



Law Society  
of Scotland

# The House of Commons Procedure Committee's inquiry, Withdrawal Agreement Bill: call for evidence

## The Law Society of Scotland's Response

October 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 consider and respond to the House of Commons Procedure Committee Inquiry on Withdrawal Agreement Bill: call for evidence. The Sub-committee has the following comments to put forward for consideration.

## General Comments

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- The nature and extent of the delegated powers the Government is likely to be required to claim in the Withdrawal Agreement Bill, in the event a withdrawal agreement is reached and approved by the House of Commons
- 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).
- We welcome the Government's commitment in the White Paper on Legislating for the Withdrawal Agreement to parliamentary scrutiny of the 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 so that we have a workable, certain body of law following withdrawal.

The European Union (Withdrawal) Act 2018 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 currently provides in Article 121 for a transitional period during which EU law will continue to apply to the UK until 31 December 2020 (subject to any potential change which negotiations may agree).

The 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.

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].

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 Inter-parliamentary 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.

- 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.
- the appropriate level of parliamentary control over the exercise of such powers

The appropriate level of parliamentary control should ensure that there is sufficient scrutiny of the subordinate legislation taking into account the purpose of that legislation. EU legislation made during the implementation or transition period should be subject to the same assessment and scrutiny protocols as currently apply to EU Law.

- *whether instruments to be made under such powers ought to be subject to sifting by the European Statutory Instruments Committee*

We agree that the instrument should be sifted and considered by the European Statutory Instruments Committee.

- *the time constraints which the exit timetable imposes on the exercise of such powers*

The timetable does impose time constraints but more information is needed about the legislation which is expected from the EU during the implementation or transition period in order to provide an answer.

It is important to set the implementation or transition period in the context of the political developments which are expected during 2019/20.

These include:

*(a) European Parliament*

- (i) Last scheduled meeting of present Parliament 18 April 2019
- (ii) Parliament elections 23-26 May 2019
- (iii) New Parliament inaugural session 2 July 2019

*(b) European Council*

- (i) Council rotating presidencies covering the period are :  
  
Romania January-June 2019  
  
Finland July-December 2019  
  
Croatia. January-June 2020  
  
Germany July-December 2020

*(c) European Commission*

The Spitzenkandidat process may apply and would require the nomination by EU political parties of candidates for the role of Commission President. The party which wins the most seats in Parliament under this process gets the first opportunity to attempt to form a majority in the EU Parliament to back their candidate.

Until these processes are complete any assessment of the future EU legislative programme (and consequently any impact on the UK or devolved legislative requirements) during the implementation or transition period is speculative.

- *whether there is likely to be any justifiable requirement for an urgency procedure for the exercise of such powers*

We believe it would be prudent to make provision for an urgency procedure in the EU (Withdrawal Agreement) bill.



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