



Public Law Project

**WRITTEN EVIDENCE FROM THE PUBLIC LAW PROJECT TO THE  
HOUSE OF COMMONS PROCEDURE COMMITTEE'S INQUIRY, 'EXITING  
THE EUROPEAN UNION: SCRUTINY OF DELEGATED LEGISLATION'**

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 litigation.<sup>1</sup> Our strategic objectives include promoting and safeguarding the Rule of Law; ensuring fair systems for public decision making; and improving access to justice.
  2. PLP takes no position on the UK's decision to leave the European Union. Our work around Brexit is intended to ensure that Parliament is appropriately sovereign, the executive held to account, and the interests of disadvantaged groups properly and effectively represented. We hope to ensure procedural fairness to those likely to be most affected by the Brexit process.
  3. We welcome the opportunity to provide written evidence to the House of Commons Procedure Committee's inquiry, 'Exiting the European Union: Scrutiny of Delegated legislation' ('the inquiry'). Our submission addresses the European Union (Withdrawal) Act 2018 ('the Withdrawal Act') and the forthcoming European Union (Withdrawal Agreement) Bill ('the Withdrawal Agreement Bill'). We focus on three issues for the inquiry to consider:
    - a. The constitutional risks of Parliament conferring overly broad delegated powers on Ministers;
    - b. The importance of effective Parliamentary scrutiny;
    - c. The limits of the courts in addressing constitutional issues in relation to delegated powers.
- a) The constitutional risks of broad delegated powers
4. Broad delegated powers are a constitutional risk as they transfer legislative power from Parliament to Ministers. This can lead to legal uncertainty and a weakening of democratic accountability.
  5. The Withdrawal Act conferred potentially broad delegated powers on Ministers. It is essential that the Withdrawal Agreement Bill does not unnecessarily expand

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<sup>1</sup> 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 identifying unlawfulness within the legal aid scheme, particularly in respect of actual and proposed secondary legislation. Its Exceptional Case Funding Project has been shortlisted for the FT Innovative Lawyers Report and Awards for Europe 2018.

Ministers' powers, either by weakening existing safeguards or creating further broad powers.

6. The Government asserted in its White Paper that the Withdrawal Act was not intended to be “a vehicle for policy changes” but that the powers were required 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.”<sup>2</sup> The Withdrawal Bill White Paper further recognised the importance of limiting the powers, stating that the Government would “ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU derived law arising out of our exit from the EU.”<sup>3</sup> In introducing that White Paper to Parliament, the Secretary of State said that it “almost goes without saying” that “no change should be made to rights through delegated legislation”.<sup>4</sup>
7. While Parliamentary pressure led to additional limitations on the delegated powers conferred by the Withdrawal Act, they are still unprecedented in their breadth. Section 8 gives Ministers the power to “make such provision as the Minister considers appropriate to prevent, remedy or mitigate – (a) any failure of retained EU law to operate effectively; or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU”. “Retained EU law” is arguably broadly defined by the Act,<sup>5</sup> and these powers confer ‘Henry VIII’ powers under which Ministers are able to amend primary legislation. Ministers’ proper use of these powers is subject to limitations specified in the Act,<sup>6</sup> and public law principles, including the need for Henry VIII powers to be interpreted restrictively<sup>7</sup> and in accordance with the principle of legality. However, such powers should always give cause for concern as they undermine the ability of Parliament to effectively scrutinise legislative change and, for the reasons explained below, there are limits on the courts’ ability to provide that scrutiny.
8. Furthermore, section 9 of the Withdrawal Act confers a power to “make such provision as the Minister considers appropriate for the purpose of implementing the withdrawal agreement, if the Minister considers that such provision should be in force on or before exit day”, subject to the prior enactment of the Withdrawal Agreement Bill. Although the exercise of these powers is again subject to limitations (see Annex A), the use of the phrase “as the Minister considers appropriate” means that the power delegated is again on the face of it broad.

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<sup>2</sup> See forward to Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union Cm 9446, 30.03.2017* (‘the Withdrawal Bill 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 Withdrawal Bill White Paper.

<sup>3</sup> *Ibid.* paragraph 3.17.

<sup>4</sup> HC Hansard 30 March 2017 Col 431.

<sup>5</sup> See for example the definition of ‘EU-derived domestic legislation’ in s2(2).

<sup>6</sup> PLP has produced a table that sets out all the delegated powers in the Withdrawal Act and the limitations imposed by the Act, which is annexed to this submission (‘Annex A’).

<sup>7</sup> See, for example, *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39.

9. The White Paper to the Withdrawal Agreement Bill<sup>8</sup> ('Withdrawal Agreement White Paper') sets out the Government's intention to amend section 8 of the Withdrawal Act so that it can be used by Ministers in preparation for the end of a transition period. As set out above, the stated purpose of section 8 when the Withdrawal Act was passed was to prepare the statute book for "exit day", the day the UK leaves the EU (29<sup>th</sup> March 2019). These powers were "sunsetting" so that they could not be used more than two years after exit day.<sup>9</sup> However, despite stating that "exit day" will not change,<sup>10</sup> the Government has said that the Withdrawal Agreement Bill will extend the power in sections of the Withdrawal Act for two years after the end of the transition period, i.e. until 31 December 2022.
10. **PLP is concerned that the Government has not adequately justified this extension of the broad delegated powers in the Withdrawal Act for two years after the end of the transition period.** That extension will nearly double the time available to the Government to use this exceptional power to amend retained EU law by way of delegated legislation. The justification for introducing the powers in the Withdrawal Act was the need to have a functioning statute book on exit day, without making significant policy changes, so that Parliament could consider and pass legislation to implement any desired policy changes after we have left the European Union. Part of its purpose was effectively to 'buy time' for Government and Parliament to consider what the UK's legal framework should be after we have left the EU. If the Withdrawal Agreement is agreed, it will provide for a transition period of 21 months, during which most of EU law will apply to the UK, and during which that process of policy change can begin to be considered and implemented by Parliament. It is therefore unclear why the Government wishes – or needs - to retain the section 8 power for two years after the end of the transition period.
11. The limitations on section 8 imposed by the Withdrawal Act include that it could not be used to implement the Withdrawal Agreement.<sup>11</sup> However, there is no express restriction on its use to implement the Treaty (or Treaties) on the Future Relationship. Even though the Government enjoys the prerogative to negotiate treaties on the international plane, the Withdrawal Agreement White Paper rightly notes that whatever agreement is reached between the EU and the UK, it "will require UK legislation to implement in domestic law." This means that, in order to preserve the sovereignty of Parliament, which is at the heart of our constitution, Parliament must have significant control over the process of implementing a withdrawal agreement and any treaties subsequently agreed to establish the future relationship between the UK and the EU. **The Withdrawal Agreement Bill should make clear that delegated powers may not be used to implement any future relationship and primary legislation will be required.**
12. Furthermore, any additional delegated powers in the forthcoming Withdrawal Agreement Bill need to be considered in the context of the broad delegated powers in the Withdrawal Act. Delegated legislation is a necessary feature of

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<sup>8</sup> Legislating for the Withdrawal Agreement between the United Kingdom and the European Union (Cm 9674)

<sup>9</sup> Section 8(8) and 9(4).

<sup>10</sup> Withdrawal Agreement White Paper, para 60.

<sup>11</sup> Withdrawal Agreement White Paper, para 73.

governance in all contemporary complex polities. However, because law-making is a responsibility entrusted to Parliament in our constitutional arrangements, the availability of such powers to the executive should be kept to a minimal level, and **Parliament should ensure that there is no duplication of powers in the Withdrawal Agreement Bill or watering down of existing safeguards.**

b) Importance of effective Parliamentary scrutiny

(i) *The need for Withdrawal Agreement Bill to be properly debated*

13. The Withdrawal Agreement White Paper references the approval process for the agreement set out in the Withdrawal Act. Other than noting the statutory form this approval ought to take, neither the Withdrawal Act nor the Withdrawal Agreement White Paper sets out a timetable or timeframe in which this legislative process ought to take place. This is crucial because the legislation needs to be in place before exit day on 29 March 2019.<sup>12</sup> PLP is concerned that Parliamentarians will not have sufficient time to deliberate on the substance of the withdrawal agreement or the Framework for Our Future Relationship with the EU before enacting the Withdrawal Agreement Bill. Very few areas of public policy have not been affected by our membership of the EU, and in the event of an agreement, the material scope of issues covered by the agreement will be considerable.

14. Parliament needs to be given enough time to consider the impact of the withdrawal agreement. A truncated legislative process risks compromising Parliament's capacity to consider what has been negotiated and agreed by the executive on the international plane. **The Committee should ensure that a satisfactory amount of parliamentary time is allocated to both pre-legislative and legislative scrutiny of the Withdrawal Agreement Bill. Government should be encouraged to consider publishing a draft of the proposed Bill, at least in part, as soon as possible and in advance of a withdrawal agreement being concluded, so that Parliament has more time to consider its provisions.**

(ii) *The need for effective scrutiny of delegated powers*

15. It is essential that there is effective Parliamentary scrutiny of statutory instruments (SIs) in order to mitigate the constitutional risks of overly broad delegated powers. This is particularly true in the context of Brexit-related legislation given the far-reaching implications of our departure from the EU.

16. Concerns about the breadth of the delegated powers in the Withdrawal Act led to the establishment of the European Statutory Instruments Committee (ESIC), which, alongside the House of Lords' Secondary Legislation Scrutiny Committee (SLSC), currently have joint responsibility to 'sift' through SIs designated for a negative resolution procedure by Ministers. PLP has concerns about the impact of a withdrawal agreement on the functioning of this oversight framework. In

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<sup>12</sup> Unless an agreement is reached with the EU to extend the Article 50 period, in which case Ministers would be able to amend the definition of 'exit day' to the date on which the EU Treaties cease to apply to the UK in accordance with Article 50: EU (Withdrawal) Act, s20(4).

particular, it is concerned about the capacity of ESIC and SLSC to cope with quantity of SIs designated for a negative resolution procedure in both the circumstance of an agreement being reached or in the event of a supposed 'no-deal' scenario.

17. Most of the provisions that confer powers on Ministers to make delegated legislation in relation to Brexit operate on some form of contingency. If it appears that an agreement will be reached between the UK and the EU, Ministers have powers to make "enabling" statutory instruments to ensure the effective domestic implementation of an agreement (under section 9 of the Withdrawal Act). Similarly in a no deal scenario, the section 8 power will be used to amend retained EU law to ensure a functioning statute book. In either circumstance, it is foreseeable that a significant number of statutory instruments may have to be considered by the two scrutiny committees over a very short period of time. PLP is concerned about this framework's capacity to cope with the inestimable number of SIs that may have to be considered for designation to the appropriate scrutiny procedure. There is also a need for clarity about which of the SIs currently being considered may require amendment in the event of an agreement with the EU, and which it is intended will remain in force as drafted, or simply deferred until the end of the transition period. **PLP recommends that the Government should be required to make this clear as part of the explanatory statement provided when laying a draft statutory instrument.**

18. Lastly, the Withdrawal Agreement White Paper does not indicate whether SIs made under the Withdrawal Agreement Bill, designated for a negative resolution procedure, will also be subject to the same sifting procedure as instruments made under the Withdrawal Act. While PLP considers that **this is the minimum required to enable effective Parliamentary scrutiny of the use of the delegated powers, the Committee should consider the capacity of the sifting framework as it is now to cope with instruments to be made under the Withdrawal Agreement Bill.**

c) The limits of the courts in addressing constitutional issues in relation to delegated powers.

19. 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.

20. 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.

21. Judicial review cannot undo the harm done by unlawful decisions or legislation during the period. The cuts to prisoners' legal aid, which came into force in December 2013, were found to be unlawful by the Court of Appeal<sup>13</sup> last year.

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<sup>13</sup> *R (Howard League for Penal Reform and The Prisoners' Advice Service) -v- The Lord Chancellor* [2017] EWCA Civ 244

However, the Howard League reported that in the intervening period, violence and self-injury in prisons have risen to record levels, with almost 300 having committed suicide.<sup>14</sup> Similarly, the Supreme Court's 2017 judgment that the employment tribunal fees introduced in 2013 were unlawful<sup>15</sup> cannot rectify the harm that was done to those who could not afford to access justice in the meantime.

22. Litigation is also hugely expensive. Claimants face not only funding their own representation and court fees but risk being ordered to pay their opponents' 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.

23. Finally if Parliament fails to set clear limits on the extent of delegated powers, it risks "judges being stranded on the front line of a fierce political battle".<sup>16</sup> We have already seen attacks on the judiciary during the Brexit process.<sup>17</sup> If Parliament creates further legal uncertainty, renewed attacks are inevitable.

## Conclusion

24. In light of the above, Parliament must take back control of the use of delegated powers in the Brexit process. It is essential for Parliamentary democracy and the Rule of Law that delegated powers are narrowly tailored in primary legislation and that there are procedures in place for effective Parliamentary scrutiny of SIs.

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<sup>14</sup> See The Howard League's analysis of impact of prison legal aid cuts here:

<http://howardleague.org/legal-work/legal-aid-cuts-for-prisoners/>

<sup>15</sup> *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51

<sup>16</sup> 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>

<sup>17</sup> See The Daily Mail, "Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis", 3<sup>rd</sup> November 2018.

## Annex A

### EU (Withdrawal) Act Delegated Powers Table

All powers under the Act are subject to s10 restriction which requires that the power must be exercised in a way that is compatible with the Northern Ireland Act 1998; has due regard to the joint report on progress in the Article 50 negotiations; does not diminish any form of North-South cooperation under the Belfast Agreement; and does not create or facilitate new physical border infrastructure between NI & ROI.

<b>Power</b>	<b>Scrutiny</b>	<b>Other conditions/ limitations</b>
<p>Dealing with deficiencies in retained EU law arising from withdrawal (section 8, schedule 2, part 1 for devolved authorities)</p> <p>Power to “make such provision as the Minister considers appropriate to prevent, remedy or mitigate – (a) any failure of retained EU law to operative effectively; or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom</p>	<p>If not subject to the affirmative procedure, the SI is subject to the sifting procedure</p> <p>Per para 1(1) and 1(2) for section 8 and para 10(1) and 10(2) for section 9, the SI is subject to the affirmative procedure if it:</p> <p>(a) provides for any function of an EU entity or public authority in a member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom, (b) relates to a fee in respect of a function exercisable by a public authority in the United Kingdom, (c) creates, or widens the scope of, a criminal offence, (d) creates or amends a power to legislate or (e) makes regulations under s8(3)(b) (extending scope of “deficiency” for</p>	<p>See section 8(2)-(4) for definition of “deficiency”</p> <p>This power cannot be used to (a) impose or increase taxation or fees, (b) make retrospective provision, (c) create a relevant criminal offence, (d) establish a public authority, (e) be made to implement the withdrawal agreement, (f) amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it, or (g) amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998 (unless the regulations are made by virtue of paragraph 21(b) of Schedule 7 to this Act or are amending or repealing any provision of those Acts which modifies another enactment) (section 8(7)).</p> <p>Power expires two years after exit day (section 8(8))</p> <p>Urgency procedure: where a Minister decides that, for reason of urgency, an instrument exercising powers subject to affirmative procedure must be made and brought into force being laid before Parliament, but must be approved by resolution of both Houses within 28 days of the date of laying if it is to remain in force (schedule 7, paras 5 and 19).</p> <p>Explanatory statements for certain powers: appropriateness, equalities etc. (schedule 7, para 28) – requires a statement that the instrument “does no more than is appropriate” (para 28(2)), an explanation as to why in the Minister’s opinion there are good reasons for the instrument, and it’s a reasonable course of action (para 28(3)), and a statement as to whether it amends, repeals or revokes</p>

<p>from the EU” (section 8(1))</p> <p>See also s8(9)</p>	<p>purposes of s8(1)(b)) (para 1(5))</p> <p>OR if the Minister decides to make them subject to the affirmative procedure.</p> <p>IF Minister decides to make them subject to annulment by resolution then must be considered by sifting committee, and Minister must make a statement and explain why he considers that they should be subject to annulment (para 3). The recommendation of the sifting committee is not binding but if the Minister does not agree with it he must make a statement explaining why (para 3(7)).</p>	<p>any provision of equalities legislation &amp; if so, explaining the effect (para 28(4); that the Minister has had due regard to the need to eliminate discrimination &amp; other prohibited conduct under the EA 2010 (para 28(5)); and otherwise explaining its effect.</p> <p>Explanatory statements on Scottish Ministers’ use of powers (schedule 7, para 29)</p> <p>Further explanatory statements in certain sub-delegation cases (schedule 7, para 30) – explaining why it’s appropriate to create a sub-delegated power</p> <p>Further explanatory statements in certain Scottish sub-delegation cases (schedule 7, para 31)</p> <p>Annual reports in certain sub-delegation cases (schedule 7, para 32)</p> <p>Annual reports in certain Scottish sub-delegation cases (schedule 7, para 33)</p> <p>Further explanatory statements in urgency cases (schedule 7, para 34)</p> <p>Further explanatory statements in Scottish urgency cases (schedule 7, para 35)</p>
<p>Implementing any withdrawal agreement (section 9, scheduled 2, part 2 for devolved authorities)</p> <p>“such provision as the Minister considers appropriate for the purposes of</p>		<p>Power only available “subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the EU”: s9(1)</p> <p>Per section 9(3), this power cannot be used to (a) impose or increase taxation or fees, (b) make retrospective provision, (c) create a relevant criminal offence, (d) establish a public authority, or (e) amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it.</p> <p>Power expires on exit day per section 9(4)</p> <p>Urgency procedure- see above</p>



<p>implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day...”</p>		<p>Explanatory statements &amp; annual reports – see above (paras 28-35 of Sch 7 apply to instruments made under s9)</p>
<p>Making consequential provision (section 23(1)) “such provision as the Minister considers appropriate in consequence of this Act”</p>	<p>Subject to the sifting procedure if the government proposes an SI made under these powers is subject to negative SI per schedule 7, para 17(1).</p>	<p>Power expires 10 years after exit day: section 23(4)</p> <p>Urgency procedure- see above</p> <p>Explanatory statements for certain powers: appropriateness, equalities etc. (schedule 7, para 28) – see above</p>
<p>Providing for fees and charges in relation to functions which public authorities may have as a consequence of regulations made under sections 8 and 9 (section 14(1) and schedule 4)</p>	<p>Affirmative procedure only- see schedule 7.</p>	<p>Urgency procedure- see above</p> <p>Requires consent of the Treasury (Sch 4, para 3(1)) and for devolved authorities, the consent of a Minister in some circumstances (para 3(2))</p> <p>Power expires 2 years after exit day, with some exceptions (para 5)</p> <p>Power to amend pre-exit fees or changes in para 7 may not be used to impose or increase taxation where the provision is made only under s2(2) ECA 1972</p> <p>Further explanatory statements &amp; annual reports in sub-delegation cases (paras 30-32 of Sch 7) apply – see above</p>
<p>Authorising challenges to the validity of retained</p>		<p>Urgency procedure- see above</p>

EU law (section 5(6) and Schedule 1)		
Repealing provisions in devolution acts relating to devolution restrictions in retained EU law (section 12(9))		
Providing for the admissibility of evidence in legal proceedings (schedule 5, paragraph 4)		No power to amend primary legislation passed or made after the end of the current Parliamentary session (para 4(4) of Sch 5 Part 2)
Amending the definition of 'exit day' in the Act (section 20(4))		Expires on exit day.  Can only be exercised if "the day or time on or at which the Treaties are to cease to apply to the United Kingdom in accordance with Article 50(3) of the Treaty" is different from 29 March 2019 at 11.00pm.
Making transitional, transitory or saving provision considered by Ministers to be appropriate in connection with the coming into force of any provision of the Act (section 23(6))	Affirmative, negative or no procedure, at Ministerial discretion	