steps? Could not any subsequent Parliament simply repeal them?

## **Chapter 3: The implementation period**

### **3A: Duration and scope**

#### **Our Comments**

We note that the implementation period will last from 29 March 2019 at 11pm (described as “the moment of exit”) until 31 December 2020 (presumably at 11pm GMT). Paragraph 55 it states that the “relevant provisions in the Bill will be sunsetted so that they cease to apply from 31 December 2020”. Will they be repealed at that point or retained on the statute book?

### **3B: Relationship to EU law**

#### **Our Comments**

The White Paper acknowledges, following Part 4 of the Withdrawal Agreement, that “EU law will continue to apply to and in the UK under the terms set out in the Withdrawal Agreement. New pieces of directly

applicable EU law that are introduced will continue to apply automatically within the UK; other new EU measures introduced during the implementation period will need to continue to be implemented domestically” [paragraph 57].

Given that during the implementation or transition period the United Kingdom will no longer participate in or nominate or elect members of the Union institutions, nor participate in the decision-making or the governance of the Union bodies, offices and agencies it will be difficult for adequate engagement in relation to new EU legislation to take place other than through what are effectively forms of lobbying by the UK Government, the devolved legislatures and administrations and stakeholders.

We agree that there is a continuing need for effective scrutiny by the UK Parliament and of close engagement by Government with this scrutiny process and we emphasise that this scrutiny should include the devolved legislatures and administrations. The work of the House of Lords Liaison Committee Interparliamentary Forum on Brexit will be very important in this area. The Government should detail exactly how the scrutiny carried out in terms of paragraph 59 will be translated into representations to the European institutions for example will the Government seek to adopt a joint committee decision process like that under the EEA?

Saving the effect of the ECA for the time-limited duration of the implementation or transition period, may be one way to provide continuity and certainty to businesses and individuals. Consultation on the draft provisions of the EU (Withdrawal Agreement) bill would be helpful.

We note the terms of paragraph 67 which states “The Government will discuss with the devolved administrations how to make sure that EU-related legislation made by the devolved institutions likewise continues to function for the duration of the implementation period”. The Government should clarify what is meant by EU related legislation and detail exactly how discussions will take place with the devolved institutions.

We agree with paragraphs 68-77 that the amendments detailed are necessary but as these touch on aspects of the European Union (Withdrawal) Act 2018 and devolved powers we underscore the need for the Government to engage with the devolved administrations. We take the view that legislating for the European Union (Withdrawal Agreement) bill will engage the Sewel or Legislative Consent Convention.

We note the existing bills in the Brexit Schedule include the Trade, Taxation (Cross-border Trade), Agriculture, Fisheries and Immigration bills. We think the Government should respond to the following questions:-

- i. Are other bills which it envisages needed to be introduced before exit day?
- ii. What engagement it has had with the devolved administrations in connection with the additional bills?  
and;
- iii. Will the Legislative Consent Convention apply to those additional bills?

### **3C: Governance, enforcement and safeguards**

#### **Our Comments**

#### **Court of Justice of the European Union**

We note the terms of paragraph 78 and agree that this approach follows Article 126 of the Withdrawal Agreement. It is appropriate to highlight that there will be no Judge from the UK at the CJEU from exit day.

#### **Safeguards**

Details are needed about the method of appointment of members of the UK representation on the Joint Committee. How will they be chosen? How representative will they be of all the jurisdictions in the UK? Would it not be better for there to be legislation so that the remit, powers and accountability of the Joint Committee will be transparent?

### **3D: Participation in EU institutions, agencies and bodies**

#### **Our Comments**

We note that the UK and the EU have agreed that representatives or experts from the UK will be able to continue to attend certain Commission-led EU meetings, and meetings of EU entities where the presence of the UK is necessary and is in the interests of the Union, or where the discussion concerns acts addressed to the UK and its citizens. We expect that the UK Government will continue the operation of the Concordat on the Coordination of European Union Policy regarding the devolved administrations and the correlative Memorandum of Understanding subject to such modifications as are necessary.

### **3E: International agreements, trade negotiations and external representation**

#### **Our Comments**

We agree that there will need to be provision in the EU (Withdrawal Agreement) bill for international agreements to which the UK is a party as a result of or relevant to its membership of the EU. Paragraph 92 notes that under Article 2 (iv) of the Withdrawal Agreement the UK is to be treated as a Member State for the purpose of international agreements and that Article 6 provides that subject to certain exception the term "Member State" includes the UK. Paragraph 92 also states that "Third parties to the agreements will be notified of this approach", reflecting the foot note to Article 124. We also think it is appropriate for the Government to detail:-

- (a) how this notification process will work and
- (b) all the agreements which will be legislated for in the EU (Withdrawal Agreement) bill.

These agreements should be listed in a comprehensive schedule.

### **3F: Fisheries policy**

#### **Our Comments**

We note the terms of chapter 3F.

### **3G: Justice, home affairs and foreign policy, security and defence**

#### **Our Comments**

We note that paragraph 100 details that the UK will continue to be able to choose whether to participate in additional Justice and Home Affairs and Schengen measures during implementation where these amend, build upon or replace an existing measure in which the UK already participates. In order to support continuing cooperation, the UK can also be invited by the EU to cooperate in relation to entirely new measures; this will allow for continuity of cooperation, whilst ensuring that the UK cannot be bound by any measures that it does not deem to be in the national interest. We emphasise the need to engage with the Scottish Government, the Lord Advocate and Scottish justice agencies including the Scottish Courts and Tribunal service during the processes envisaged in this paragraph.

### **Chapter 4: The negotiated financial settlement**

#### **Our Comments**

We have no comment to make.

### **Chapter 5: Procedures for approval and implementation of the Withdrawal Agreement and framework for our future relationship**

We welcome the Government's commitment to parliamentary scrutiny of our process of withdrawal but note that there is no reference to engagement with the devolved legislatures in paragraph 138. It is likely that the devolved legislatures and administrations will have a keen interest in all the legislation which implements the Withdrawal Agreement and it is important that there is sufficient engagement to take into account the views of the devolved legislatures.

### **5A: Overview of sequencing**

#### **Our Comments**

We note the helpful overview of sequencing. The timetable is challenging, particularly for the European Union (Withdrawal Agreement) bill. We urge the Government to consult as widely as possible on a draft of the bill so that issues which might delay its passage can be considered at the earliest possible point and consideration can be given to the broadest range of views about its content.



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