House of Lords International Agreements Committee
Inquiry into the review of treaty scrutiny
Bar Council written evidence

About Us

The Bar Council represents approximately 18,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of Response

The Bar Council provided written evidence in June 2021 to the House of Commons' Public Administration and Constitutional Affairs Committee (PACAC) Inquiry into the Scrutiny of International Treaties and other international agreements in the 21st century (2021 BCWE).[1] This response relies on and expands that evidence.

Question 1: the role of government and parliament

1. In addressing whether the Constitutional Reform and Governance Act 2010 (CRAG) "strike[s] the right balance between the prerogative powers of government to conclude treaties and the role of parliament in holding the government to account for actions it takes on treaties", we proceed on the basis of the following objectives, as set out in our 2021 submission to the PACAC,[2] by which we still stand:
    a. the constitutional allocation of functions to parliament and to the executive should be maintained and respected, and a harmonious relationship between them in the treaty-making field should be encouraged;[3]
    b. the competences and special perspectives of the devolved administrations, Overseas Territories and Crown Dependencies should be respected; and
    c. the standing of the UK's courts and legal professions should be maintained, and, so far as possible, enhanced.
2. We reiterate that we "would welcome the development of a mutually beneficial relationship between parliament and the executive in the treaty field, which, in [our] view, would be in keeping with modern conceptions of the rule of law"; that "[s]uch a relationship should aim to be feasible and effective in practice and should be designed to bring positive benefit to all users of the treaty system, including practising lawyers"; and that "it remains a matter of general public interest that treaties concluded by the UK should be properly understood in themselves and their effects."[4]

[1] Bar Council submission to the PACAC inquiry into the scrutiny of international treaties
[2] See 2021 BCWE, para. 49.
[3] See further 2021 BCWE, para. 7.
[4] 2021 BCWE, para. 8.

3. There is no 'legal' answer to the question of whether some treaties, or treaty actions (such as withdrawals, legally binding decisions of treaty bodies which do not amend the treaty and reservations to treaties), merit greater scrutiny by parliament than others under CRAG or any other process. As stressed in our 2021 submission, to an extent, any answer must be informed by the volume and practicalities of modern treaty practice.[5] We reiterate our recommendation that a proper empirical study of contemporaneous UK treaty-making and practice (including treaty actions and the treatment of decisions adopted by treaty bodies) be undertaken in order to conceive to best effect a realistic and durable parliamentary role.[6] To our knowledge, this has not been done. In the absence of such a study, the risk is that amendments of the treaty scrutiny requirements in CRAG are based on one-off-cases or special categories of treaty not suitable for general application.
4. In our recommendation to the PACAC we said that consideration of any scrutiny process or processes should:
    a. reflect the distinction between specific treaty-like characteristics and treaties' substantive content;
    b. include of a 'triage' function through which the limited number of treaties considered apt for detailed substantive scrutiny are separated out from those which are routine or require no more than perfunctory examination;[7]
    c. be a joint initiative of the House of Commons and House of Lords to be able to bring to bear the combined experience and expertise available in both and avoid duplication of effort.[8]
5. We have since been impressed by the quality and seriousness of the expertise brought to bear by the House of Lords' International Agreements Committee (IAC).
6. As to the power in s. 21 of CRAG, we would support its greater use to allow meaningful scrutiny for complex treaties and extend our recommendations in paragraph 39 of the 2021 BCWE concerning s. 22 to s. 21. That is, specific undertakings by government would provide greater clarity and certainty. We would particularly welcome written guidance identifying

[5] As set out at paras. 11-12 of the 2021 BCWE (footnotes omitted):

"11. The current volume of treaty-making on the international scene is very substantial. The UN Treaty Series contains, year on year, some 400 items. UK Treaties Online, the official public record maintained by the Foreign, Commonwealth and Development Office (FCDO), refers to some 14,000 treaties to which the UK is or has been a party. Year by year, the annual numbers of new treaties published in the UK Treaty Series and Miscellaneous or Country Series amounts on average to some 50. This is a reflection of globalization in a world of interdependent States, and the need it brings for States to collaborate and cooperate across a wide variety of subject-matters, which are too numerous and disparate to list, but range from global efforts to combat climate change or drugs trafficking to the situation-specific minutiae of visas, or cross-border tax or social security arrangements.

12. The only realistic working assumption must therefore be that the treaty will continue, as in the past, to serve a kaleidoscopic variety of purposes and functions, and will, accordingly, continue to vary significantly in terms of complexity and length. These features of treaties and treaty-making in the 21st century will necessarily have an effect on the structure and design of effective mechanisms for treaty scrutiny at the national level. …"

[6] See 2021 BCWE, para. 12 for a suggestion as to the scope and format of the study.

[7] The Bar Council notes in this regard the recommendations made by House of Commons PACAC in its Report on Parliamentary Scrutiny of International Agreements in the 21st Century, Second Report of Session 2023-24, 23 January 2024, p. 65, at paras. 28-39.

[8] See 2021 BCWE, paras. 64-65.

the criteria which the government will apply in deciding to extend the period in s. 20(1)(c) once or more than once, and the provision of reasons for declining a request to extend the period.

7. As to the concern expressed that the scrutiny requirement can be sidestepped by the "choice of process" for adoption of the treaty (or treaty amendments), the general considerations set out above apply. There is no 'legal' answer to the question of whether such treaties (or treaty amendments) merit greater scrutiny by parliament. Furthermore, any answer to this question must be informed by the volume and practicalities of modern treaty practice, including the purpose and function of such treaties. We further observe that the choice of process for adoption of a treaty is a matter for negotiation and agreement of the treaty parties. Accordingly, it is not a matter of choice solely for the UK, and other considerations will come into play, including the UK's interests in the timely conclusion and implementation of the agreement.
8. We also recall that, regardless of the process agreed by the parties to the treaty, there has emerged a long-established practice that the government will not give the UK's formal consent to be bound by a treaty requiring legislation to give it effect in domestic law until that legislation has been enacted by parliament.[9]
9. The typical case of treaty amendment is that it can itself only take place by treaty, which would thus come under the relevant scrutiny process in its own right. Less formal treaty amendment procedures are less common, although included in a number of trade agreements, where "joint governance" bodies are given the power to make amendments, normally on technical aspects. Another example are the mechanisms under the International Maritime Organisation (IMO) conventions designed to enable adoption or amendment of rules concerning pollution from vessels, safety of life at sea, the training of seafarers and carriage of dangerous goods.[10] Such powers of amendment are most appropriately dealt with when the parent treaty comes under scrutiny in the first place,[11] and when considering government bills to implement such treaties, in particular powers to adopt delegated legislation or any other mechanism to implement measures adopted by treaty bodies.
10. In this regard we refer to our 2021 submission regarding the relationship between the scrutiny process under CRAG and scrutiny incidental to consideration of implementing legislation,[12] and reiterate the following recommendations:
    a. In those cases where the passing of primary legislation is required for implementation, the connection with the underlying treaty should in all cases, as a matter of routine, be made clear in any white paper and/or in the explanatory notes to the bill and the text of the treaty be made available to parliament at the latest at the same time as publication of the bill. In this manner, even in advance of the formal laying of the treaty under CRAG, scrutiny of the treaty and whether or not it should

[9] See 2021 BCWE, para. 16, referring to the FCDO's Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures (2013), which was revised in 2022 (Treaties and MOUs: Guidance on Practice and Procedures - GOV.UK)

[10] Other examples include conservation and management measures adopted by Regional Fisheries Management Organisations and the measures under the BBNJ treaty (not yet in force).

[11] 2021 BCWE, para. 48.

[12] 2021 BCWE, paras. 40-47.

be ratified can form a part of, and inform, the debate on the implementing legislation.

b. As regards those treaties which can be implemented via statutory instrument under existing powers, it would in general enhance the opportunity for effective scrutiny if any relevant implementing legislation is laid either in advance of, or at latest at the same time as, the treaty itself is laid under CRAG.

c. The opportunities for realistic scrutiny will also be enhanced if, as a matter of course, in all cases when a draft statutory instrument intended to implement a treaty is laid before parliament, the accompanying explanatory note makes clear the connection with the treaty it is intended to implement, and the text of the treaty is made available to parliament.

Question 2: scope of the scrutiny requirement

11. As to the question of whether the treaty scrutiny requirement of CRAG should be extended to other types of treaties which enter into force on signature or exchange of notes, we refer to paragraph 3 (above). The concern with a blanket extension would be the sweeping up of treaties which are not suited for subjection to a scrutiny process. A qualitative study of treaty practice would assist any assessment of the necessity and desirability of extending CRAG to these treaties. We further note our recommendations in paragraph 10 (above) apply *mutatis mutandis* to legislation implementing a treaty not subject to scrutiny under CRAG.

12. To extend the present scope of scrutiny so as to embrace the "regulations, rules, measures, decisions or similar instruments or similar instrument made under a treaty" currently excluded by s.25(2) of CRAG is likely to sweep up a huge array of subsidiary instruments, which are simply not suited to being subjected to a scrutiny process, including, to take two examples, binding decisions of dispute settlement bodies, and decisions of the UN Security Council under Ch. VII of the UN Charter.[13] Other rules, regulations or measures adopted by treaty bodies under a treaty are more appropriately addressed at the time of scrutiny of the parent treaty and/or the legislation to implement the parent treaty, including the mechanisms therein for implementing decisions by treaty bodies, such as delegated legislation.

13. As to whether CRAG should be extended to treaty withdrawals beyond the category identified in the *Miller*[14] case, the observations at paragraphs 3 and 8-10 (above) apply *mutatis mutandis*. Powers of withdrawal are most appropriately dealt with when the parent treaty comes under scrutiny in the first place,[15] and when considering government bills to implement such treaties.

Question 3: non-binding instruments

[13] As set out in 2021 BCWE, para. 48.

[14] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) and 2 Judicial Reviews

[15] 2021 BCWE, para. 48.

14. We reiterate our 2021 evidence to the PACAC concerning non-binding instruments as follows:[16]

    a. Extending CRAG or other methods of parliamentary scrutiny to informal intergovernmental understandings not intended to be legally binding, except perhaps in very limited circumstances, would seem to pose acute problems of definition and demarcation between those that might justify some form of scrutiny and those which don't.[17] It might moreover entail bringing within the net an incalculably large number of documents, some of which will not be public owing to the areas with which they deal with, for example, security and intelligence, joint weapons programmes, police cooperation and control of nuclear materials.

    b. We do however, recognise the existence of a limited category of international exchanges which even if they are (or are said to be) non-binding and are not implemented through legislation, may still be capable of having an impact on the domestic plane. We would welcome written guidance identifying the criteria which the government apply in deciding under what circumstances parliament could or would be informed about informal intergovernmental exchanges or understandings which are not regarded as legally binding, but which may have significant domestic effects.[18] In this regard we note the recommendations of the IAC 'Working practices: one year on' report.[19]

    c. There may be sensitivities which impose secrecy or which otherwise make it undesirable to share information more widely than strictly necessary. Disclosure of information may compromise the UK's negotiating position. This also applies to treaties, but is perhaps more acute in the context of non-legally binding intergovernmental understandings, which may be entered into precisely because sensitivities of one sort or another make it unrealistic to conclude a formal treaty. That said, we see no reason why the general principle should not be that all information capable of being shared with the relevant committee or committees should be shared as early as possible, subject to any necessary safeguards.[20]

Question 4: international comparators

15. In 2021 we identified the most recent comparative analysis of treaty scrutiny processes in other countries as the work of the American Society of International Law in 2005.[21] Further

[16] 2021 BCWE, paras. 35-37.

[17] An instructive current example given in the 2021 BCWE was the New Atlantic Charter 2021 (The New Atlantic Charter 2021 - GOV.UK) which, although based on international agreement at high level, is plainly not binding in any legal sense, and which, if parliamentary attention were called for, would not be by a treaty scrutiny process.

[18] The Bar Council notes that during the passage of CRAG the then Lord Chancellor accepted that some such instruments might be examined by a Select Committee on an ad hoc basis, if need be in confidence: see the Joint Committee on the Draft Constitutional Renewal Bill, Volume II: Evidence, Session 2007-8, Q752, pp.331-332, at https://publications.parliament.uk/pa/jt200708/jtselect/jtconren/166/166ii.pdf.

[19] House of Lords IAC, Working practices one year on, September 2021, Summary of conclusions and recommendations, paras. 21-22.

[20] As to which, see 2021 BCWE, paras. 55-60.

[21] Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff, in association with the American Society of International Law, 2005). The study, noted in para. 66 of the 2021 BCWE, covers 19 countries.

useful material has been identified in the House of Commons Library Research Briefings in 2021.[22] We would welcome an initiative to commission an updated, detailed study which would bring together all the material covering the scrutiny and approval processes of treaties in other countries, especially, but not limited to, those in operation in countries with similar legal systems to the UK.

16. We also consider that the UK's dualist constitutional system is a relevant factor in considering any scrutiny process and our views on this, and recommendations concerning scrutiny of treaties through consideration of primary and secondary legislation implementing such treaties (including treaty amendments and decisions of treaty bodies), are set out above.

Question 5: public engagement

17. As to whether there should be *"greater public engagement with the process of treaty scrutiny"*, we maintain our position set out in our evidence to the PACAC, as follows:[23]
    a. The government already provides a large amount of information publicly online on gov.uk on existing treaties and concerning negotiations of new treaties (such as press releases by ministers), and on legislative processes.
    b. The Committee on Standards in Public Life states that "holders of public office should act… in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing".[24] We recognise that in some specific circumstances it is necessary to keep information confidential. For example, to protect national security or international relations, or where disclosure might compromise the UK's negotiating position.
    c. The current legislative framework set out in the Freedom of Information Act 2000 is sufficient for both the purpose of providing the public with a route to access information, in so far as it is not already available, and withholding information where it falls within one of the exemptions or would be unreasonably burdensome.
18. Some stakeholders, including the Bar Council and its members, are invited by the government to engage in treaty negotiation processes and from an early stage, through various routes including Strategic Advisory Group and Trade Advisory Groups (TAG) and direct engagement with the responsible government department. The Bar Council welcomes this approach and any additional efforts that would improve and enhance stakeholder engagement and engagement with the general public.
19. Finally, we wish to express our continued willingness to lend further assistance and support to the IAC in its work.

The Bar Council

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[22] A. Lang, How Parliament treats treaties, Briefing Paper, number 9247, 1 June 2021, esp. at n. 86 and the sources therein, and p. 38.
[23] 2021 BCWE, paras. 61-63.
[24] The Committee on Standards in Public Life, "The Seven Principles of Public Life", published 31 May 1995, The Seven Principles of Public Life - GOV.UK.

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