



BRIEFING PAPER

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Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19: Progress of the Bill

By Hannah Wilkins

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Contributing Authors: Steven Kennedy, Social Security, Section 3

Summary of the Bill

The [*Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill 2017-19*](#) (“the Bill”) was introduced in the House of Commons on 20 December 2018 and had its Second Reading in the House of Commons on 28 January 2019.

The Bill has passed through Public Bill Committee and is due to have its Report stage and Third Reading on a date to be announced.

The Bill was reported to the House by the Public Bill Committee **without amendments**.

You can read the Library briefing paper, '[The Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill 2017-19](#)', for more information on the Bill.

In summary, the Bill would repeal free movement, and other related EU-derived rights in UK primary and secondary legislation, and bring EU citizens under domestic immigration law. It would also make provision for Irish citizens and amend retained direct EU legislation on social security.

The Bill does not set out the future immigration system for EU citizens who move to the UK after Brexit. The future immigration system will be set out in the immigration rules.

1. Second Reading

The Bill was given its Second Reading on [28 January 2019](#), by 297 votes to 234.

The Home Secretary described the Bill as ‘fundamental to our future immigration system’. He explained that the Bill will bring an end to free movement and repeal ‘all related EU legislation that is retained in UK law under the Withdrawal Act’.¹

Some of the recurrent concerns raised were:

- The wide-ranging nature of the Henry VIII powers of Clause 4 and level of parliamentary scrutiny;
- The timing of the Bill in repealing free movement;
- Indefinite immigration detention of asylum seekers;
- The effect of the future immigration system, proposed in the [Immigration White Paper](#), on the social care sector, the NHS and the agriculture industry;
- The lack of detail on the immigration system to replace free movement; and
- The minimum income threshold for non-EEA visas and the future minimum income threshold for work visas after the end of free movement.

At the commencement of Second Reading the Shadow Home Secretary Diane Abbott stated that ‘the Front Bench of the Labour party will not be opposing the Bill this evening’.² However, later on in the debate Afzal Khan, Shadow Minister of Immigration, explained that ‘listening to the debate, it has become clear that Ministers’ intentions are even worse than we had expected, so we will be voting against the Bill on Second Reading.’³

The SNP immigration spokesperson Stuart C McDonald confirmed the SNP’s opposition to the Bill. He commented that Clause 2 (on the protection of Irish citizens) was welcome but that the remainder of the Bill would make the immigration system ‘much worse’.⁴

The Minister for Immigration, Caroline Nokes, concluded the debate, stating that the Government would ‘phase in’ the new immigration system, ‘giving individuals, business and, indeed, Government, the time to adapt.’⁵

¹ [HC Deb 28 January 2019 cc508-509](#)

² [HC Deb 28 January 2019 c515](#)

³ [HC Deb 28 January 2019 c586](#)

⁴ [HC Deb 28 January 2019 c521](#)

⁵ [HC Deb 28 January 2019 c590](#)

2. Immigration

2.1 Summary of Bill's immigration provisions

Part 1 of the Bill (**clauses 1-4** and **Schedule 1**) would make provision to end the free movement of EEA citizens in the UK. EEA citizens would be brought under UK immigration law and require immigration permission to remain in the UK. Part 1 would also confirm the status of Irish citizens in the UK.

Part 1 would also introduce a Henry VIII clause which would allow the Government to amend primary and secondary legislation by statutory instrument. The provisions made by statutory instrument would need to be considered by the Secretary of State as 'appropriate in consequence of, or in connection with' any provision in Part 1 of the Bill.

Part 2 of the Bill (**Clause 5** and **Schedules 2** and **3**) sets out the provisions on social security co-ordination.

Part 3 of the Bill (**Clauses 6 and 7**) sets out the general provisions on interpretation and commencement.

2.2 Lords Delegated Powers and Regulatory Reform Committee report

On 30 January 2019 the Lords Delegated Powers and Regulatory Reform Committee published their report on the Bill. The report stated:

Given the significance of this Bill, we have decided to report in time for Members of the House of Commons to consider it at committee stage in their House.⁶

The Lords report was quite critical of some features of the Bill.

The Committee was concerned with the wide scope of the regulation making powers found in **Clause 4** of the Bill. They stated:

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, however tenuous; and to do so by negative procedure regulations (assuming no amendment was made to primary legislation).⁷

In the Committee's view **Clause 4** of the Bill gives the Government a 'very significant delegation of power from Parliament to the Executive.'⁸

The Committee came to this view due to the 'the combination of the subjective test of appropriateness, the words "in connection with Part

⁶ [46th Report of Session 2017-19: Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#), HL 275 2017-19, 30 January 2019, para 2

⁷ [46th Report of Session 2017-19: Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#), HL 275 2017-19, 30 January 2019, para 30

⁸ [46th Report of Session 2017-19: Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#), HL 275 2017-19, 30 January 2019, para 15

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1”, the subject matter of Part 1 and the large number of persons who will be affected’.⁹

The Committee recommended that the words “in connection with” be removed from **Clause 1**.

2.3 Committee stage proceedings

Witnesses

Witnesses gave expert evidence to the Committee across 4 sessions touching on immigration and asylum law, and the impact of immigration on the economy including on the agricultural and healthcare industries, immigration detention, citizens’ rights, parliamentary scrutiny and many other issues.

Amendments

Ending free movement (Clause 1 and Schedule 1)

Clause 1 went to division and was agreed to by 10 votes to 9.

Clause 1 would make provision to end free movement in the UK and establish Schedule 1. Schedule 1 would dismantle the provisions in UK law which enable free movement and EU-derived migration rights. In Committee the Immigration Minister said:

The purpose of the Bill is clear: we are ending free movement and providing the legal framework for the future border and immigration system. Clause 1 introduces the first schedule, which contains a list of measures to be repealed in relation to the end of free movement and related issues. The clause fulfils a purely mechanistic function to introduce the schedule. It is the bare bones of the Bill.¹⁰

Labour was concerned that **Clause 1** did not provide statutory protection for resident EU citizens. Kate Green stated:

I want to express some concerns about the implications of endorsing clause 1 today without knowing what we will have in its place. The Government have announced a settlement scheme for EEA nationals already resident in the UK. They can either apply for settled status, if they can demonstrate five years’ residence exercising treaty rights, or for pre-settled status, on the way to achieving that. It is good that EU nationals have already begun to register under that scheme, and many have managed to do that very straightforwardly. However, we know from the evidence we have heard and read that some have experienced difficulties. That is why I feel very strongly—we will debate this later in Committee—that if we are going to apply clause 1, we have to put something in the Bill that protects in statute the rights of all those people so that they are not left in some sort of limbo or black hole until we get to the new immigration system the Government negotiate, perhaps by 2021.

I have particular concerns about the implications of clause 1 in the event that we do not reach a deal for the transition phase; after

⁹ [46th Report of Session 2017-19: Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#), HL 275 2017-19, 30 January 2019, para 15

¹⁰ [PBC Deb 26 February 2019 c157](#)

all, we are only five weeks away from that and the situation it could leave European Union nationals in—in particular, those who arrive after Brexit day of 29 March but before we have the new immigration system in place.¹¹

The Minister explained that ‘this is the Bill that will end free movement. That is not the role of the withdrawal agreement Bill, which is where we will enshrine citizens’ rights.’¹²

Labour was also concerned about the impact of ending free movement on the economy. In relation to the future immigration system for EU citizens and the economy, Labour’s Nic Dakin said:

Does my hon. Friend agree that the fact that this is not dealt with in the Bill as clearly as it could be is unsettling for not only EU nationals but businesses? It interrupts business continuity in a way that is not helpful to the UK economy.¹³

Labour and the SNP raised concerns about a repeat of the ‘Windrush scandal’ in relation to providing residence rights for EU citizens with settled status. Nic Dakin asked:

We heard quite a lot of evidence from people concerned that, if we get this wrong at this point, we could create another Windrush situation further down the line. How will that be prevented?¹⁴

The Minister responded:

The hon. Gentleman raises an important point. If we have learned one thing from Windrush—and I sincerely hope we have learned many—it is that a declaratory system that does not give people the evidence they need to be able to affirm their right to be in the UK, to work and own property, does not work. That is why we have a scheme that I am confident will give people the evidence they need so that we can avoid a position whereby EU citizens who are here and settled are in the same situation in the future.¹⁵

The SNP’s Stuart C McDonald questioned the timeframe for ending free movement, arguing:

Now is the most bizarre moment for MPs to consider voting to end free movement. Parliament hopefully is on the verge of taking control. Who knows what trading arrangements may be secured, perhaps involving free movement. A people’s vote is even more on the cards than it was at the time of Second Reading. As the shadow Minister said, the Bill puts the cart before the horse. Let us sort out our negotiating position first, then we can decide what that means for free movement. If the public are happy enough to retain free movement for a closer trading arrangement, it is wrong for MPs to rule it out at this stage. There is no need to rush through the end of free movement, even if we do leave in a month’s time. For those reasons, my party believes that the clause should not stand part of the Bill.¹⁶

¹¹ [PBC Deb 26 February 2019 c161](#)

¹² [PBC Deb 26 February 2019 c168](#)

¹³ [PBC Deb 26 February 2019 c163](#)

¹⁴ [PBC Deb 26 February 2019 c166](#)

¹⁵ [PBC Deb 26 February 2019 c166-7](#)

¹⁶ [PBC Deb 26 February 2019 c160](#)

Irish citizens' rights (Clause 2)

Clause 2 of the Bill would amend the *Immigration Act 1971* to confirm that the rights of Irish citizens prevail, regardless of the repeal of free movement law. It would provide that Irish citizens do not require leave to enter or remain in the UK.

Two amendments (amendments 28 and 29) to **Clause 2** were tabled by Stuart C McDonald. Amendment 28 went to division and was lost by 10 votes to 9. This amendment aimed to provide additional safeguards for Irish citizens and their families by requiring a higher threshold against deportation.

The Minister stated:

Amendment 28 would introduce additional provisions regarding the deportation and exclusion of Irish citizens and their family members. I will use this opportunity to reiterate our approach to deporting Irish citizens in light of the historical community and political ties between the UK and Ireland, along with the existence of the common travel area. Irish citizens are considered for deportation only if a court has recommended deportation following conviction or if the Secretary of State concludes that, because of the exceptional circumstances of a case, the public interest requires deportation. We carefully assess all deportation decisions on a case-by-case basis, taking into account all the facts of the case.¹⁷

Stuart C McDonald withdrew amendment 29, noting:

In relation to what the Minister said about deportations and amendment 28, it seems to me that we are mostly saying the same things, but our statements are reflected better in my amendment than in the clause. We seem to be saying the same thing, but reaching different conclusions about how to enshrine it in law. I am simply asking the Government to put their current practice into statute.¹⁸

Labour supported the SNP's position, with the Shadow Immigration Minister, Afzal Khan, stating 'In essence, we agree that clause 2 is necessary, but we believe that it requires some improvements.'¹⁹ He went on to say:

I have some questions for the Minister. First, the Good Friday agreement grants people who were born in Northern Ireland the right to identify and be accepted as exclusively Irish, as exclusively British or as both Irish and British. Does the reference to Irish citizens in the Bill, and therefore the Immigration Act 1971, include Northern Ireland-born Irish citizens who do not identify as British? Secondly, clause 2 highlights the fact that many associated rights of the common travel area are provided for only by virtue of free movement. When, if not in the Bill, will common travel area rights be legislated for to ensure that they are maintained on a clear legal footing? Finally, will the Minister make it explicit in the Bill that people in Northern Ireland who identify

¹⁷ [PBC Deb 26 February 2019 c174](#)

¹⁸ [PBC Deb 26 February 2019 c175](#)

¹⁹ [PBC Deb 26 February 2019 c173](#)

exclusively as Irish, as is their right under the Belfast agreement, are exempt from deportation and exclusion?²⁰

Henry VIII powers and parliamentary scrutiny (Clause 4)

Clause 4 sets out the consequential provisions of the Bill. It is a Henry VIII clause which allows the Government to amend primary and secondary legislation by statutory instrument. The provisions made by statutory instrument must be considered by the Secretary of State as 'appropriate in consequence of, or in connection with' any provision in Part 1 of the Bill. **Clause 4** also sets out the methods of parliamentary scrutiny for regulations made in connection with Part 1 of the Bill.

Clause 4 has been controversial during all stages of the Bill's progress. Many amendments were tabled on **Clause 4** by a range of MPs including the following

- amendment 1 went to division and lost by 10 votes to 9
- amendment 11 went to division and lost by 10 votes to 9
- amendment 20 went to division and lost by 10 votes to 8
- amendment 12 went to division and lost by 10 votes to 8

Amendment 1, moved by Stuart C McDonald, was to leave out the words "or in connection with" from subsection 1 of **Clause 4**. The effect of this would be to 'narrow the scope of the powers provided to the Secretary of State in Clause 4, as recommended by the House of Lords Delegated Powers and Regulatory Reform Committee'.²¹

In support of his amendments, Stuart C McDonald argued that 'if we are serious about our role as legislators and about separating the Executive from the legislature, we must start putting our foot down and reining in these clauses.'²² He referred also to arguments made by the Lords Delegated Powers and Regulatory Reform Committee which are outlined in part 2.2 of this briefing.

In response, the Minister stated:

Amendment 1 would limit the changes made under the regulations to those that are "in consequence of" the ending of free movement, rather than "in connection with" or "in consequence of". I note that the amendment was recommended by the Delegated Powers and Regulatory Reform Committee. As I have explained, references to EEA nationals occur in numerous places across the entire statute book and in numerous different ways, not always by reference to free movement rights. The inclusion of "in connection with" is more appropriate to describe the provision that needs to be made for some of those cases. It is also better suited than the phrase "in consequence of" for the making of transitional provision for those who arrive in the UK after the commencement of the Bill.²³

Amendment 11, moved by Afzal Khan, would have amended subsection 4 of **Clause 4** to replace the words 'make provisions

²⁰ [PBC Deb 26 February 2019 c173](#)

²¹ [PBC Deb 26 February 2019 c178](#)

²² [PBC Deb 26 February 2019 c179](#)

²³ [PBC Deb 26 February 2019 c185](#)

applying' with 'give leave to enter the United Kingdom'. This would have narrowed the scope of the regulation making power in relation to those who were in the UK before exit day but who were not entitled to be in the UK under EU law. In support of his amendment Mr Khan stated:

Amendment 11 in my name would allow Ministers to grant status to a group of EEA nationals but not allow them to remove any such rights without primary legislation. I am grateful to the Immigration Law Practitioners Association for its help in drafting it. We believe this is a vital safeguard and that right to remain should be set in stone, and not subject to amendment or to being removed by secondary legislation.²⁴

In response, the Minister argued:

Subsection (4) is needed because not every person who is an EEA national in the UK is exercising free movement rights...

We have taken the decision to be generous in our treatment of EU nationals already in the UK and we have opened the EU settlement scheme to them all, regardless of whether they are exercising treaty rights or not. However, we need to ensure that we have the power to amend other legislation to facilitate that—for example, checks on rights to work or access to benefits and public services that might otherwise apply to them. The amendment could prevent us from making those changes, potentially meaning that that group could fall through the gaps.

I reiterate that the power is not the means by which the future border and immigration system will be delivered. That will be done through the immigration rules made under the Immigration Act 1971. I am sure that the hon. Gentleman does not intend that group to be denied protection. I hope I have provided sufficient reassurance on the need for and use of the subsection. I respectfully ask him to not to press amendment 11.²⁵

Amendment 20, moved by the Shadow Minister, proposed to add a further two subsections to **Clause 4(5)** to require regulations made under **Clause 4(1)**, which introduce a work visa scheme for EEA nationals, to be developed in consultation with trade unions, and for an impact assessment to be published. In response the Minister stated:

On the requirement in amendment 20 to consult trade unions, I appreciate that trade unions have a unique perspective on work-related immigration, and they will understandably want to protect the rights of their existing members in the domestic workforce. As part of our ongoing engagement following the publication of the immigration White Paper, we are consulting some trade unions about the proposed future system. However, I do not see how the amendment could practically be made to work. As I have explained, we do not propose to introduce sectoral working visas other than in agriculture, and MAC specifically advised against doing so. Our proposed work routes—the skilled worker route and the temporary worker route—are, in combination, open to the full range of occupations and professions. That means that the Government would be committed to consulting hundreds of trade unions and representative bodies every time a change was required to the immigration rules, and that would be unworkable.

²⁴ [PBC Deb 26 February 2019 c182](#)

²⁵ [PBC Deb 26 February 2019 c186](#)

The second half of amendment 20 would require the Secretary of State to publish an impact assessment on workers' rights for any future work-related immigration arrangements, and I do not believe that that is necessary. As I have said, migrant workers who come to the UK will be subject to the full protections that already exist for every worker—regardless of their nationality—who is employed by a UK employer. Since the statutory workplace employment rights and protections will be the same for domestic and migrant workers, it is unlikely that an impact assessment would be necessary or add to the understanding of the future immigration system.²⁶

Amendment 12 would have removed the words 'that amend or repeal any provision of primary legislation (whether alone or with any other provision' to the effect that 'all regulations made under Clause 4 would be subject to the affirmative procedure'.²⁷ This, and other similar amendments were proposed to:

improve the scrutiny that changes to immigration rules will be subject to. Clause 4(6) sets out that some immigration rules may be made by the made affirmative procedure, which means that they will be assigned into law before being laid in Parliament. There is then a period of 40 days in which the House must approve them or they will cease to have effect. The House of Lords Committee recommended that this be removed, which is what amendment 3 does. Amendments 12, 13 and 7 will ensure that immigration rules are subject to the affirmative procedure. Labour has tabled new clause 9, which will subject them to super-affirmative procedure. Our immigration rules have an enormous impact on people's lives, but they often receive very little scrutiny. The made affirmative procedure means that they will receive no scrutiny before coming into effect and that scrutiny will only be retrospective.²⁸

The Immigration Minister also made the following arguments in support of **Clause 4**:

- The clause is necessary to implement the citizens' rights provisions of the Withdrawal Agreement and the Government's no deal policy on citizen's rights;²⁹
- It would allow the Government to make provision for EEA nationals who arrive after Brexit but prior to the implementation of the future immigration system in the event of a no-deal;³⁰
- It would allow the Government to 'align the immigration treatment of EEA and non-EEA nationals in the future, so that we can create a level playing field in terms of who can come to the UK',³¹ and
- The power is 'important to ensure that our laws work coherently once we have left the EU' and needs to be 'wide enough' to address references to free movement across the statute book.³²

²⁶ [PBC Deb 26 February 2019 c214](#)

²⁷ [PBC Deb 28 February 2019 c241](#)

²⁸ [PBC Deb 26 February 2019 c182](#)

²⁹ [PBC Deb 26 February 2019 c184](#)

³⁰ [PBC Deb 26 February 2019 cc183-4](#)

³¹ [PBC Deb 26 February 2019 c184](#)

³² [PBC Deb 26 February 2019 c184](#)

Commencement and extent (Clause 7)

Clause 7 would set out the Bill's commencement and extent. The Bill would apply to all parts of the UK. The clause enables Her Majesty, by Order in Council, to extend its operation to any of the Channel Islands, the Isle of Man and any of the British overseas territories. Except for clauses 6 and 7, the Bill would come into force on a day appointed by regulations.

The Shadow Immigration Minister pressed several amendments to division, all of which were defeated.

Amendment 36 would have prevented 'the repeal of free movement until after the 30 June 2021'.³³ In support of his amendment Mr Khan argued:

If there is a withdrawal agreement, free movement will be repealed at the end of the transition period. Our amendments would ensure that if there is no deal, and therefore no transition period, the Secretary of State will not be able to repeal free movement until EU citizens have been given sufficient time to register for settled status. They would offer safeguards, protect citizens' rights and secure their status.³⁴

In response the Minister stated that 'the ability to control immigration and secure our border was part of why many people voted to leave the EU. Therefore, delaying the end of free movement to 30 June 2021 would not be acceptable.'³⁵

Amendment 21 would have required the Secretary of State to ensure 'legal aid is available to all EEA and Swiss nationals, and their family members, who are domiciled or habitually resident in the UK for Early Legal Help on immigration matters'.³⁶ The Minister responded:

The EU settlement scheme has been specifically designed to ensure that individuals can apply for settled status without the need for a lawyer. The Government have also committed to providing a range of safeguards to ensure that vulnerable individuals receive the assistance they need in securing their immigration rights. These safeguards will of course apply to vulnerable EEA and Swiss nationals.³⁷

Amendment 32 would have required the Secretary of State to lay before both Houses an independent review of UK legislation requiring modification to end free movement, before repealing free movement. In introducing his amendment the Shadow Minister drew parallels with the Windrush scandal and its human rights impact.³⁸

The Minister explained that the Government began a comprehensive review of legislation that needed to be addressed because of Brexit:

The review required by amendment 32 is unnecessary, for several reasons. The Government take seriously their obligations under

³³ [PBC Deb 28 February 2019 c266](#)

³⁴ [PBC Deb 28 February 2019 c264](#)

³⁵ [PBC Deb 28 February 2019 c264](#)

³⁶ [PBC Deb 20 February 2019 c267](#)

³⁷ [PBC Deb 28 February 2019 c273](#)

³⁸ [PBC Deb 28 February 2019 c274-5](#)

the public sector equality duty and the European convention on human rights and ensure that all elements of the immigration system comply with them. We will vigilantly monitor such requirements as we manage the transition of EEA nationals from free movement rights to having leave to remain under UK immigration law. In a deal scenario, the withdrawal agreement Bill will also deliver that.³⁹

Amendment 16 would have amended **Clause 7(8)** to 'prevent schedule 1 from coming into force until the Home Office has completed a full review of how enforcement has been applied following the Windrush scandal.'⁴⁰ The Shadow Minister argued:

Without an amendment such as this one or amendment 36, tabled by the Scottish National party, we risk a situation in which millions of EU citizens have the right to be here but cannot prove that right, and face being denied public services, detained and potentially deported. As outlined in new clause 15, tabled in my name, our preference is for a declaratory system, which will avoid a cliff-edge, where potentially millions of people are in the UK illegally.

Even if there is such a scheme, our preference is for amendment 16 to be enacted, because it will ensure that the maximum number of people will have registered for proof of their right to be here before free movement is repealed, making it less likely that they will be denied services, housing or the right to vote, even though they were their right.⁴¹

The Minister agreed with Mr Khan that the 'lessons of Windrush' should be considered when implementing the future immigration system.⁴² She added however that 'the amendment would make the commencement of clause 1, which ends free movement, and clause 5—the social security provision—dependent on 3 million people having applied for, and been granted, status under the EU settlement scheme'⁴³ and that 'setting a target for the number of applications that must be reached before the Bill comes into force is not appropriate, for a number of reasons.'⁴⁴

New clauses

A total of 57 new clauses were tabled during the Committee stage. The Government did not propose any new clauses.

None of the new clauses became part of the Bill however the following went to division:

- Clause 10, moved by Afzal Khan, on the right of appeal for settled status
- Clause 11, moved by Afzal Khan, on the hostile environment and EEA nationals
- Clause 15, moved by Afzal Khan and Paul Blomfield, on protection of those with settled status

³⁹ [PBC Deb 28 February 2019 c277-8](#)

⁴⁰ [PBC Deb 28 February 2019 c285](#)

⁴¹ [PBC Deb 28 February 2019 c286-7](#)

⁴² [PBC Deb 28 February 2019 c287](#)

⁴³ [PBC Deb 28 February 2019 c289](#)

⁴⁴ [PBC Deb 28 February 2019 c288](#)

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There were common and reoccurring themes amongst the new clauses. These included introducing time limits on immigration detention, appeal rights for settled status, and protection of settled status rights in a range of areas.

3. Social security co-ordination

3.1 Summary of Bill's social security provisions

Part 2 of the Bill (**clause 5** and **Schedules 2 and 3**) would enable the Government (and/or where appropriate, a devolved authority) by regulations to modify retained EU legislation on social security co-ordination. The Government maintains this is necessary to enable it to deliver a range of policy options from EU exit day, and specifically to implement its preferred approach to social security co-ordination if no agreement is reached with the EU. The powers are framed broadly, and the Government has not set out what its preferred approach to social security co-ordination would be in a 'no deal' scenario. Regulations would be subject to the affirmative procedure.

3.2 Lords Delegated Powers and Regulatory Reform Committee report

In its report on the Bill published after the Commons Second Reading debate, the House of Lords Delegated Powers and Regulatory Reform Committee observed:

Part 2 of the Bill gives current and future Ministers almost absolute power to rewrite the Co-ordination Regulations at any time of their choosing. Parliament will have no opportunity to amend this Ministerial legislation; the two Houses would be asked only to approve or reject it under the affirmative procedure.⁴⁵

In the Committee's view, the reasons given by the Government why such powers are needed are "an inadequate justification for a wholesale transfer from Parliament to the Government of power to legislate in a field that could... have a major impact on large numbers of UK citizens resident in EEA members states, and EEA nationals resident in the UK..."⁴⁶

The Committee's report continues:

The [DWP's Delegated Powers] Memorandum does not explain:

- the necessity of Ministers having the clause 5 power immediately upon EU exit;
- how the Government might seek to use it;
- why it includes a power to amend primary legislation and retained direct EU legislation not listed in clause 5(2);
- why it is not time limited;
- why Ministers will have no duty to consult before making regulations.⁴⁷

⁴⁵ [46th Report of Session 2017-19: Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#), HL 275 2017-19, 30 January 2019, para 38

⁴⁶ Ibid. para 45

⁴⁷ Ibid. para 46

The report notes that the Committee has repeatedly made it clear that, if a bill is wholly or mainly a skeleton bill, it expects a full justification for the decision to adopt that structure of powers. It also notes that a recent report by the Lords Constitution Committee stated:

Skeleton bills inhibit parliamentary scrutiny and we find it difficult to envisage any circumstances in which their use is acceptable. The Government must provide an exceptional justification for them, as recommended by the DPPRC's guidance for departments; it cannot rely on generalised assertions of the need for flexibility or future-proofing.⁴⁸

The Delegated Powers Committee's report states (original emphasis):

This requirement to provide "an exceptional justification" applies even more strongly where, as in this case, Parliament is being asked to scrutinise a clause so lacking in any substance whatsoever that it cannot even be described as a skeleton.⁴⁹

The Committee states that "there appears to be no particular need for Ministers to have these powers in the near future" given the expectation that the four Statutory Instruments containing retained EU law on social security co-ordination⁵⁰ will be in place by exit day. Moreover, the Committee notes that there is no indication at all in any of the documents accompanying the Bill that the Government has even begun to devise their policy on the future of social security co-ordination, adding that much will depend in what (if any) arrangements can be negotiated with the EU and Member States after Brexit.⁵¹

The Committee's report continues (original emphasis):

51. 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.

52. While the affirmative procedure would apply to the power in clause 5, this cannot remedy an inappropriate delegation of legislation power.

53. The Committee therefore recommends that clause 5 should be omitted from the Bill on the ground that it contains an inappropriate delegation of power.

3.3 Committee stage proceedings

Witnesses giving evidence to the Public Bill Committee also commented on the breadth of the powers conferred by clause 5. Jodie Blackstock of **Justice** said that clause 5 the most concerning clause in the Bill, and

⁴⁸ Constitution Committee, [The Legislative Process: The Delegation of Powers](#), HL 225 2017-19, 20 November 2018, para 58

⁴⁹ HL 275 2017-19, para 48

⁵⁰ See section 4.4 of Commons Library briefing CBP-8473, [The Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill 2017-19](#), 25 January 2019

⁵¹ HL 275 2017-19, paras 49-50

ought to be deleted entirely.⁵² Given that social security co-ordination is vital to protect the rights of EEA nationals in the UK and UK nationals in EEA states, Justice believes that it is “wholly inappropriate for the Bill to grant the Government unlimited power to legislate for policy in this important field.”⁵³ It argues that the EU (Withdrawal) Act 2018 already provides sufficient powers to make regulations (as the Government is doing) to maintain the status quo as far as possible until an agreement on social security co-ordination is reached with the EU, at which point further primary legislation would be required.

Professor Steve Peers of the University of Essex also thought that clause 5 “does seem like an awfully broad power”, adding “It would be useful, I think, for Parliament to insist on some sort of statutory limits or guidelines in primary legislation as to how the Government might use their power.”⁵⁴

Jeremy Morgan, vice-chair of **British in Europe**, thought that the powers were “very open ended, and to my mind they are unnecessary, certainly at this stage.” He added:

There is no need for any rushed legislation on this. The existing law, which we are told it is the intention of the Government to preserve, is in place. The amended statutory instrument is in place. The new regulations are simply there to make further changes, as yet unspecified. No policy reasons for that are put forward in any of the supporting documentation. It is unnecessary, very broad and very worrying.⁵⁵

Kalba Meadows, a committee member of **British in Europe**, said that the fact that the UK had not enshrined EU citizens’ rights in primary legislation had meant that EU27 states were reluctant to bring forward their own legislation. She added:

We hear that in our conversations with member states, and we are very aware that Governments are holding back on coming forward with their protections for us. You can imagine that that creates the most incredible uncertainty for people, because this is actually about people.⁵⁶

Clause 5 and Schedules 2 and 3 were considered at the Committee’s 7th sitting on 28 February 2019.⁵⁷

For Labour, Kate Green moved **amendment 26** which was intended to prevent the Secretary of State from making regulations which might remove the ability of UK and EEA nationals to aggregate pension and social security rights. Speaking to her amendment, she sought clarification from the Government in why the powers were considered necessary, on what the Government’s intentions were as regards their use, on contingency plans to help returning UK nationals, on future commitments to uprating State Pensions for UK nationals in EU

⁵² [PBC Deb 12 February 2019 cc59-60](#)

⁵³ Justice, [Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill: House of Commons Committee Stage Briefing](#), ISSB13, February 2019, para 42

⁵⁴ [PBC Deb 14 February 2019 c123](#)

⁵⁵ [PBC Deb 14 February 2019 c145](#)

⁵⁶ [PBC Deb 14 February 2019 c146](#)

⁵⁷ [PBC Deb 28 February 2019 cc243-257](#)

countries, and continued protection for posted and frontier workers. Kate Green concluded:

...through my amendment I seek to curtail Ministers' delegated powers in relation to social security co-ordination. The Government have stated that the anticipated policy changes, both in a no-deal scenario and in certain deal scenarios, could not otherwise be delivered by existing powers such as the European Union withdrawal agreement powers. However, in my view, such policy changes, or at least the principles of the policy, should be set out in primary legislation. That will be the case in a deal scenario, as the withdrawal agreement and its implementing primary legislation will address future policy on social security co-ordination. In a no-deal scenario, the European Union (Withdrawal) Act 2018 provides sufficient powers to make regulations—indeed, the Government have already drafted them—to maintain the status quo as far as possible until an agreement on social security co-ordination is reached with the EU for the future, at which point further primary legislation will be needed.⁵⁸

For the Government, the Minister for Employment, Alok Sharma, said:

The hon. Lady asked why future policy was not set out in the clause. She knows that the clause provides the legislative framework to deliver the future policy at the appropriate time. Future policy changes will be set out in regulations and will be subject, as she pointed out, to the affirmative procedure. If Opposition Members do not agree with any such regulations, they will have the opportunity to vote against them. Further impact assessments and appropriate consultation will follow those proposed changes.⁵⁹

The amendment was defeated by 10 votes to 9.⁶⁰

In the debate on whether clause 5 and Schedules 2 and 3 should stand part of the Bill, Labour and SNP members drew attention to the points raised by the Delegated Powers and Regulatory Reform Committee and the organisations that gave evidence to the Public Bill Committee about the need for the powers and their scope. For Labour, Afzal Khan said:

...secondary legislation does not provide Parliament with an opportunity for adequate scrutiny and oversight of major policy changes. The rights in question were brought in by primary legislation, and it is only right that their removal should be possible only with the same level of scrutiny.⁶¹

For the SNP, Gavin Newlands said that the Government had already awarded itself too many broad Henry VIII powers and that all too often the justification for needing those powers was “wholly insufficient.” The SNP firmly believed that clause 5 should not stand part of the Bill.⁶²

Clause 5 and Schedules 2 and 3 were agreed without a vote.⁶³

⁵⁸ [PBC Deb 28 February 2019 c247](#)

⁵⁹ [PBC Deb 28 February 2019 c251](#)

⁶⁰ [PBC Deb 28 February 2019 c251](#)

⁶¹ [PBC Deb 28 February 2019 c254](#)

⁶² [PBC Deb 28 February 2019 c256](#)

⁶³ [PBC Deb 28 February 2019 c257](#)

At the Committee's 10th and final sitting on 5 March, Kate Green moved **New Clause 56**, to prevent EEA and Swiss families with children under 18 from being given the right to remain subject to a "no recourse to public funds" condition.⁶⁴ For the Government, the Immigration Minister Caroline Noakes emphasised that all leave issued under the EU settlement scheme does not and would not include a public funds condition. As regards the future immigration system, the Minister said that non-EEA migrants coming to live in the UK are currently expected to provide for any children they have without recourse to public funds and there was "no reasonable justification for adopting a different principle for EEA nationals arriving in the UK when the new system is introduced." The Minister nevertheless shared Kate Green's concerns about the wellbeing of children, and said that safeguards for the vulnerable would remain in place, including the powers of local authorities to intervene where required regardless of the immigration status or nationality of the child or parent.⁶⁵

The amendment was withdrawn.

⁶⁴ [PBC Deb 5 March 2019 cc394-5](#)

⁶⁵ [PBC Deb 5 March 2019 cc396](#)

4. Appendix 1: members of the Public Bill Committee

- [Badenoch, Mrs Kemi](#) (Saffron Walden)
- [Blomfield, Paul](#) (Sheffield Central)
- [Brereton, Jack](#) (Stoke-on-Trent South)
- [Caulfield, Maria](#) (Lewes)
- [Crouch, Tracey](#) (Chatham and Aylesford)
- [Dakin, Nic](#) (Scunthorpe)
- [Davies, Glyn](#) (Montgomeryshire)
- [Duguid, David](#) (Banff and Buchan)
- [Green, Kate](#) (Stretford and Urmston)
- [Khan, Afzal](#) (Manchester, Gorton)
- [McDonald, Stuart C.](#) (Cumbernauld, Kilsyth and Kirkintilloch East)
- [McGovern, Alison](#) (Wairral South)
- [Maclean, Rachel](#) (Redditch)
- [Maynard, Paul](#) (Blackpool North and Cleveleys)
- [Newlands, Gavin](#) (Paisley and Renfrewshire North)
- [Nokes, Caroline](#) (Romsey and Southampton North)
- [Sharma, Alok](#) (Reading West)
- [Smith, Eleanor](#) (Wolverhampton South West)
- [Thomas-Symonds, Nick](#) (Torfaen)

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