



Law Society  
of Scotland

# Law Society of Scotland

Second Reading Briefing on the Trade Bill in the  
House of Lords – 8 September 2020



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

In October 2017 the Department for International Trade published its paper on *Preparing for our future UK trade policy*<sup>1</sup> to which the Law Society responded.<sup>2</sup> The Society welcomes the opportunity to consider and respond to the Trade Bill<sup>3</sup> and has the following comments to put forward for consideration.

1. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/654714/Preparing\\_for\\_our\\_future\\_UK\\_trade\\_policy\\_Report\\_Web\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/654714/Preparing_for_our_future_UK_trade_policy_Report_Web_Accessible.pdf)
2. [https://www.lawscot.org.uk/media/359078/lss-response-to-dit\\_preparing-for-future-uk-trade-policy\\_november-2017.pdf](https://www.lawscot.org.uk/media/359078/lss-response-to-dit_preparing-for-future-uk-trade-policy_november-2017.pdf)
3. <https://services.parliament.uk/Bills/2019-21/trade.html>

## General Remarks

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We continue to support an inclusive and transparent trade policy to which extensive engagement with a wide variety of stakeholder groups is important. In our response we welcomed the recognition of the importance of engaging with the devolved administrations and legislatures. We underscore that it is most important that the devolved administrations and legislatures are engaged in the process of negotiating future trade agreements aspects of which may impact on devolved matters. We also emphasise that it is important to ensure that a whole of governance approach is extended to trade negotiations.

We consider that trade in services should be firmly embedded in the UK's approach to trade and that free trade agreements should include commitments to facilitate trade in legal services. The legal services sector facilitates trade across all other sectors as well as being an important contributor to the UK economy.

## Comments on the bill

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### Scope of delegated Powers

We are concerned by the extensive scope of delegated ministerial powers under the bill, mirroring concerns previously identified in relation to the use of Henry VIII. It is not clear why the Government considers such wide powers to be necessary.

Under clause 1(1), the Bill grants an appropriate authority the power to make regulations which it considers “appropriate” to implement GPA including those which amend retained direct principal EU legislation. We consider that if the intention is to ensure implementation of the 1994 GPA then the authorities should be *required* to make such provisions.

Clause 2(1) provides that an appropriate authority may make such provision as the authority considers appropriate to implement a future agreement. We believe this power should be limited to making regulations which are considered “necessary” to implement the agreement.

We are concerned that clause 7(1) grants a very wide discretion to HMRC to request information. The scope of this provision should be more clearly defined to give greater certainty as to the extent of information and the anticipated frequency and method of data collection.

Similarly, clause 8(1) could involve disclosure of information which could be subject to legal professional privilege. Limitations should be enshrined in clause 8 protecting legal professional privilege.

### Clarity of drafting

The principle of certainty is central to good law-making.

Clause 2(2)(b) refers to “an international agreement that mainly relates to trade, other than a free trade agreement”. However, “mainly” does not grant enough certainty in terms of interpretation. We note that paragraph 31 of the Explanatory Notes defines international trade agreements as follows: “International trade agreements are agreements between two or more countries aimed at reducing the barriers to trade in goods or services between them.” It would be helpful if clause 2(2) were amended accordingly.

### Issues of relevance in the context of devolution

Free trade agreements negotiated by the EU are classified as exclusive or mixed agreements, depending on whether the matters dealt with are within the exclusive competence of the EU or also apply to areas where competence is shared between the EU and Member States. For mixed agreements – including EU-Singapore FTA and CETA – approval is required from national parliaments, which in the UK means approval by both Houses of Parliament.

International relations and regulation of international trade is reserved to the UK Government and Parliament. The Scottish Parliament and the Scottish Government (as with the other devolved legislative authorities) have no formal role in negotiations or approval of EU agreements. However, in our response to

the consultation on *the Future of UK Trade Policy*, we highlighted the importance of extending a whole of governance approach to trade negotiations. We would urge further consideration of how trade negotiations will be handled where they intersect with the powers of the Scottish Parliament and other devolved legislatures where any proposed trade agreement will affect an area of devolved competence. The Minister for Trade, Investment and Innovation, Rt Hon Conor Burns MP confirmed his commitment that UK Government Ministers will not normally use the powers conferred by the Bill in devolved areas without Scottish and other devolved Ministers' consent, and never without consulting them. The current Minister for Trade Policy, Greg Hands MP has restated this commitment on the floor of the House of Commons. The Government should explain why this commitment it is not in the bill.

We note that Schedule 1, paragraph 2 of the Bill requires Scottish Ministers to consult with UK Ministers (rather than seek consent) when making particular regulations relating to the implementation of international trade agreements in devolved areas or changes to or affecting the operation of the GPA.

The Scottish Government lodged the [Legislative Consent Memorandum \(LCM\)](#) in the Scottish Parliament on 18 August 2020 recommending that the Parliament agree to it.

The LCM identifies the clauses in the Bill which trigger the need for legislative consent:

- Clause 1 – which provides a power for both UK and the Scottish Ministers (within devolved competence) to make regulations to implement the Agreement on Government Procurement;
- Clause 2 – which provides a power for both UK and the Scottish Ministers (within devolved competence) to make regulations to implement qualifying international trade agreements;
- Clause 9 – which provides that certain public authorities may disclose information for the purpose of facilitating the exercise by a Minister of the Crown of the Minister's functions relating to trade;
- Part 1 of the Bill also introduces schedules 1-3, which establish and constrain 'devolved competence' for the purpose of the exercise of those power.

## Entry into force

It is important that regulations can be put in place in advance of IP completion day (31 December 2020) to ensure continuity in relation to the GPA and other international trade agreements. Currently the UK can negotiate, sign and ratify trade agreements to come into effect after 31 December 2020. The Government should make clear the terms of those agreements as they are being negotiated in order that there can be Parliamentary scrutiny of their terms. When those agreements are concluded there should be appropriate information campaigns so that citizens and businesses in the UK can be aware of the terms of such agreements and their implications.



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