



Public Law Project

Preliminary Briefing on
the European Union (Withdrawal Agreement) Bill
22 October 2019

I: 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. 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 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.
2. As part of its Brexit work, PLP has three major projects underway. The SIFT Project (Statutory Instruments: Filtering and Tracking) scrutinises the statutory instruments ('SIs') made in the wake of Brexit to ensure that they conform to public law principles and do not undermine fundamental rights.¹ PLP's Brexit, Immigration and Administrative Justice Project looks at the impact of changes in immigration law and policy on administrative justice.² This project focuses on administrative justice issues arising from the EU Settlement Scheme ('the Scheme'). Additionally, PLP has recently launched an public law support hub for the Scheme, through which PLP is working closely with frontline organisations supporting vulnerable applicants.
3. In this initial briefing on the European Union (Withdrawal Agreement) Bill ('the Bill'), PLP highlights three initial areas of concern on which parliamentarians may wish to focus in debates on the Bill:
 - a. Unjustifiably broad delegated powers
 - b. Appeal rights for EU Settlement Scheme decisions
 - c. Unexplained power to make regulations in connection with judicial review
4. The Bill is constitutionally very significant and is complex. Its interaction with other pieces of domestic legislation and with the Withdrawal Agreement, Protocol on Northern Ireland and the Political Declaration require careful and detailed consideration. This initial briefing is not intended to be an exhaustive analysis of the issues arising under the Bill but to focus on these key areas of particular concern for PLP.

¹ <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/the-sift-project/>

² <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/brexit-immigration-and-administrative-justice-project/>

II: Delegated Powers

5. Unjustifiably broad delegated powers are a recurring theme in primary legislation implementing Brexit. The delegated powers in the EU Withdrawal Act 2018 ('EUWA') were unprecedented in their breadth. PLP's SIFT project has identified multiple concerns with the ways in which those powers have been exercised, including through the making of policy changes in delegated legislation and failure to ensure adequate scrutiny.³ The powers in this Bill appear even broader.
6. The Bill in its current form gives Ministers extensive powers to amend primary and secondary legislation with little Parliamentary oversight. For example, the Bill allows Ministers in implementing the Withdrawal Agreement to 'modify any provision made by or under an enactment'⁴ and this power is constrained only by the word 'appropriate'.⁵ Clause 3 of the Bill inserts a new section 8A into EUWA and gives Ministers the power to make any Regulations it considers 'appropriate' 'in connection' with implementing the WAB.
7. Appropriateness is a test based on the subjective judgment of the minister and therefore gives ministers a very broad discretion. The Delegated Powers and Regulatory Reform Committee have previously recommended that powers should be restricted by an objective test of necessity rather than a subjective test of appropriateness.⁶
8. Furthermore, section 8 of EUWA 2018 is amended by clause 27 of the Bill to extend its use to the rectification of deficiencies in retained EU law arising at the end of the implementation period, and the sunset clause in s8(8) is amended to provide that the power remains available for 2 years after the end of the implementation period. The Government justifies this in the Delegated Powers Memorandum on the basis that "As a result of the implementation period, the Bill will amend the EU (Withdrawal) Act 2018 so that EU law will not be retained and domesticated on the UK statute book until the end of the implementation period. For this reason, the Bill needs to also amend section 8 of the EU (Withdrawal) Act 2018 so that the power can be used to amend deficiencies arising in retained EU law as at the end of the implementation period."⁷ Yet the section 8 powers were justified on the basis that 'This substantial task of delivering a functioning statute book must be completed before we leave the EU'.⁸ The very purpose of the implementation period is to enable the UK and the EU to prepare for

³ See various SIFT project blog posts, including a three-part series: 'Eliminating Effective Scrutiny: Prorogation, No Deal Brexit, and Statutory Instruments' linked to here: <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/the-sift-project/>

⁴ See European Union Withdrawal Bill, clause 3 inserts section 8A(2) into the EU Withdrawal Act 2018.

⁵ See European Union Withdrawal Bill, clause 3 inserts section 8A(2) into the EU Withdrawal Act 2018.

⁶ 7 Delegated Powers and Regulatory Reform Committee, HL Paper 73, 12th Report of Session 2017–19, European Union (Withdrawal) Bill; <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/73/73.pdf>

⁷ Delegated Powers Memorandum ,para 288

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841012/EU_Withdrawal_Agreement_Bill_Delegated_Powers_Memorandum.pdf

⁸ White Paper on the Great Repeal Bill, Foreword by David Davis MP, page 7:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf

the UK's departure from the EU and ensure a smooth transition. It does not follow from the fact that there will be an implementation period that the Government needs the same extensive powers to amend retained EU law at the end of the implementation period, and for two years afterwards. The Government needs to offer more by way of justification as to why an additional 14 months' availability of these powers is needed.

9. The Bill contains unprecedented numbers of Henry VIII powers: the Delegated Powers Memorandum that accompanies the Bill refers to at least 19 Henry VIII powers contained within it.⁹ Some of these Henry VIII powers give ministers the broad discretion where it is deemed appropriate to make regulations restricting rights of entry for EU citizens,¹⁰ to amend provisions relating to non-discrimination, equal treatment and rights of workers¹¹ and to delete certain directives on workers' rights.¹²

III: The Bill fails to secure appeal rights for all applicants to the EU Settlement Scheme.

10. PLP has previously explained the importance of a right of appeal against decisions made under the Scheme.¹³ Clause 11, which confers powers on Ministers to make Regulations providing for appeal rights against immigration decisions made under the Scheme, is therefore welcome.
11. However, PLP is concerned that clause 11 does not go far enough. In particular, it does not impose an obligation on Ministers to make such Regulations or to provide for appeal rights for all applicants under the Scheme. A failure to do so in respect of those falling within the scope of the Withdrawal Agreement would be incompatible with the directly effective rights in the Agreement. EU citizens should not have to rely on those rights to secure a right of appeal and the Bill should be amended to provide on its face for a right appeal, rather than leaving the matter to Ministerial discretion and secondary legislation.
12. The Bill must be amended to place a duty on Ministers to provide appeal rights for all applicants to the Scheme.

IV: Unexplained powers to make provision for judicial review

13. Clause 11(3) of the Bill proposes to give Ministers a power (emphasis added) "by regulations [to] make provision for, or in connection with, reviews (including judicial reviews) of decisions with subsection (2)(g)" i.e. "any other decision made in connection with restricting the right of a relevant person to enter the United Kingdom". This power is a Henry VIII power which can be used to modify primary legislation: cl 11(4).
14. Clause 11 generally makes provision for Ministers to make regulations in connection with appeal rights. The reference to "reviews" is understood to be a reference to

⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841007/EU_Withdrawal_Agreement_Bill_Delegated_Powers_Memorandum.pdf

¹⁰ See European Union Withdrawal Bill, clause 9.

¹¹ See European Union Withdrawal Bill, clause 14.

¹² See European Union Withdrawal Bill, clause 34.

¹³ See, for example, PLP's 'No deal, no appeal' briefing proposing an amendment to the Immigration and Social Security (EU Withdrawal) Bill: <https://publiclawproject.org.uk/wp-content/uploads/2019/01/Amended-PLP-Briefing-on-Immigration-and-Social-Security-Co-ordination-Bill-2019-1.pdf>

internal reviews by the Home Office staff of its own decisions. While PLP has concerns about the adequacy and effectiveness of such internal reviews, explained elsewhere, it understands the rationale for giving Ministers power to make regulations in connection with such internal reviews.

15. However, none of the supporting materials published alongside the Bill explains the intention behind the power to make provision for judicial review. Paragraph 103 of the Delegated Powers Memorandum explains that regulations under clause 11(1) will make provision for appeals to the First-tier Tribunal. Paragraph 105 describes the power in clause 11(3) but gives no clue as to its intended use. Paragraphs 111-114 set out the justification for the power to make regulations but again say nothing about why there is a need for a power to make provision for or in connection with judicial review, as distinct from appeals.

16. Judicial review is a common law remedy and has a special constitutional status because it ensures the constitutional protection of the courts, which is central to the rule of law. There is no need to provide a statutory basis for access to judicial review to challenge decisions by the executive. The Government could not use such a power to limit or constrain the right of access to judicial review because of its constitutional status. In such circumstances it is wholly unclear what the purpose of this power is. **The words in parentheses in clause 11(3) (“including judicial reviews”) should be deleted.**

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