



Public Law Project

Immigration and Social Security Co-ordination (EU Withdrawal) Bill Briefing for the House of Commons

I: Introduction

1. The 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. PLP takes no 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.
3. In this briefing on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill ('the Bill'), we highlight two areas of concern:
 - a. Unjustifiably broad delegated powers; and
 - b. Inadequate scrutiny procedures.
4. PLP has two key recommendations:
 - a. **The delegated powers in the Bill must be narrowed to ensure that MPs can scrutinise the changes to our immigration and social security laws and significant policy changes are not left to Ministers alone.**
 - b. **The scrutiny procedures in the Bill must be improved including by removing the power to make regulations using the 'made affirmative' procedure.**

I: Delegated Powers

5. The delegated powers in the European Union (Withdrawal) Act 2018 ('EUWA') and the European Union (Withdrawal Agreement) Act 2020 ('EUWAgA') were unprecedentedly wide.¹ There are well-documented examples of where the delegated Henry VIII power in s.8 EUWA has been used beyond the purpose legislated for by Parliament.² The powers in this Bill appear even broader.
6. Clause 4(1) allows the Secretary of State by Statutory Instrument ('SI') to amend any legislation which she considers 'appropriate' provided it is 'in connection with' or 'consequential to' the repeal of free movement legislation. Given the use of 'in connection with,' this is potentially a breathtakingly wide power. Clause 4 is also, like

¹ See the concerns expressed by PLP in our briefings during the passage of EUWA and EU (WA)A and available here: <https://publiclawproject.org.uk/what-we-do/current-projects-and-activities/brexit/> and <https://publiclawproject.org.uk/resource/eu-withdrawal-agreement-bill-second-reading-briefing/>

² See e.g. SIFT project blog posts explaining how the s.8 power has been used, see for example A. Sinclair and J. Tomlinson, 'Brexit Delegated Legislation: Problematic Results', U.K. Const. L. Blog (9th Jan. 2020).

s8 EUWA, a Henry VIII clause, permitting amendment to primary legislation, as well as to retained direct EU legislation³ (clause 4(2)).

7. Clause 4 is identical to clause 4 in the previous Immigration and Social Security Coordination (EU Withdrawal) Bill which fell at the end of the last Parliamentary session. The Delegated Powers and Regulatory Reform Committee reported in advance of committee stage in January 2019. They described clause 4 in these terms:⁴

The combination of the subjective test of appropriateness, the words “in connection with Part 1”, the subject matter of Part 1 and the large number of persons who will be affected, make this a very significant delegation of power from Parliament to the Executive....

We are frankly disturbed that the Government should consider it appropriate to include the words “in connection with”. This would confer permanent powers on Ministers to make whatever legislation they considered appropriate, provided there was at least some connection with Part 1.

8. None of these concerns have been taken on board and clause 4 continues to be an extremely wide delegation of power from Parliament to the Executive.
9. The breadth of clause 4 needs to be seen in the context that the Bill repeals huge swathes of existing immigration and free movement law via clause 1 (and schedule 1) without replacement. This leaves significant uncertainty for individuals whose rights will be affected. This is in effect a skeleton bill: important immigration policy decisions are being left for delegated legislation where they will necessarily receive only limited Parliamentary scrutiny and debate.
10. Under clause 4(4), this power includes delegated legislation affecting the rights of those who were not entitled to rely on EU law free movement rights immediately before the repeal of free movement law under clause 1. The Government states in the Delegated Powers memoranda that the purpose of clause 4(4) is to enable provision to be made for people who ‘have been granted (and will continue to remain eligible for) leave under the EU Settlement Scheme, notwithstanding that they fall outside the scope of the Agreements’. It should therefore track the language of s 7(2)(b) of EUWAgA⁵ which protects ‘the position of certain groups who currently derive their residence rights from EU law, and are granted leave to enter or remain in the UK ... but who are not covered by the Agreements’.
11. Clause 4(5) enables the Government to ‘modify provision[s] relating to the imposition of fees or charges’ under primary legislation. This is a wide power to levy fees and charges and the Government has not given a satisfactory reason for requiring it.

³ i.e. EU Regulations, decisions and tertiary regulations, and annexes to the EEA agreement which are incorporated into domestic law by s3 EUWA.

⁴ House of Lords Delegated Powers and Regulatory Reform Committee, Report on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (January 2019) [15] and [30].

⁵ Which extends the power to make Regulations implementing certain provisions of the Withdrawal Agreements so as to apply to those to whom the relevant provision ‘does not apply but who may be granted leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules’.

12. Finally, clause 5(1) of the Bill allows ‘an appropriate authority’ by regulations to amend, repeal or revoke any provision of the Social Security Co-ordination Regulations which would otherwise apply as ‘retained EU law’ in UK domestic law after the transition period.⁶ The Coordination Regulations are reciprocal and guarantee the rights of EEA nationals in the UK (and UK nationals in the EEA) to pensions, social security and other benefits to which they have entitlements.
13. The memorandum for the December 2018 Bill justified the clause 5 power on the basis that ‘In the absence of a deal or withdrawal agreement with the EU, the power may need to be exercised to implement policy changes to the social security co-ordination rules’. Now that the Withdrawal Agreement provides a framework for social security coordination after the transition period this power is unnecessary.
14. However, now that an agreement has been negotiated, the same power remains in the current Bill. The new justification for the power is ‘this clause is intended to be used to implement new policies subject to the outcome of future negotiations with the EU’. If the Government reaches further agreements with the EU or EU member states as to social security coordination those should be placed in primary legislation and passed through Parliament to allow for proper scrutiny. In the words of The Delegated Powers and Regulatory Reform Committee:⁷

The clear impression is that the Government are seeking these powers in order to avoid: having to prepare a detailed bill implementing their policy once it is settled, and any future arrangements with the EU are concluded; and then to submit that bill for full Parliamentary scrutiny.

Recommendation 1: That the words ‘or in connection with’ are removed from clause 4(1) so that the power is limited to consequential provisions.

Recommendation 2: That the powers under clause 4(1) contain a sunset clause.

Recommendation 3: That clause 4(4) be amended to track the language of s 7(2)(b) of EUWAgA and therefore to make provision for persons who may be granted leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules and who do not have such leave.

Recommendation 4: That clause 4(5) is removed unless the Government can provide a proper and explicit justification for its inclusion and explain how they intend to use the power.

Recommendation 5: That clause 5 be removed from the Bill and any new policies on social security coordination arising out of further negotiations with the EU are placed in primary legislation.

II: Inadequate scrutiny procedures

15. The scrutiny provisions in the Bill are comparable to the arrangements proposed under EUWA as originally published. Those arrangements were widely criticised by Parliament for constituting an inappropriate transfer of power to the Executive.

⁶ i.e. the retained direct EU legislation listed in clause 5(2).

⁷ House of Lords Delegated Powers and Regulatory Reform Committee, Report on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (January 2019) [51].

16. After amendment by Parliament, EUWA instituted a 'sifting' procedure for all Brexit SIs made under the s. 8 power laid using the draft negative resolution procedure. This sifting procedure requires a designated committee of each House to recommend whether a negative resolution SI should be upgraded to the affirmative resolution procedure. This procedure has resulted in more than 70 SIs being upgraded and led to more meaningful scrutiny by Parliament. This Bill makes no use of this sifting procedure and SIs laid under the negative resolution procedure can never be upgraded to the affirmative procedure, no matter how significant they are.
17. Of greatest concern is that the first set of regulations made under clause 4(1) are subject to the made affirmative procedure. The made affirmative procedure allows the Government to make regulations which remain in force for up to 40 days before needing debate. Regulations could therefore be in force - and significantly affecting the lives of EEA nationals before they can be debated in Parliament. The Government originally justified this provision on the basis that the Bill might receive royal assent close to exit day in a no deal scenario. Now that a deal with the EU has been ratified, the made affirmative procedure should be removed from the Bill.
18. Subsequent SIs made under clause 4 are subject only to the negative resolution procedure unless they amend primary legislation in which case they are subject to the draft affirmative procedure (meaning they will not become law until they have been debated and approved by each house). The appropriate test for whether an SI should be subject to full scrutiny is not only whether or not it amends primary legislation: SIs are capable of having a profound impact on policy and rights without amending primary legislation. For example, clause 4(7) only allows for heightened scrutiny where the SI is amending primary legislation but not when it is amending retained EU law. This is despite the fact a good deal of retained EU law contains measures of the type that might be contained in Acts of Parliament had its legislative root been domestic rather than European.
19. The Delegated Legislation and Regulatory Reform Committee also criticised the model of scrutiny in the Bill stating:⁸

There would, however, be nothing to prevent a future Government from abolishing those rights by subsequent clause 4(1) regulations; and the negative procedure would apply unless the regulations amended primary legislation (which would be unlikely in the case of changes to transitional provisions).

Recommendation 6: That the sifting mechanism for negative SIs under EUWA is applied to negative resolution procedure SIs made under the Bill.

Recommendation 7: That the made affirmative procedure is removed from clause 4 of the Bill.

If you would like to discuss points raised in this briefing, please do not hesitate to contact: Alexandra Sinclair, Research Fellow, a.sinclair@publiclawproject.org.uk

⁸ House of Lords Delegated Powers and Regulatory Reform Committee, Report on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (January 2019) [25].