



Law Society
of Scotland

Consultation Response

Parliamentary Scrutiny of Treaties

December 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 Constitution Committee Inquiry: *Parliamentary Scrutiny of Treaties*.¹ The Sub-committee has the following comments to put forward for consideration.

Consultation Response

1. How effective is Parliament's current scrutiny of treaties in both holding the Government to account and helping it get the best agreements possible? The current scrutiny arrangements are not very effective at holding the Government to account nor in helping to get the best agreements possible. What are the current arrangements?

Under the UK's constitutional arrangements, the Government is the body which, in exercise of the Royal prerogative, negotiates, signs and ratifies treaties to which the UK wishes to accede. Our system is a dualist system and Parliament has a role in ensuring that the treaties to which the UK has agreed are then implemented and given the force of law. This power is quite distinct from having a role in the creation of the treaty which is ratified. Parliament (and this also applies to the devolved legislatures) has no formal role in the agreeing of treaties nor the binding of the UK by treaty obligations.

Special scrutiny rules do apply to EU treaties which are not covered by the Constitutional Reform and Governance Act 2010. There are a number of Committees which have scrutinised the EU Withdrawal process: the House of Commons European Scrutiny Committee is taking evidence on the EU Withdrawal Agreement negotiations; the House of Lords Home Affairs Committee has looked at the

¹ <https://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/inquiries/parliament-2017/parliamentary-scrutiny-of-treaties/>

proposed UK/EU security treaty; and finally, the House of Lords European Union Select Committee has taken evidence on Brexit: the Withdrawal Agreement and Political Declaration. The report of the EU Select Committee published on 5 December 2018 (HL Paper 245) draws specific attention to the difference between the UK and the EU in conducting negotiations. In paragraph 310 the report states that *“the negotiations on the future relationship should be subject to full Parliamentary scrutiny. [They] noted that at EU level the negotiations are likely to take place under article 217 or 218 TFEU and will be subject to detailed and transparent scrutiny by the European Parliament. The UK Parliament and British people deserve the same transparency and accountability”*. These are views with which we agree.

2. How useful are the processes and powers under the Constitutional Reform and Governance Act 2010 (CRAG) and do they strike the right balance between Parliament and government?

The processes of the Constitutional Reform and Governance Act 2010 (the 2010 Act) are as follows:

Part 2 (sections 20-25) of the 2010 Act requires the Government to lay before Parliament most treaties it wishes to ratify (section 20), along with an Explanatory Memorandum (section 24). This is a statutory expression of the Ponsonby Rule which had governed parliamentary scrutiny of treaties since 1924.

The 2010 Act enables parliamentary disapproval of treaties by statute by which the House of Commons can block ratification. Under the Act the Government cannot ratify a treaty for 21 ‘sitting days’ (days when both Houses are sitting) after it is laid before Parliament. If within the 21 sitting days either House agrees a motion that the treaty should not be ratified, the Government must lay a statement setting out reasons for wanting to ratify. If the House of Commons resolves against ratification a further 21 sitting day period commences during which the treaty cannot be ratified. If the House of Commons again resolves against ratification during this 21 sitting day period, the process is repeated. This can continue indefinitely which means that the House of Commons block ratification. It is worth noting that these powers have not yet been used.

Neither House has yet resolved against ratification of a treaty under these provisions.

Exclusions

The 2010 Act contains a number of exclusions and limitations. Some types of treaty are excluded from the 2010 Act.

The 2010 Act does permit an opportunity to scrutinise treaties but does not require scrutiny, debate or a vote on treaties. Furthermore, it is not clear and transparent. We consider that process should be more straightforward and direct.

There have been some calls for a process that results in more debates and votes on treaties, involving committees, but as yet Parliament has not introduced provisions for systematic scrutiny of treaties. We

take the view that such arrangements are necessary and should be implemented in good time to deal with the consequences of Brexit.

3. What challenges does Brexit pose for Parliament's consideration of treaties?

The most immediate challenge which Brexit presents is that relating to the consideration of the Withdrawal Agreement. The EU (Withdrawal) Act 2018 (EUWA) section 13 seeks to provide a 'meaningful vote' and related approval processes for the Withdrawal Agreement. It is not always appreciated that the Withdrawal Agreement is a treaty like any other and that the CRAG provisions apply to it, in addition to those in the EUWA. Therefore, the Withdrawal Agreement is subject to dual certification by Parliament.

During the implementation or transition period the UK would be treated as a Member State, for the purposes of EU International Agreements with third countries. However, during this time the UK would also be able to negotiate, sign and ratify new treaties which would come into effect after the implementation or transition period ends.

The Political Declaration seeks to set out the basis of the future relationship between the UK and the EU. This will be in the form of an Association Agreement with two major components: the economic partnership and the security partnership.

The UK Government has consulted on proposed agreements with the US, Australia and New Zealand. It could be expected that Parliament should have an enhanced role in scrutinising these treaties as they may be subject to critical appraisal by stakeholders.

4. What role should Parliament have in the future in scrutinising treaties, from potentially requiring approval for the negotiating mandate through negotiations themselves to treaty agreement, as well as in subsequent treaty actions like amendments, derogations, enforcement and withdrawal? How should this link to Parliament's consideration of treaty-implementing legislation?

This issue has been considered by a number of Parliamentary committees over the years and the Joint Committee on Human Rights has issued many reports on, for example, scrutiny of international Human Rights law. Its report on Protocol No. 14 to the European Convention on Human Rights (First Report of Session 2004–05 HL Paper 8 HC 106) stated:

"5. In keeping with a number of recent recommendations, we consider it desirable for Parliament to be more involved before the ratification by the Executive of treaties which incur human rights obligations on behalf of the UK. The purpose of the constitutional practice known as the Ponsonby Rule is to enable Parliament to be informed about a treaty that the Executive intends to ratify, and to give it an opportunity to debate it if it is controversial.

In practice, however, there is no mechanism for reliably scrutinising treaties to establish whether they raise issues which merit debate or reconsideration before they are ratified.

6. The problem of lack of effective parliamentary scrutiny is particularly pressing in relation to human rights treaties, because it is now well established that UK courts will have regard to such treaties in a wide range of circumstances, whether or not they are incorporated, and the Executive and administration also routinely have regard to such treaties in both policy-making and decision-making.

7. We have therefore decided to report to Parliament in future in relation to all human rights treaties, or amendments to such treaties, in respect of which there is a need to ensure that Parliament is fully informed about the background, content and implications of such treaties. This will enable parliamentarians to decide whether it is appropriate to call for a debate on the treaty concerned before it is ratified, and hopefully ensure that any such debate is properly informed. We consider that this will enhance the democratic legitimacy of human rights obligations incurred on behalf of the UK by the Executive pursuant to the prerogative power.”

These comments indicate that the problem of the inadequacy of scrutiny has been recognised for a considerable period of time. The current constitutional changes highlight that action ought to be taken to establish adequate scrutiny mechanisms before the prospective increase in treaty material begins.

5. To what extent, if at all, does the judgment of the Supreme Court in the Miller case on triggering Article 50 have implications for the government’s future treaty actions?

It is worthwhile noting that in *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union* 2017 UKSC 5, the Supreme Court’s judgement set out ‘two features of the United Kingdom’s constitutional arrangements’:

“...The first is that ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament ... The second feature is that ministers are not normally entitled to exercise any power they might otherwise have if it results in a change in UK domestic law unless statute, i.e. an Act of Parliament, so provides”.

“We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation”.

The ruling made it clear that the Government cannot make or withdraw from a treaty that amounts to a ‘major change to UK constitutional arrangements’ without an Act of Parliament.

Applying the principle to this case, the judgment held that the UK Government could withdraw from the EU Treaties only if Parliament ‘positively created’ the power for ministers to do so. This was because the EU Treaties are a source of domestic law and domestic rights which ministers cannot alter using the

prerogative alone. Parliament accordingly enacted the European Union (Notification of Withdrawal) Act 2017 to enable the notification of Withdrawal to be made.

6. Should different types of treaties be subject to different levels of scrutiny? If so, how should these be differentiated?

The Vienna Convention on the Law of Treaties² defines a ‘treaty’ as ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’ (Article 2(1)(a)).

A treaty is an agreement between sovereign states (countries) and in some cases international organisations, which is binding at international law. Treaties cover a multitude of topics ranging from political and security agreements covering national security and defence commitments (such as arms control treaties), economic treaties (such as the EU treaties or double taxation treaties), environmental treaties, and legal cooperation agreements (such as extradition treaties, human rights conventions such as ECHR or the UN Covenant on Human Rights and Hague Conventions dealing with Private International Law).

7. Is a parliamentary treaties scrutiny committee required to examine government treaty actions post-Brexit? If so, how should it be composed and supported, and what powers should it have? Or would another model be appropriate?

This would be a good idea and would enable Parliament to hold Government to account more effectively. The various models from other jurisdictions provide examples of how such a system could work.

The Constitution Committee and the House of Commons’ Exiting the European Union Committee have already expressed the view that the process for “treaty scrutiny under the Constitutional Reform and Governance Act 2010 is inadequate” and that there will have to be new mechanisms for scrutinising proposed treaties (13th Report of Session 2017–19 HL Paper 193 Trade Bill paragraphs 22-24 and House of Commons Exiting the European Union Committee, Parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship, Sixth Report of Session 2017–19, HC 1240, paras 105–106).

We agree with the views of both Committees and have given evidence to the House of Lords Liaison Committee that *“the UK’s withdrawal from the EU and replacement of policy and law originating from the EU with that originating within the UK. This will require changed roles for committees and sub committees and the opportunity should be taken to rationalise and modernise the committee structure. Government’s aspirations to create a ‘Global Britain’ and to create a network of trade agreements will necessitate*

² <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

additional scrutiny requirements. Accordingly, this could translate into the creation of select committees on international trade, free trade agreements, private international law and citizens' rights."

8. What information should the government provide to Parliament on its treaty actions? Should there be a regular reporting requirement during negotiations?

The Foreign and Commonwealth Office publishes a monthly report on Government treaty actions which details the significant work which is undertaken in the field of diplomacy concerning treaties. This work appears to go largely unnoticed by Parliament and should be given a higher profile by for example being a standard reporting item on relevant Committee agendas.

There should be regular meaningful reporting of treaty negotiations. This should take place by way of ministerial statements, regular debates and ministerial appearances at relevant committees.

9. How might the government and/or Parliament best engage other stakeholders and members of the public during treaty negotiation and scrutiny?

Government and Parliament could engage more effectively with stakeholders and the public by using new ways of taking views, employing language which is more accessible and less legalistic or parliamentary in style.

Parliamentary Committees can also conduct broader outreach by holding sessions outwith Parliament and by choosing a more diverse range of locations in which to meet with the public.

Government and Parliament could also be more flexible about the channels of communication which they use and the engagement programme, which they undertake. Any new committee should have a communications plan to identify targets for engagement with the devolved administrations and legislatures, professional bodies, academia, community groups, representative bodies and also individuals, including those on the margins of society, who might be affected by the negotiations.

Although negotiation of a treaty can be a sensitive matter there must nevertheless be a robust mechanism for democratic accountability, regular reporting and the engagement with the stakeholder groups mentioned above. A failure to approach the negotiations openly could risk scrutiny problems at later stages or contribute to public concern, which may affect the outcome of the negotiations in the long run. Adopting inclusive methods of engagement could help to develop an authentic broad conversation with society and result in better treaty making.

10. What models of treaty scrutiny in other countries are most effective and what might the UK Parliament learn from them?

There are a number of scrutiny models which are considered to be effective in other jurisdictions. The crucial issue about any comparative analysis is that institutions from other jurisdictions may work well within their legal and political context but that is no guarantee that such institutions will translate well into our system.

Below we offer four examples - from the EU, the US, Australia and New Zealand – which may be of assistance.

European Union

EU Member States still largely control their own foreign relations. However, on some issues - for example trade policy - the EU exercises an exclusive competence; only the EU and not individual Member States can legislate on trade matters and conclude international trade agreements.

The European Commission negotiates on behalf of the EU after authorisation from the Council to negotiate a trade agreement with a trading partner, on the basis of a specific mandate agreed by the Council. The Commission reports regularly on the state of negotiations to the Council and the European Parliament.

When negotiations are finished, the Commission sends the agreement to the Council to decide on signature and conclusion. The agreement is then sent to the European Parliament, which can vote either for or against the agreement ahead of ratification. Where the agreement contains provisions that relate to Member State competences, the agreement must also be ratified by those member states in accordance with their ratification procedures.

The EU's policy concerning transparency of trade negotiations provides that all MEPs are granted access to texts currently made available to a select group of law-makers so members may inspect restricted text in special reading rooms. The Commission is also seeking to classify fewer documents as 'restricted' to make them more accessible outside the confines of a reading room.

United States

There are a few methods for the President to secure the authority to enter a treaty: Art II(2) of the US Constitution provides that the President 'shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.' The Senate can vote, not only on whether to accept or reject the treaty in its entirety, but can also amend the treaty. By taking this approach, there is no requirement to consult with the House of Representatives.

The President can also enter into 'executive agreements', which can be ratified without the consent of the Senate. These generally relate to foreign relations or military issues rather than those impacting on the rights and obligations of citizens. The Trade Promotion Authority (TPA) is a legislative procedure, established in 1974, by which Congress defines US trade negotiating objectives and sets out an oversight

and consultation process for use during trade negotiations. Under the TPA, Congress retains the authority to review and decide whether any proposed US trade agreement will be implemented.

Through the TPA, Congress sets out:

- 1) guidance to the President on trade policy priorities and negotiating objectives;
- 2) requirements for the Administration to notify and consult with Congress, other stakeholders and the public during the negotiations of trade agreements; and
- 3) definitions of the terms, conditions and procedures under which it allows the Administration to enter into trade agreements and sets the procedures for consideration of bills to implement the agreements. This approach does not require a two-thirds majority in the Senate.

When the United States ratifies a treaty it immediately becomes law and a treaty provision that is sufficiently clear and precise to be applied as if it is a statute will be considered 'self-executing' like an Act of Congress. This can, however, create uncertainty about which treaty provisions are self-executing, and which require implementing legislation.³

Australia

Section 51 xxix of the Australian Constitution provides that *“the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: xxix external affairs...”*

Executive powers - which are vested in the Queen and exercisable by the Governor General, including the power to enter into treaties - are granted under section 61 of the Constitution. Under this constitutional framework, decisions regarding negotiating, signing or acceding to a treaty are taken by the executive. The decision to pass implementing legislation - which is necessary because treaty commitments are not automatically incorporated into Australian law - is made by the parliament.

The Legal and Constitutional Affairs References Committee's 1995 inquiry into the Commonwealth's treaty-making power and external affairs power was the most comprehensive and detailed examination of these issues undertaken by a parliamentary committee. The Committee's report, *“Trick or Treaty? Commonwealth Power to Make and Implement Treaties”*, included recommendations most of which were accepted by the Australian Government.

The reforms introduced by the Australian Government in 1996 consisted of:

³ See: <https://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/html/CPRT-106SPRT66922.htm>

1. tabling of treaties in Parliament at least 15 (later increased to 20 for treaties with major political, economic and social significance) joint sitting days before binding treaty action is taken by the government;
2. preparation of a National Interest Analysis (NIA) and associated material for each proposed treaty action;
3. establishment of the Joint Standing Committee on Treaties (JSCOT) whose mandate is to inquire into and report on matters arising from treaties. Other than in exceptional circumstances, the Government does not take binding treaty action until JSCOT has reviewed and reported on the treaty. Other parliamentary committees may also consider specific proposed treaties;
4. establishment of the Treaties Council as an adjunct to the Council of Australian Government; and
5. establishment on the internet of the online Australian Treaties Library.⁴

New Zealand

Under New Zealand's constitutional arrangements, the executive negotiates and enters into treaties and the legislature scrutinises treaties and passes the laws to implement them in domestic law. Although Governments may signal their intention to take internationally binding treaty action (for example, by signing a treaty), by convention they will not take that action until the treaty has been presented to Parliament and the minimum period for parliamentary scrutiny of a treaty has elapsed. Also by convention, the Government will generally prefer to pass any implementing legislation before ratifying a treaty. This way, the risk of breaching international obligations by failing to pass legislation is pre-empted.

Parliamentary procedure for treaty examination requires the Government to present to the House any treaty that is to be subject to ratification. The treaty and a national interest analysis (NIA) —prepared by the relevant department and the Ministry of Foreign Affairs and Trade are referred to the Foreign Affairs, Defence and Trade Committee. That Committee may refer the treaty and NIA to another select committee if the treaty is within that select committee's remit. The consideration process comprises —

- 1) a briefing from the Government on the international agreement and the NIA;
- 2) calling for written evidence from the public; and
- 3) hearing oral evidence.

The committee then reports its findings to the House.

⁴ See https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/~media/Committees/fadt_ctte/Treaty-making_process/c02.pdf

The committee can ask the Government for additional time for its consideration, to supplement the minimum 15-sitting-day period.

The Parliament's Standing Orders contain a procedure for holding a plenary debate on international treaties. If the Government intends for the treaty to be implemented through a bill, the committee must draw this to the House's attention in its report. In such cases, the House may decide to hold a debate on the select committee report on the treaty examination, in exchange for there being no debate on the first reading of the implementing legislation.

Standard Parliamentary procedure applies to a treaty that requires legislation for implementation:

- Introduction;
- First reading (Without debate where the report on the treaty examination has been debated);
- Consideration by select committee;
- Second reading;
- Committee of the whole House;
- Third reading;
- Royal assent.

Bills to incorporate international treaty obligations into domestic law often do so by including the text of the treaty in a schedule of a bill.⁵

11. What role should the devolved institutions have in negotiating and agreeing treaties?

The devolved legislatures and administrations have not played a formal role in negotiating treaties. The Scotland Act 1998 Schedule 5, paragraph 7 provides that:

"1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

2) Sub-paragraph (1) does not reserve—

(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,

⁵ See <https://www.mfat.govt.nz/assets/Treaties/International-Treaty-Making-Guide-2017.pdf>

(b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.”

As we have stated elsewhere, we believe it is important to ensure a “whole-of-government” approach in terms of the negotiations with the EU in relation to the Withdrawal Agreement. The concept is also of particular relevance to other international agreements - including trade agreements - which may or will have an impact on domestic law. In this context “whole of government” should be interpreted as “whole of governance” to include not only the UK Government and Whitehall Ministries but also the Scottish Government, the Northern Ireland Executive and the Welsh Government as well as professional bodies, the universities and civic society groups.

The Concordat on International Relations

Cooperation between the UK Government and the Devolved Administrations is specifically recognised in paragraph D1.4 of the Concordat on International Relations which is part of the Memorandum of Understanding between the UK Government and Devolved Administrations and which states:

“The UK Government recognises that the devolved administrations will have an interest in international policy making in relation to devolved matters and also in obligations touching on devolved matters that the UK may agree as a result of concluding international agreements (including UN Conventions)”

and paragraph D1.5 which states:

“The parties to this Concordat recognise that the conduct of international relations is likely to have implications for the devolved responsibilities of Scottish Ministers and that the exercise of these responsibilities is likely to have implications for international relations. This Concordat therefore reflects a mutual determination to ensure that there is close co-operation in these areas between the United Kingdom Government and the Scottish Ministers with the objective of promoting the overseas interests of the United Kingdom and all its constituent parts.”

In addition to the Memorandum and Concordats there are a number of significant relations between officials which enable exchange on policy developments, evidence building, contacts and related matters on a practical and day to day basis.

UK withdrawal from the EU offers an opportunity to review the procedures in place for negotiation of international agreements and consider how these might best be modernised to take account of changes in the UK’s political landscape, particularly those brought about by devolution and also in recognition of the increased public interest in and engagement with treaty negotiations in recent years.

In order to create a comprehensive and inclusive international and trade policy, conduct negotiations and implement agreements, it would helpful were the UK government to engage with the devolved administrations and legislatures.

In our recent response to the International Trade Committee’s UK Trade Policy Transparency and Scrutiny inquiry, we set out a range of options for involvement of the devolved administrations as follows:

- A. requiring the consent of the devolved administrations to any UK negotiated trade position;
- B. normally requiring the consent of the devolved administrations, but the UK Government not being bound to obtain such consent;
- C. having a procedural structure for the devolved administrations' involvement similar to that in the European Union Withdrawal Act 2018 for "common frameworks" (i.e. formal consent by the devolved administrations would not be required but a procedure would be set out to ensure involvement in the process); and,
- D. as a minimum, and without requiring the consent of the devolved legislatures, allowing the devolved legislatures and administrations access to documents, policies etc. and allowing them to have a scrutiny and comment role (as noted above).

With some of the above, consideration would need to be given to whether the rules should be set down in statute, convention or a memorandum of understanding.

Where the subject of negotiations relates to devolved matters, it should be expected that the UK Government would seek the involvement of devolved administrations in negotiations. Consideration should be given to whether the UK Government should be required to seek more than just the involvement of the devolved administrations in such negotiations but also seek their consent to the position of the UK Government during such negotiations where they relate to devolved matters. This will be important where agreements impact upon on devolved matters and implementing legislation may be carried out by the devolved administrations or engage the legislative consent convention.

Accordingly, rather than seek to engage with devolved administrations on an ad hoc basis, to enable the smoothest possible design and operation of trade policy (and to minimise uncertainty for industry and trade partners), it would be advisable for formal structures to be established to facilitate confidence-building and good-faith collaboration across the UK Government and devolved administrations. Such structures may provide, for example, for devolved participation in the design of negotiation mandates and the conduct of negotiations in respect of devolved areas, thereby ensuring devolved buy-in to agreement, implementation and minimising risks to UK-wide implementation of trade agreements.

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