

UNISON House of Lords briefing EU (Withdrawal) Bill

Clauses 7, 8 and 9 of the Bill would provide Ministers with extensive new powers (including Henry VIII powers) to introduce statutory instruments which amend, weaken or repeal retained EU law.

This briefing sets out UNISON's concerns and recommendations on:

*Implementing the withdrawal agreement (**Clause 9**); Scrutiny and scope of delegated powers (**Clause 16, Schedule 7**); Powers to amend other legislation as a consequence of the Act and to make transitional arrangements in preparation for exit day (**Clause 17**); Powers to amend UK law to ensure compliance with international obligations (**Clause 8**)*

Clause 9: Provides Ministers and the Government with the legislative authority to use secondary legislation to implement any withdrawal agreement agreed with the European Union under Article 50(2) Treaty on European Union (TEU)

- The Government has not yet explained how the use of clause 9 will be coordinated with either the proposed Withdrawal Agreement and Implementation Bill, or with the promised vote, on a motion both Houses of Parliament, on the substance of a withdrawal agreement.
- It has however indicated that clause 9 could be used if the negotiations conclude late in the two-year period. This could mean that clause 9 might only be used if there was not enough parliamentary time to implement the withdrawal agreement through primary legislation. The Communication from the Commission to the European Council on the progress of the negotiations, published on the 8 December 2017, set out the following on the timings of the process:

European Negotiations should be complete by autumn 2018 to allow good time for the Withdrawal Agreement to be concluded by the Council after obtaining consent of the European Parliament, and to be approved by the United Kingdom in accordance with its own procedures before 29 March 2019.[1]

UNISON concerns around Clause 9

1. Purpose, scope and limits of the clause 9 power. The purpose of clause 9 is to enable UK Ministers to make regulations “for the purposes of implementing the withdrawal agreement” made under Article 50, “**whether or not ratified**”. The scope of clause 9 is notable as it would enable regulations to “amend the Bill itself in order to reflect the outcome of negotiations”. The Joint Report of Phase 1 indicates that elements of the EUW Bill, for example clause 6(1)(b) on references to the Court of Justice of European Union, could need to be amended to give effect to the Withdrawal Agreement.[2]

- The terms of the withdrawal are still far from clear, but it is possible Ministers could use the clause 9 powers to make wide-ranging changes relating to the rights of EU citizens, the Irish border, Euratom issues, and dispute resolution issues
- The new powers could be used to amend the EU Withdrawal Bill itself
- Clause 9 powers could be used to lift the time-limits for the new powers or to remove the requirement on UK courts to follow the decisions of ECJ issued before exit day. As a result, UK employment law could quickly fall behind EU standards. The powers

could even be used to restrict or remove Parliament's ability to scrutinise how Ministers exercise the new powers

- The new powers are not limited to making technical changes to retained EU law (e.g. removing references to EU institutions). Ministers would also be able to introduce substantial policy changes – such as establishing new statutory bodies, introducing new regulatory systems or weakening rights which individuals rely on in the workplace and beyond.

2. Clarity is needed over the interlocking aspects of the EU Withdrawal Bill powers and the Withdrawal Agreement & Implementation Bill in any transition period is required.

- If a transition or 'implementation' period is agreed as part of the Article 50 agreement, implementing legislation would be needed for that too. This could require changes to the provisions of the EUW Bill itself. The Government has said that the EUW Bill is not intended to provide for any transition period.
- In November the Government announced that it would "enshrine the Withdrawal Agreement between the UK and the EU" in UK domestic law through new primary legislation: the Withdrawal Agreement and Implementation Bill, which would also deal with the complexities of legislating for an 'implementation period'.
- The Joint Report on Phase 1 indicates that elements of the withdrawal agreement could require changes to the EUW Bill, as it is currently drafted, for example in relation to the role of the CJEU after exit day (clause 6 of the EUW Bill).[3] These changes could be through the WAI Bill or by using the delegated power in clause 9 of the EUW Bill.

3. Timing

- It will not be possible to publish implementing legislation under clause 9 (or the proposed new Bill) until the withdrawal agreement is finalised. But depending on the timing of the negotiations, this could leave very little time to make all the necessary implementing legislation before exit day.
- Clause 9 could therefore be used to effect a number of significant policy changes via secondary legislation in a short timescale. The scarcity of time is central to the Government's justification for including a power to implement the withdrawal agreement through secondary legislation. The commitment to the WAI Bill in the Joint Report on Phase 1 would require the Government to find the necessary parliamentary time to ensure that the WAI Bill was passed before exit day. It is presumed, but not legally necessary, that the vote on the substance of the withdrawal agreement in both Houses of Parliament will occur before either the implementing primary or secondary legislation.

4. Ensuring that Parliament votes on the withdrawal agreement

- While the withdrawal agreement is being negotiated, Parliament is debating the powers it will have for implementing the (as yet unknown) provisions of the agreement. It is likely that Parliament would then consider legislation to implement the agreement only if the vote on the substance of the agreement is passed. It is likely that any agreement will have profound implications for the UK constitutional framework and legal system. In particular, it is likely to necessitate major changes to areas of retained EU law such as citizens' rights, Irish border issues and dispute resolution.

UNISON is concerned that this executive power grab is evident in the way that the government has proposed the 4 stages of preparing for Brexit constitutionally:

- A. EU (Withdrawal Bill) 2018** has been written to give government Ministers powers to change legislation after Brexit whether we get an EU UK Agreement deal or no deal.

B. Two resolutions with no ‘meaningful vote’¹. Both of these will be laid as two resolutions for agreement in one single motion for both Houses to agree.

- I. **Withdrawal Agreement (WA) 2018** a legal EU UK Treaty which will include the divorce bill, transition terms, Ireland, provisions on citizen’s rights etc
- II. **Framework for the future EU UK Agreement (FEUKA)** will include the future framework for the new EU UK Agreement.

These are not legally binding – but more of a political gesture so that the government can say that a ‘meaningful vote’ was taken. Without guarantees that a parliamentary select committee will be given time to scrutinise or take evidence in effect there is **no meaningful vote** and parliament cannot amend either of the agreements.

It is also still under debate that if parliament voted down the resolution whether Brexit can go ahead? Could the government be told by parliament to go back and get another deal?

The government has proposed this parliamentary approval ‘motion’ process as a separate ‘voting’ procedure alongside the traditional use of the CRAG (Constitutional Reform and Governance Act 2010) procedure. The government will also place a copy of the Withdrawal Agreement - which is a Treaty - before both Houses for ratification. Parliament could use the powers of CRAG to object to ratification and indefinitely block the ratification of the Withdrawal Agreement Treaty.

After the resolutions have been passed (if they do get passed) the government proposes to introduce a second constitutional bill the **Withdrawal and Implementation Bill (WAI Bill)**. This blurs the boundaries between the ‘approval and implementation process’ as the bill will invite parliamentary scrutiny on both the Withdrawal Agreement Treaty and the FEUKA, even though both Houses will have already supported the resolution to support the agreements with little scrutiny.

Furthermore, unless amendments to Clause 9 in the EU Withdrawal Bill (Stage 1) are successfully passed, there will be nothing stopping the government from using secondary legislation to implement the WA before the **Withdrawal and Implementation Bill** has received parliamentary scrutiny and Royal Assent. This is because the government wants to be able to use its new powers it will inherit from the EU Withdrawal Bill to implement any part of the WA where it considers it is necessary.

C. Withdrawal and Implementation Bill (WAI Bill) to implement the WA once the WA and FEUKA are passed as a resolution in both Houses. The WAI Bill needs to be passed before Exit day, or else any legal provisions and treaty obligations in the withdrawal agreement will have no legal basis in UK Law.

There will be limited scope for amending the WAI Bill as amendments cannot seek to change the text of the agreement (WA Treaty) itself, or presumably the political declarations of the future EU UK relations already agreed by resolution in the FEUKA.

D. The EU UK future Agreement can only be legally conducted once the UK has left the EU. It is not clear yet whether it will be a single agreement or a series of bilateral agreements covering various common areas such as Trade, Public Procurement, Energy, Security, Banking, Data protection etc. The CRAG process will likely apply to any new agreements as they will be treated as International Treaties too and will not be available to be amended by Parliament. The government will also introduce further legislation where it is needed to implement the terms of the future new EU U Agreement

¹ <https://commonslibrary.parliament.uk/parliament-and-elections/parliament/parliament-and-the-withdrawal-agreement-the-meaningful-vote/1290/>

into UK law but it is not know if this will be primary or secondary legislation and if it can be amended.

Recommended amendments to support for clause 9:

- Amendment 153
- Amendment 196
- Amendment 198
- Amendment 202
- Amendment 213
- Amendment 218

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