



Public Law Project

European Union (Withdrawal) Bill

Briefing for the House of Lords Report

April 2018

Introduction

1. The Public Law Project (PLP) is an independent national legal charity. PLP's mission is to improve public decision-making and facilitate access to justice. We work through a combination of research and policy work; training, conferences and second-tier support; and legal casework including public interest litigation¹. Our strategic objectives include promoting and safeguarding the Rule of Law; ensuring fair systems for public decision making; and improving access to justice. PLP takes no position on the UK's decision to leave the European Union. Our work around the EU (Withdrawal) Bill is intended to ensure that Brexit is a democratic success and Parliamentary sovereignty is strengthened; to minimise the availability of broad delegated legislative powers and ensure they are used appropriately; and to secure the retention of fundamental rights protections.
2. The impact of the European Union (Withdrawal) Bill on the shape of public law in the UK and upon our constitution will be unprecedented. In this briefing, we consider three challenges that the Bill poses for Parliamentarians:
 - a. It creates unprecedented and unjustifiably broad powers for Ministers. It empowers Ministers to 'take back control', rather than Parliament.
 - b. It is far from clear about crucial constitutional questions, including the scope and impact of EU law transposed into our domestic law. This lack of legal certainty undermines the Rule of Law.
 - c. Parliamentarians should not rely on Courts to plaster over any legislative gaps or constitutional cracks. The limits of the ordinary public law and the barriers individuals face in pursuing judicial review are such that scrutiny of the Bill by Parliament must ensure that the Bill is fit for purpose.

¹ PLP is recognised as having particular expertise in public law: in 2013 it was awarded the Special Rule of Law award by Halsbury's Laws and in 2015 it received the Legal Aid Lawyer of the Year 'Outstanding Achievement' Award for its work on the legal aid reforms. For more information about PLP's work please see our 5 year Impact Report for 2012-2016 published at: http://www.publiclawproject.org.uk/data/resources/255/PLP-5-yearReview_Impact_Report_1012_2016_view1.pdf

3. This briefing does not attempt to address all of the important constitutional issues raised by the Bill, and in particular does not address the devolution issues or the proposed exclusion of the Charter of Fundamental Rights. We have sought not to duplicate the work of other organisations who are recognised experts in those areas such as Liberty and Amnesty International UK.

The relationship between Parliament and the Executive

4. The Bill transfers too much power from Parliament to the Executive without providing for sufficient Parliamentary scrutiny of how those powers are used.

The breadth and scope of the delegated powers in the Bill is unprecedented and unnecessary for the purpose of enabling a smooth transition

5. The Government has emphasised that the Bill is not intended to be a “vehicle for policy changes” and “no change should be made to rights through delegated legislation” but the powers in the Bill were required only “to give the Government the necessary power to correct or remove the laws that would otherwise not function properly once we have left the EU.”² During the passage of the Bill, Ministers reconfirmed that the Government “will not make major policy changes, and that those would be brought forward in primary legislation”³ and “do not intend to use the provisions in this Bill to sneak through substantial or substantive policy changes in a way that would not pass the test of proper parliamentary scrutiny.”⁴
6. However, contrary to these assurances, the Bill continues to give Ministers extensive powers to make major, substantive policy changes (including the establishment of entire public bodies) and remove or change existing rights and obligations (including the creation of new criminal offences). For example, clause 7 gives Ministers the power “to make any provision that could be made by an Act of Parliament” to “prevent, remedy or mitigate” any failure of retained EU law to operate “effectively”, or any other “deficiency” in retained EU law, arising from the withdrawal of the United Kingdom from the EU. Nowhere in the Bill are the terms “prevent, remedy or mitigate” defined. The power is given to Ministers to use whenever *they* consider it “appropriate” or to make amendments to provisions that are “no longer appropriate”. This language appears to give a broad discretion to Ministers.
7. The examples given in the Explanatory Notes⁵ to the Bill of possible uses of clause 7 give real cause for concern as they involve the making of significant policy choices. For example, the Explanatory Notes suggest that issues arising out of “reciprocal

² See forward to the White Paper by Rt Hon David Davis MP, Secretary of State for Exiting the European Union; see also paragraphs 3.10 and 3.17 of the White Paper and paragraph 14 of the Explanatory Notes.

³ [Steve Baker, MP, oral evidence to the Select Committee on the Constitution, 13 December 2017, Q53.](#)

⁴ [Solicitor General, oral evidence to the Select Committee on the Constitution, 13 December 2017, Q48.](#)

⁵ See textbox between paragraphs 26 and 27 of the Explanatory Notes to the Bill as introduced to the House of Lords, 18 January 2018.

arrangements” could be a basis for finding retained EU law deficient and that the powers could therefore be used to remove the rights of EU citizens in the UK. The explanation advanced is that because other EU states will no longer have any obligations to UK citizens, an obligation on the UK to respect EU citizens’ rights would be a “deficiency” in retained EU law. This is an extraordinarily broad interpretation of the concept of “deficiency”. If correct, it signifies that the powers in the Bill would allow Ministers through delegated legislation to make very significant changes to retained EU law not only in connection with the rights of EU citizens but more generally. Many other EU law obligations could be described as “reciprocal” in this sense and therefore changed through delegated legislation if the powers in the Bill are not circumscribed.

8. Changes made to retained EU law using the delegated powers in the Bill should be strictly confined to changes which are *necessary* to enable retained EU law to function until such time as Parliament can consider what, if any, changes to make at a policy level through properly informed debate and the passage of primary legislation. From a pragmatic perspective, the Public Law Project recognises that the Bill is designed to deal with the circumstances where EU law ceases to be applicable in the UK (i.e. the ‘no deal’ scenario) and this is likely to result in significant parts of retained EU law becoming deficient on withdrawal and therefore requiring amendment to correct the deficiency. In such exceptional circumstances, it may be necessary to be able to make some changes to how retained EU law works as a result of the UK’s withdrawal from the EU which are more than minor or technical. Such provision should only be allowed to be made under clause 7 where it can be clearly demonstrated that the provision is in fact necessary to ensure that retained EU law works after withdrawal from the EU. They should not involve significant policy changes. Such provision should also be subject to greater Parliamentary scrutiny, and a ‘sunset clause’ limiting the period of time during which those powers can be exercised after the Bill comes into force.
9. The Constitution Committee has also concluded,⁶ given the wide scope of the powers in clause 7, and the subjectivity with which they may be used, ministerial assurances that the powers will not be used to make “major” or “substantive” policy changes are insufficient. Effective safeguards and procedures are required to ensure that the powers in the Bill are more tightly circumscribed and subject to proper Parliamentary scrutiny.
10. The Public Law Project **recommends** that the Bill is amended as follows to restrict the scope of the Bill’s powers and to ensure that those powers are exercised as intended by the Government:
 - a. In accordance with the recommendations of the Delegated Powers Committee, **the subjective ‘the Minister considers’ test in clauses 7, 8 and 9 should be**

⁶ Constitution Committee, ‘European Union (Withdrawal) Bill’ (9th Report, Session 2017–19, HL Paper 69) at para 184.

replaced by a test based on objectiveness.⁷ And these clauses should not allow Ministers to make amendments where it is thought ‘appropriate’. This term is too broad and vague; it should be replaced with a test of necessity. We agree with the Constitution Committee that the interpretation of ‘necessary’ would not limit the remedies available to Ministers but simply ensure that the power can only be exercised where the remedy chosen is needed for the purposes of correcting problems arising from withdrawal from the EU.⁸ We therefore support the amendments tabled by Lord Lisvane and others to replace “the Minister considers appropriate” with “is necessary”.⁹

- b. We further support the amendments tabled by Lord O’Donnell and others which would remove the power to establish new public authorities by delegated legislation, and those tabled by Lord Judge and others which would preclude the creation of *any* new criminal offences (including those which carry a sentence of imprisonment of less than 2 years). We consider that these amendments would add appropriate restrictions to the scope of Ministerial powers to amend delegated legislation.
- c. The Government has amended the requirement in the Bill for Ministers to provide explanatory statements concerning appropriateness, equalities etc. This requirement should be amended to require an explanatory statement as to why the provision is required to correct problems arising from withdrawal from the EU and whether provisions of the regulations make more than minor or technical policy changes to retained EU law.¹⁰ This will ensure that Parliament will have the necessary information to scrutinise the regulations.
- d. The affirmative resolution procedure must be used if the regulations made under clause 7 make more than minor or technical policy changes to retained EU law or remove or change existing rights of any person. Such changes should be subject to a higher level of Parliamentary scrutiny.

The Bill will not enable proper Parliamentary scrutiny of Ministers’ exercise of the broad powers conferred

- 11. Ministers will be able to exercise the broad powers in the Bill with limited Parliamentary oversight. The Bill provides for many of these powers to be subject to the “negative resolution” procedure. This means that the secondary legislation made under these powers is enacted and takes effect unless either House of Parliament takes steps to pass a motion to annul it. Under the Bill as currently drafted, Ministers could (for

⁷ Delegated Powers & Regulatory Reform Committee, ‘European Union (Withdrawal) Bill’ (12th Report, Session 2017-19, HL Paper 73) at para 12.

⁸ 9th Report of the Constitution Committee, at para 164.

⁹ The latest version of the amendments tabled for Report are available from the [page for the Bill on the Parliamentary website](#).

¹⁰ Paragraph 22 of Schedule 7 to the Bill. See also the 9th Report of the Constitution Committee, para 211.

example) repeal workers' and environment rights, abolish the data protection regime and extend the period a person could be detained without charge – all by negative resolution.

12. In certain, circumstances the Bill requires the secondary legislation made under the Bill's powers to be enacted using the "affirmative resolution" procedure. Here, a law only takes effect if approved by both Houses of Parliament. This allows for greater Parliamentary scrutiny than the negative procedure but even so there is rarely time for significant debate, the legislation being considered cannot be amended and it is very rare that the legislation is rejected by either House.
13. Even where the affirmative resolution procedure is required, the Bill allows Ministers to bypass the procedure in "urgent cases". In such circumstances, approval is not needed but legislation can only take effect for a month, unless Parliament subsequently approves it. That month does not include any Parliamentary recess or prorogation longer than four days, so could last for significantly longer than a calendar month. The potency of the powers that could be exercised in "urgent" cases is hard to overstate. Ministers could deprive people of their liberty and Parliament would not be able to do anything about it. A person could be imprisoned or extradited pursuant to an urgent measure. Particularly worryingly, acts done while the provisions were in force would retain the force of law, even if Parliament later struck down the law.
14. The insufficiency of Parliamentary scrutiny has been the subject of much debate during the passage of the Bill through both Houses. The Public Law Project **welcomes** the amendments made to the Bill which: require Ministers to make a statement of the Minister's opinion of the appropriate Parliamentary procedure and the reasons for the opinion; and provide for a sifting mechanism by a committee of the House of Commons to make a recommendation as to the appropriate procedure to be used.¹¹
15. However, these do not go far enough as Ministers retain too much discretion to decide on the appropriate procedure. The Public Law Project therefore **recommends** that the Bill is amended:
 - a. **To require the affirmative resolution procedure to be used** for: (1) regulations that transfer EU functions to a UK body irrespective of whether or not the body is newly established (currently the affirmative procedure is only required for the establishment of a new public authority); (2) regulations that amend or repeal primary legislation;¹² or (3) which make more than minor or technical changes to secondary legislation which would have been primary legislation but for section 2(2) of the European Communities Act 1972.

¹¹ Paragraph 3 of Schedule 7.

¹² 12th Report of the Delegated Powers & Regulatory Reform Committee at paras 52 and 53.

- b. To extend the sifting mechanism to the House of Lords.¹³
 - c. To provide that the recommendation of the sifting committee of either House to use the affirmative resolution is determinative save where the recommendation is rejected by a resolution of the relevant House.¹⁴
16. We therefore support the amendment tabled by Lord Lisvane to amend paragraph 3 of Schedule 7 to extend the sifting mechanism to the House of Lords and to ensure the decision of either House is binding on Ministers.

Exit Day

17. In our previous briefings and evidence to Parliamentary committees, the Public Law Project expressed concern about the power in the Bill conferred on Ministers to define 'exit day' and the lack of any Parliamentary scrutiny on the exercise of that power. We recommended that 'exit day' should be defined as 'the day on which the UK ceases to be subject to the EU Treaties' and the power to define 'exit day' by regulations is subject to the affirmative resolution procedure to ensure there is proper Parliamentary scrutiny.
18. We therefore **welcome** the amendments made to the Bill which clarify that "exit day" will be 29 March 2019, that any change to the definition of "exit day" must reflect the day that the Treaties cease to apply to the UK in accordance with Article 50 TFEU and regulations making such a change must be subject to the affirmative resolution procedure.
19. Nevertheless there remains a lack of clarity about how the provisions of the Bill will apply in the circumstances where the UK and EU have successfully concluded a withdrawal agreement under Article 50. The latest draft of the Withdrawal Agreement makes provision (which has been agreed in principle) that the Treaties shall cease to apply to the UK on 30 March 2019 but that there shall be a transition period running from that date to 31 December 2020 during which EU law shall continue to apply in the UK (unless otherwise provided in the Agreement).¹⁵
20. The Government has committed to bringing forward a Withdrawal Agreement and Implementation Bill to implement the Withdrawal Agreement. That Bill would need to make provision to ensure that EU law continued to apply in the UK (for example, by keeping in force the European Communities Act 1972 until the end of the transition period). In these circumstances, it would not be necessary to specify an "exit day" under the Withdrawal Bill, nor take a snapshot of EU law to be converted into a new

¹³ The Government indicated that it will bring amendments on this issue at Report.

¹⁴ See the 12th Report of the Delegated Powers & Regulatory Reform Committee, at paras 56 and 58. See also the report of the Hansard Society, Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union (Withdrawal) Bill <https://www.hansardsociety.org.uk/resources/taking-back-control-for-brexit-and-beyond-delegated-legislation>

¹⁵ Articles 121, 122 and 168 of the [draft Withdrawal Agreement](#) published on 28 February 2018.

category of domestic law – retained EU law – on that day. In fact, the commencement of the present Withdrawal Bill (particularly the definition of the exit day of 29 March 2019) would be wholly incompatible with the implementation of the Withdrawal Agreement. The provisions of this Bill would have become redundant as a result of the agreement between the UK and the EU.

21. The Public Law Project therefore **recommends that the Government provides greater clarity about the interrelationship between the Withdrawal Agreement and the Withdrawal Bill** and confirms that it will not commence the Bill in the event that a Withdrawal Agreement is agreed between the UK and the EU and consented to by Parliament and the European Parliament.
22. In addition, given that the Government will bring forward a separate Bill to implement the Withdrawal Agreement and that clause 9 (implementing the withdrawal agreement) has been amended so that it cannot be used until Parliament has enacted a statute approving the final terms of the Withdrawal Agreement, **the Government should clarify whether it intends to retain clause 9 in the Bill.**¹⁶

Legal certainty and the rule of law

23. The scale of the task of converting vast amounts of EU law into domestic law is unprecedented. Unfortunately, the lack of clarity in the Bill in its present form will create significant legal uncertainty and undermine the Rule of Law.

What status will retained EU law have?

24. The Bill is unclear as to whether retained EU law should be treated as primary or secondary legislation, and whether it should be treated differently depending on the circumstances. For example, “retained direct EU legislation” is to be treated as primary legislation for the purposes of the Human Rights Act 1998 (HRA). That means that the courts cannot strike down or disapply such laws on the grounds of incompatibility with the HRA, but only make a declaration of incompatibility. However, the Bill is silent on whether “retained direct EU legislation” should be treated as primary or secondary legislation for other purposes. This may have implications for the remedies available to challenge such provisions on grounds other than incompatibility with the HRA.
25. The Constitution Committee has recommended that the Bill assign a single status to all retained direct EU legislation for all purposes and that status should be equivalent to domestic primary legislation.¹⁷ This led to considerable debate in Committee with Lord Pannick tabling an amendment that all retained EU law (both retained direct EU legislation and EU-derived domestic legislation) should have the status of primary

¹⁶ 12th Report of the Delegated Powers & Regulatory Reform Committee, at para 24. See also Exiting the European Union Committee, ‘European Union (Withdrawal) Bill’ (1st Report, Session 2017–19, HC 373) at para 85.

¹⁷ 9th Report, at paras 51 and 52.

legislation. However, some contributors have disagreed with this approach and suggest that the status should depend on the status which the norm had in EU law pre-exit day.

26. In any event, there was agreement that the Government should amend the Bill to provide more clarity on the status of retained EU law and that the Government suggestion to allow Ministers to determine the status of retained EU law by making regulations under clause 17 (consequential and transitional provision) should be rejected. **The Public Law Project supports this position** and welcomes the fact that the Government has considered the recommendations of the Constitution Committee and others and tabled amendments to clarify the status of retained EU law:
- a. We note the clarification in the amendments that the status of retained EU-derived legislation will remain the same as prior to exit day. That is, primary legislation will continue to be primary legislation and secondary legislation continues to be secondary legislation. We remain concerned, however, that EU-derived secondary legislation which would have been enacted as primary legislation but for s2(2) of the European Communities Act 1972 will be able to be amended using delegated powers under the Bill, without the implied constraint of compliance with EU law, or even other retained EU law.¹⁸ **It is for that reason that we recommend that any such use of the powers in the Bill should, at minimum, be subject to the affirmative resolution procedure.**¹⁹
 - b. We note that the amendments seek to make clear how retained direct EU legislation may be modified. However, we are concerned about the breadth of these methods. Retained direct EU legislation can be amended by the secondary-legislation making powers in the Bill (e.g. clause 7) as well as by secondary-legislation making powers under any other Act passed during this Session or subsequently, so far as they permit modification of retained direct EU legislation. **Further clarification is needed as to the effect of these amendments**, particularly on whether any secondary legislation-making power must expressly allow for the modification of direct EU legislation.
 - c. Importantly, the amendments do not clarify the status of direct EU legislation in relation what *remedies* are available to the courts with respect to a challenge to the validity of such legislation. **It therefore remains unclear, save in relation to the remedies available under the Human Rights Act 1998, whether direct EU legislation will be able to be quashed by our domestic courts.**

¹⁸ See the new paragraph 3E of Schedule 8 proposed in the amendments laid by Lord Callanan.

¹⁹ See paragraph 15 above.

Parliamentarians should not rely on Courts to plaster over any legislative gaps or constitutional cracks

What should be the role of the courts?

27. Ensuring that legislation provides legal certainty, which is central to upholding the Rule of Law, is primarily the responsibility of Parliament. It is difficult for courts to police Ministers exercising delegated powers unlawfully.
28. It can take years to bring a legal case, and while proceedings are ongoing the decision or policy under challenge may cause harm. If Ministers use the Bill's broad powers unlawfully, for example by extraditing a person or rolling back key rights protections, the harm caused might be impossible to remedy.
29. Judicial review cannot undo the harm done by unlawful decisions or legislation during the intervening period. While the cuts to prisoners' legal aid, which came into force in December 2013, were found to be unlawful by the Court of Appeal in 2017,²⁰ the Howard League reports that in the intervening period, violence and self-injury in prisons have risen to record levels, with almost 300 having committed suicide.²¹ Similarly, the Supreme Court's 2017 judgment that the employment tribunal fees introduced in 2013 were unlawful²² cannot rectify the harm that was done to those who could not afford to access justice in the meantime.
30. Litigation is also hugely expensive. Claimants face not only funding their own representation and court fees but risk being ordered to pay their opponent's costs if their claim is unsuccessful. With restrictions on legal aid it will be difficult for claimants of modest means to bring a challenge. This means that Ministers may be able to act unlawfully with impunity if there are not claimants with the resources to bring a challenge. Poor and disadvantaged groups will be less able to access the courts than business and commercial interests.

How should the courts consider judgments of the CJEU after the exit date?

31. If Parliament does not make appropriate amendments to the Bill, it risks "leaving judges stranded on the front line of a fierce political battle"²³. The outgoing President of the Supreme Court, Lord Neuberger, highlighted the risks of judges being politicised if the Bill is not clarified. He commented that if "[the Government] doesn't express clearly what the judges should do about decisions of the European Court of Justice after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do

²⁰ *R (Howard League for Penal Reform and The Prisoners' Advice Service) -v- The Lord Chancellor* [2017] EWCA Civ 244.

²¹ See The Howard League's analysis of impact of prison legal aid cuts here: <http://howardleague.org/legal-work/legal-aid-cuts-for-prisoners/>

²² *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

²³ See article by Raphael Hogarth, Institute for Government, 10/08/17 available here:

<https://www.instituteforgovernment.org.uk/brexit-ecj-european-court-justice-lord-neuberger>

their best.” It would be “unfair”, he said, “to blame judges for making the law when Parliament has failed to do so”.²⁴

32. Clause 6 of the Bill provides that a court or tribunal is not bound by any judgment made after exit day by the CJEU. However, it goes on to provide that a court or tribunal need not have regard to judgments of the CJEU after exit day but may do so if it considers it “appropriate” to do so.
33. This drafting does not make clear how courts should deal with the jurisprudence of the CJEU. The President of the Supreme Court, Baroness Hale, considers the current draft very unhelpful: “We do not think that ‘appropriate’ is the right sort of word to address to judges. We do not do things because they are appropriate; we look at things because they are relevant and helpful. We do not want to be put in the position of appearing to make a political decision about what is and is not appropriate.”²⁵
34. This issue has been subject to debate during Committee in the House of Lords and we **welcome the amendment tabled by the Government to clause 6 with the effect that a court or tribunal may have regard to anything done on or after exit day by the CJEU so far as it is relevant to any matter before the court or tribunal.** This amendment reflects the recommendation of the Constitution Committee and amendments tabled by Lord Pannick and others. This amendment provides sensible guidance to the courts about when they should to consider post-exit CJEU case law and reduces the risk of judges becoming involved in political controversy.

²⁴ See comments of Lord Neuberger, from 08/08/2017, reported by BBC News Online here: <http://www.bbc.co.uk/news/uk-40855526>.

²⁵ [Oral evidence to the Select Committee on the Constitution, 21 March 2018, Q1.](#)