EU (Withdrawal Agreement) Bill

PLP and Liberty's Joint Briefing for Second Reading in the House of Commons

1. Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.

2. Liberty is an independent national membership organisation that seeks to challenge injustice and defend freedom. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

3. Neither PLP nor Liberty take a position on the UK's decision to leave the EU. Rather, our work on Brexit seeks to promote Parliamentary sovereignty, ensure that the executive is held to account and protect the interests of disadvantaged groups.[1]

4. In this briefing on the European Union (Withdrawal Agreement) Bill ('the Bill'), we highlight four areas of concern and make ten recommendations. This briefing has been prepared on the basis of the Bill as laid before the last Parliament. We understand from media reports this week that the Bill is likely to be reintroduced with some amendments. This briefing does not attempt to address those amendments as the amended Bill has not yet been published.

5. The four areas of concern are:

    (1) Unjustifiably broad delegated powers;
    (2) Appeal rights for EU Settlement Scheme decisions ('EUSS');
    (3) The powers of the Independent Monitoring Authority ('IMA'); and
    (4) Power to make regulations in connection with judicial review.

6. These provisions represent a constitutionally significant transfer of power to the executive and pose a real threat to our democratic processes and rights protections.

[1] For more information on PLP's Brexit work, see: https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/; for more information on Liberty's Brexit work, see: https://www.libertyhumanrights.org.uk/human-rights/human-rights-uk-after-brexit.

(1) UNJUSTIFIABLY BROAD DELEGATED POWERS

7. The delegated Henry VIII power in s.8 European Union (Withdrawal) Act 2018 ('EU(W)A') has been a significant and troubling feature of the Brexit-related legislative landscape to date. There are well-documented examples of where this power has been used beyond the purpose legislated for by Parliament.[2]

8. The Bill confers on ministers 19 further delegated Henry VIII powers, with very significant policy and rights implications. We are deeply concerned that the powers in the Bill are broader and subject to less scrutiny than those in the EU(W)A.[3]

Implementing the Withdrawal Agreement

9. In implementing the Withdrawal Agreement, ministers are empowered to make regulations which *'modify any provision made by or under an enactment'* as they *'consider appropriate'*.[4]

10. The House of Lords Constitution Committee has rightly stated that if the powers in the Bill are used to make statutory instruments which are contrary to the terms of the Withdrawal Agreement, they would be open to legal challenge.[5] However the Bill does not contain an express restriction in those terms, which would aid understanding, transparency and legal certainty.

Recommendation 1: That the Government confirms it cannot use the powers in the Bill in a manner inconsistent with the Withdrawal Agreement.

Northern Ireland Protocol

11. The implementing provisions for the Northern Ireland Protocol are too widely drafted to reasonably serve as a meaningful constraint on the executive: ministers may by regulations make any such provisions that they consider to be *'appropriate'*.[6]

12. The House of Lords Constitutional Committee has observed that the power is essentially unrestricted[7] and concluded that it requires *'the strongest justification'*.[8] No such justification has been provided.

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[2] Through its Statutory Instruments: Filtering and Tracking ('SIFT') project, created to scrutinise Brexit-related Statutory Instruments to ensure conformity with public law and rights standards. See e.g. SIFT project blog posts explaining how the s.8 power has been used, including a three-part series: 'Eliminating Effective Scrutiny: Prorogation, No Deal Brexit, and Statutory Instruments': https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/the-sift-project/.
[3] See for example, discussion of the delegated powers and related scrutiny procedure under the European Union (Withdrawal) Bill by the House of Lords Constitution Committee, Chapters 8 and 9 https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/69.pdf.
[4] See for example clause 3 and clauses 5-11 of the Bill. All of the 19 new delegated powers in the Bill use this language.
[5] House of Lords Constitution Committee, Interim Report on the EU (Withdrawal Agreement) Bill (November 2019), [32] https://publications.parliament.uk/pa/ld201919/ldselect/ldconst/21/21.pdf.
[6] Clause 21, inserting new clause 8C
[7] House of Lords Constitution Committee, Interim Report on the EU (Withdrawal Agreement) Bill (November 2019), [83] https://publications.parliament.uk/pa/ld201919/ldselect/ldconst/21/21.pdf.
[8] House of Lords Constitution Committee, Report on EU (Withdrawal Bill), [196] https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/69.pdf.

Recommendation 2: That clause 21 is amended to introduce appropriate restrictions on the new s8C of the EU (Withdrawal) Act 2018. This should include a test of necessity, and a restriction to prevent any use to impose or increase taxation or fees; make retrospective provision; create a relevant criminal offence; establish a public authority; amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it; or amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998.

Social security coordination

13. Clause 13 of the Bill has no sunset clause despite the purpose of the delegated powers being to implement social security coordination after Brexit. It is not clear why such powers are required beyond the implementation period.

Recommendation 3: That clause 13 is amended so that the powers sunset two years after the end of the implementation period.

Inadequate scrutiny procedures

14. The scrutiny provisions in the Bill are comparable to the arrangements proposed under EU(W)A as originally published.[9] Those arrangements did not survive Parliamentary scrutiny following widespread criticism for constituting an inappropriate transfer of power to the executive.

15. Instead, after amendment by Parliament, EU(W)A instituted a 'sifting' procedure for Brexit Statutory Instruments ('SIs') made under s.8 powers laid by way of the draft negative resolution procedure.[10] This sifting procedure requires a designated committee of each House[11] to scrutinise each SI and recommend whether or not it should be upgraded to the affirmative resolution procedure. This sifting procedure has resulted in more than 70 SIs being recommended for upgrade and led to more meaningful scrutiny of those SIs by Parliament.

16. By contrast, the Bill makes no use of this sifting procedure and SIs laid by way of the draft negative resolution procedure cannot be upgraded. Rather, there are two triggers for Parliamentary scrutiny of delegated powers under the current Bill: (1) the first time the power is used to create an SI; or (2) where the SI created amends primary legislation.[12]

[9] See, European Union (Withdrawal) Bill (HC Bill 5) https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_1.htm.
[10] For a further explanation of the sifting mechanism please see House of Commons Library Briefing Paper 'The European Union (Withdrawal) Act 2018: scrutiny of secondary legislation' (Schedule 7) By Richard Kelly Number 08329, 9 July 2018 https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8172.
[11] The European Statutory Instruments Committee in the House of Commons ('ESIC') and the Secondary Legislation Scrutiny Committee in the House of Lords ('SLSC').
[12] These triggers can be seen in clauses 3, 4, 7, 8, 9, 11 , 12, 13, 14 , 18 , 19, 21 and 22 of the Bill.

17. Under the 'first use' model, all subsequent SIs made using a power are subject only to the draft negative resolution procedure unless they amend primary legislation. This is an arbitrary approach that ignores that subsequent regulations may be as, or more, significant and worthy of debate as the first set made. It is also wrong to adopt an approach by which it is only SIs that amend primary legislation that require proper scrutiny; SIs are capable of having a profound impact on policy and rights without amending primary legislation.[13]

18. The Bill represents a regressive step in terms of Parliamentary scrutiny and it is vital that the Bill is amended to replicate the scrutiny procedure contained in the EU(W)A.

Recommendation 4: That the Bill is amended to include the EU(W)A sifting procedure.

Extending the EU(W)A sunset clause

19. Clause 27(5) of the Bill amends the sunset clause applicable to the power in s8 EU(W)A to remedy deficiencies in retained EU law so that the power remains available for two years after the end of the implementation period.

20. At the time of the passage of the EU(W)A, the s.8 powers were justified on the basis that: *'[t]his substantial task of delivering a functioning statute book must be completed before we leave the EU*'.[14] It is not clear why the Government now needs to extend these powers, already in force for 18 months, until two years after the end of the implementation period.

Recommendation 4: That clause 27(5), which extends the sunset clause, be removed from the Bill.

Expanding the definition of 'deficiency' in retained EU law

21. Clauses 27(2)(c) and (6) of the Bill amend s.8 EU(W)A to expand the definition of deficiencies in retained EU law and to include deficiencies arising from the end of the implementation period. The House of Lords Constitution Committee has described these amendments as *'vague'* and says they insert *'potentially important new categories of deficiencies'* despite *'no […] justification'* being provided by the Government.[15]

Recommendation 5: That clauses 27(2)(c) and 27(6) are removed from the Bill.

[13] This approach was criticised by the Constitution Committee see House of Lords Constitution Committee, Interim Report on the EU (Withdrawal) Bill (2017), [46] https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/1906.htm.
[14] 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.
[15] House of Lords Constitution Committee, Interim Report on the EU (Withdrawal Agreement) Bill (November 2019), [93] https://publications.parliament.uk/pa/ld201919/ldselect/ldconst/21/21.pdf.

(2) APPEAL RIGHTS FOR EUSS DECISIONS

22. PLP has previously explained the importance of a right of appeal against EUSS decisions.[16] Clause 11 of the Bill – which confers powers on ministers to make regulations providing for such appeal rights – is therefore welcome.

23. However, the Bill does not impose an *obligation* to provide for appeal rights for *all* applicants. The matter should not be left to ministerial discretion and secondary legislation.

24. A further concern is that those with an appeal outstanding at the end of the implementation period – currently 31 December 2020 – would immediately be subject to the hostile environment.[17]

Recommendation 6: That the Bill be amended to provide on its face an appeal right for all EUSS applicants.

***Recommendation 7: That the Bill is amended to protect the rights of EU citizens while their appeals are pending*.[18]**

(3) THE INDEPENDENT MONITORING AUTHORITY

25. The UK is required to create an IMA to monitor citizens' rights under the terms of the Withdrawal Agreement.

26. The Government refers to the IMA as being comparable to the Equalities and Human Rights Commission.[19] Yet, while the Bill empowers the IMA to bring judicial review claims or intervene in other legal proceedings, unlike the EHRC, it is not permitted to raise Human Rights Act 1998 arguments in proceedings. [20] In order to avoid fragmentation of legal issues, the IMA ought to be able to deploy such arguments too.

[16] 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.
[17] The Government has introduced guidance stating that the hostile environment provisions, such as right to rent checks, will apply to EEA citizens from 1st January 2021. https://www.gov.uk/guidance/right-to-rent-checks-for-eu-eea-and-swiss-citizens-after-brexit
[18] PLP supports Amendments 66 and 67 to the Bill as tabled in the last Parliament.
[19] See, for example, the Government's factsheet on the IMA https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841101/WAB_Fact_Sheet_-_INDEPENDENT_MONITOR.pdf
[20] Under s. 30 Equality Act 2006 the EHRC can rely on section 7(1)(b) of the HRA and is exempted from the requirement of being a victim.

27. Further, the Bill confers powers to modify and remove functions of the IMA, and even abolish it, by secondary legislation. Changes to a body responsible for monitoring rights and holding the executive to account should not be permissible by SI.

Recommendation 8: That the Bill be amended to permit the IMA to deploy Human Rights Act 1998 arguments in legal proceedings.

Recommendation 9: That the Bill be amended to preclude modification or removal of the functions of the IMA by secondary legislation.

(4) POWER TO MAKE REGULATIONS IN CONNECTION WITH JUDICIAL REVIEW

28. Clause 11(3) confers on ministers a delegated Henry VIII power *'by regulations [to] make provision for, or in connection with, reviews (including judicial reviews) of decisions'* made in connection with restricting the rights of certain people to enter the UK.

29. None of the supporting materials published alongside the Bill explain the intention behind the power to make provision for judicial review.

30. 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.

    Recommendation 10: That the words in parentheses in clause 11(3) ("including judicial reviews") should be deleted.

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