European Union (Withdrawal) Bill

Second Reading Briefing, House of Lords
30th and 31st January 2018

The BMA is a trade union representing and negotiating on behalf of all doctors in the UK. A leading voice advocating for outstanding health care and a healthy population. An association providing members with excellent individual services and support throughout their lives. The BMA is committed to safeguarding the future of the medical profession following the UK’s vote to leave the European Union.

Health services across the UK face a range of challenges as a result of Brexit and so it is vital that the government puts measures in place that provide stability to essential health services, patients, and the NHS workforce when the UK leaves the EU in March 2019. While the conversion of EU law into domestic law through the European Union (Withdrawal) Bill will provide some continuity, it is essential that the Bill does not become a ‘vehicle’ or opportunity to make policy changes through the back door; this risks causing unnecessary disruption to health services at an already uncertain time.

Alongside the Withdrawal Agreement and Implementation Bill, the European Union (Withdrawal) Bill gives ministers powers to implement both a transitional and withdrawal agreement which will govern the UK’s future relationship with the EU. In order to provide stability across UK health services, we are urging the government to put in place a range of robust transitional arrangements for a set period of time, governing immigration and access to medicines and treatments, which are vital to maintaining NHS workforce numbers and patient safety.

Key points
- A ‘smooth and orderly withdrawal’ from the EU is essential for health services across the UK, which face a range of challenges because of Brexit.
- The challenges facing the NHS workforce are particularly acute. A recent BMA survey found nearly half (45 per cent) of EEA doctors surveyed are considering leaving the UK following the referendum vote.
- The government must ensure workers’ rights, such as the European Working Time Directive, will continue to be available in UK law after we have left the EU. Together with twelve leading health organisations, the BMA wrote to the Prime Minister, Theresa May, in December 2017, asking her to maintain this vital health and safety legislation after Brexit.
- The Bill should not be used to make major changes to policy or to establish new legal frameworks beyond what is absolutely necessary to ensure the law functions properly after Brexit.

1 BMA EU doctors survey, November 2018
2 The full list of signatories to the letter to the Prime Minister are as follows: BMA, Royal College of Anaesthetists, Royal College of Paediatrics and Child Health, Royal College of Physicians, Royal College of Nursing, Royal College of Midwives, Royal College of Surgeons of Edinburgh, British Dental Association, Royal College of Ophthalmologists, RCGP, Royal College of Radiologists, Royal College of Emergency Medicine, Royal College of Obstetricians and Gynaecologists.
3 Letter to the Prime Minister, December 2018
The UK government has promised to seek agreement through a constructive and collaborative approach with the devolved legislatures but whether this will extend to requiring their explicit consent through a legislative consent motion is not clear. Clarity must be provided.

Ensuring a ‘smooth and orderly withdrawal’ from the EU – implications for health services

The government has explicitly stated that one of the key aims of the European Union (Withdrawal) Bill is to ensure that the same rules and laws will apply on the day after exit as on the day before, thus ensuring a ‘smooth and orderly withdrawal’ as the UK withdraws from the EU.

The BMA believes a ‘smooth and orderly withdrawal’ is essential for health services across the UK, which face a range of challenges as a result of the UK’s decision to leave the EU. Health services across the UK are subject to unprecedented demand, an ageing population coupled with increasingly complex patient illnesses, and drastic funding shortfalls. The threat to the workforce is particularly acute, with the NHS struggling to attract and retain doctors and other vital NHS staff: those that are currently working within the service are increasingly being asked to work longer in an overstretched, under-resourced system. Ensuring that the same rules and laws will apply on the day after exit as on the day before, such as the Working Time Regulations, should, in theory, help health services make the transition during a period of great upheaval and uncertainty.

Changes to EU citizens’ rights

Clause 4 of the Bill will ensure certain EU rights and obligations, including citizenship rights, rights of residence, and the free movement of workers are recognised and available in UK law after Brexit. Clause 7 of the Bill will then enable ministers to correct laws which will no longer function once we leave the EU. The government could use this clause (depending on the course of the negotiations) to ‘modify, limit or remove’ the reciprocal arrangements that apply to EU citizens, including doctors, in the UK. Clause 9 subsequently gives ministers extensive powers to implement the withdrawal agreement and make the necessary changes for Brexit, including potentially, new arrangements governing the status of EU citizens in the UK.

The BMA had previously raised concerns that under the provisions of the Bill, ministers could lawfully rescind existing arrangements for EU citizens, such as their immigration status, rights to work in the UK, or the rights of family members, and introduce secondary legislation regarding the future arrangements for UK and EU citizens without any parliamentary debate or scrutiny. We were deeply

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4 Department for Exiting the European Union: ‘Exiting the EU with certainty’ 13th July 2017
concerned that a change of such magnitude and importance to the lives of millions of people could have passed through Parliament through the negative resolution procedure, and without any debate, as currently outlined in Clause 7 and 9 of the Bill.

These individuals must not be used as bargaining chips during the negotiations. They staff our hospitals and GP surgeries, look after vulnerable patients in the community, and conduct vital medical research to help save lives. A recent BMA survey\(^5\) of 1720 doctors found that:

- more than nearly half (45 per cent) of EEA doctors surveyed are considering leaving the UK following the referendum vote.
- Of those considering leaving, more than a third (39%) have made plans to leave, meaning almost one in five EU doctors (18%) have made plans to leave the UK.

Consequently, the announcement by the Secretary of State for Exiting the EU, David Davis, that the Government would introduce a Withdrawal Agreement and Implementation Bill is a welcome development. This Bill will directly implement into domestic law the contents of the Withdrawal Agreement, including the agreement on citizens’ rights, any financial settlement and the transitional period agreed between both sides. It is only right that a change of such magnitude and importance to the lives of millions of people, including the more than 10,000 doctors who work in the NHS – who qualified in the EEA with many more working in public health and academic medicine, is scrutinised thoroughly and transparently through primary legislation, rather than by secondary legislation under the Repeal Bill.

As the negotiations progress, it is vital that the government works with health organisations to ensure that robust transitional arrangements are put in place for a set period, and that the immigration system is flexible enough to recruit doctors and other NHS staff from overseas, especially where the resident workforce is unable to produce enough suitable applicants to fill vacant roles. This clarity is essential for EEA doctors, medical academics, students and their families and key to protect the safe staffing of the NHS.

**The Bill should not become a ‘vehicle’ for policy changes**

The Bill should not be used to make major changes to policy or establish new legal frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one after Brexit. In the interests of openness and transparency, any proposals to amend, repeal, or improve EU law by either the UK or devolved legislatures should be subject to full parliamentary debate and scrutiny.

**Workers’ rights**

The BMA is satisfied with the European Working Time Directive and the measures it has transposed into the UK Working Time Regulations, namely the limit of a 48 hour working week, rest breaks and statutory paid leave. These regulations are essential health and safety legislation, which alongside European Court of Justice judgements (the SiMAP and Jaeger rulings which enshrined the principle of

\(^5\) BMA EU doctors survey, November 2018
time spent on-call at the workplace being regarded as work) has reduced fatigue amongst doctors and improved the safety of both patients and doctors in the UK.

Together with twelve leading health organisations, the BMA wrote to the Prime Minister, Theresa May, in December 2017, asking her not to renege on commitments to maintain the WTRs, after Brexit. The twelve signatories, representing doctors, nursing staff and midwives across the UK, are clear that Brexit must not be used as an excuse to overwork any staff group.

We are clear that it is not in the interests of either staff or patients for the UK to diverge or relax the safeguarding protections introduced by the WTRs after Brexit: these regulations play a critical role in protecting doctors from the dangers of overwork and patients from the impact of overtired doctors. With health and care services under more pressure than ever before, what is needed is proper resourcing and investment in the workforce, not the removal of key safeguards.

We continue to urge the government to honour the explicit commitments it has made in the past that the Bill will ensure that ‘workers’ rights that are enjoyed under EU law will continue to be available in UK law after we have left the EU, including rights derived from EU law, such as the Working Time Directive and the Agency Workers’ Directive. This will give certainty and continuity to employees and employers alike, creating stability in which the UK can grow and thrive. Furthermore, while we note that while the Bill will end the general supremacy of EU law ending the jurisdiction of the European Court of Justice in the UK, the government’s statement that British courts “may have regard” to “anything done” by the ECJ or by another EU entity after Brexit if the British court considers it appropriate to do so is welcome and should be honoured after Brexit. This will be vital with regards to key ECJ judgements on workers’ rights.

We will closely monitor the progress of the Bill and robustly challenge any proposals to introduce changes to the WTRs, or other employment legislation, as the Bill moves through Parliament.

**Devolved Administrations**

We note that the government has begun discussions with each of the nations to identify where UK-wide approaches (common frameworks) need to be retained in the future and where these frameworks are no longer necessary (where powers may be given at a devolved level after Brexit). The Bill will also give devolved ministers the power to amend devolved legislation to correct law that will

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6 The full list of signatories to the letter to the Prime Minister are as follows: BMA, Royal College of Anaesthetists, Royal College of Paediatrics and Child Health, Royal College of Physicians, Royal College of Nursing, Royal College of Midwives, Royal College of Surgeons of Edinburgh, British Dental Association, Royal College of Ophthalmologists, RCGP, Royal College of Radiologists, Royal College of Emergency Medicine, Royal College of Obstetricians and Gynaecologists.

7 Letter to the Prime Minister, December 2018

8 Department for Exiting the EU: Factsheet on workers’ rights
no longer operate appropriately once the UK has left the EU. In its factsheet on devolved nations⁹, the government also expects one of the outcomes of Brexit to be a major increase in the decision making powers of each devolved administration.

However, the expectation that policy areas that are devolved, but which have been subject to EU law, such as environmental and regional policy, will result in new powers for the devolved nations appears to be an issue of contention. Initial indications from both the Scottish Parliament and the Welsh Assembly are that they would withhold consent for the bill unless changes are made which would protect the interests of all the nations within the UK.

Legally, although the absence of a legislative consent motion would not prevent the passage of the Bill through the UK Parliament, the lack of such consent could create significant political difficulties. The UK government has promised to seek agreement through a constructive and collaborative approach with the devolved legislatures but whether this will extend to requiring their explicit consent through a legislative consent motion is not clear. As an organisation that represents doctors across the UK, we urge the government to clarify its approach as soon as possible.

For further information, please contact:
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What does Brexit mean for the medical profession? Visit the BMA website to find out more

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⁹ Department for Exiting the EU: Factsheet on Devolution