



HOUSE OF LORDS

Select Committee on the Constitution

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9th Report of Session 2016–17

# The ‘Great Repeal Bill’ and delegated powers

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The report refers to oral and written evidence gathered as part of the Committee’s inquiry into the Legislative Process, which is published online at <http://www.parliament.uk/legislative-process-inquiry> and available for inspection at the Parliamentary Archives (020 7219 3074).

## SUMMARY

At the Conservative Party Conference in October 2016, the Prime Minister announced that a 'Great Repeal Bill' would be included in the next Queen's Speech. Its working title notwithstanding, the 'Great Repeal Bill' will not actually repeal much EU law. Whilst it will repeal the European Communities Act 1972, thus stopping EU law applying to the UK, it will, at the same time, preserve the effect of what is now EU law by transforming the current body of EU law into UK law. The purpose of doing so is to provide legal certainty: the Government's intention is that, wherever practical and appropriate, the same laws will apply in the UK the day after Brexit as the day before.

That much is known. Beyond that there is little detail publicly available as to how the Government intends to take forward this process. Our conclusions and recommendations are therefore necessarily conditional and framed in general terms. We welcome, however, the Government's commitment to publishing a White Paper on the 'Great Repeal Bill'. It should contain sufficient detail—including draft clauses—to allow for a proper debate on the Government's approach. The UK's exit from the EU must be taken forward in a way that takes due account not only of the practical imperatives that will flow from the exit process, but also of the fundamental importance of maintaining constitutional propriety.

### The preservation of EU law

Both the Government and Parliament face a unique challenge in converting the current body of EU law into UK law—not least in determining the exact scope of that task. The body of EU law is found in a number of different places, and in a number of different forms. Some is embodied in existing UK primary legislation; some in secondary legislation. Other elements of EU law are directly effective in the UK (by virtue of the European Communities Act 1972), but are not actually written anywhere in the UK's statute book. Yet further elements of the body of EU law are non-legislative in nature, consisting, for example, of judgments made by the Court of Justice of the European Union, regulatory rulings by EU agencies, or in the interpretation of our own courts. The Government will need to take the lead in setting out for Parliament exactly what will be required to preserve the effect of EU law following Brexit.

The task of adapting this body of law to fit the UK's circumstances following Brexit is complicated not only by the scale and complexity of the task, but also by the fact that in many areas the final shape of that law will depend on the outcome of the UK's negotiations with the EU. Yet preparations for the amendment of EU law will need to be made *before* it comes into effect as UK law, in order that those changes will take effect on the day of Brexit. These amendments will sometimes be minor, for example removing references to EU institutions, and sometimes substantial, such as where an EU regulatory regime needs to be replaced with a UK regime.

The degree of uncertainty as to what exactly the process of converting EU law into UK law will involve—and, in particular, the need to take account of the UK's ongoing Article 50 negotiations with the EU—will almost certainly necessitate granting the Government relatively wide delegated powers under the 'Great Repeal Bill', both to amend existing EU law in preparation for the day of Brexit and to legislate for new arrangements following Brexit where necessary.

The process of converting the body of EU law, as described by the Government, will consist of two distinct phases. First, the initial preservation of EU law by converting it into UK law with such amendments as are necessary to make it work sensibly in a UK context; and second, a longer-term process in which Parliament and the Government determine the extent to which (what was) EU law will remain part of UK law. It is vital that a distinction be drawn between these two discrete processes: the more mechanical act of converting EU law into UK law, and the discretionary process of amending EU law to implement new policies in areas that previously lay within the EU's competence. The 'Great Repeal Bill' is intended to facilitate the first aspect of the process. The second should be achieved through normal parliamentary procedures.

The latter process will mostly take place after Brexit, although the Government have stated that they will introduce primary legislation to make substantive changes to certain areas currently covered by EU law, including immigration and customs law, alongside the process of domesticating the body of EU law through the 'Great Repeal Bill'. Law in these areas will be contingent upon the outcome of negotiations with the EU, so this primary legislation may also contain wide-ranging delegated legislation to allow Government to adapt their contents in light of the final withdrawal agreement.

### **Limiting the constitutional risks posed by the 'Great Repeal Bill'**

The challenge facing Parliament—and on which we focus in this report—is how to grant the Government relatively wide delegated powers for the purpose of converting EU law into UK law, while ensuring that they cannot also be used simply to implement new policies desired by the Government in areas which were formerly within EU competence.

We consider that Parliament should address this challenge in two distinct ways. First, by limiting the scope of the delegated powers granted under the Great Repeal Bill, and second, by putting in place processes to ensure that Parliament has on-going control over the exercise of those powers.

In relation to the first, we suggest that a general provision be placed on the face of the Bill to the effect that the delegated powers granted by the Bill should be used only:

- so far as necessary to adapt the body of EU law to fit the UK's domestic legal framework; and
- so far as necessary to implement the result of the UK's negotiations with the EU.

One tool available to Parliament to reduce the constitutional risks associated with wide-ranging delegated powers is sunset clauses. Sunset clauses provide that a particular provision or power ceases to have effect on a certain date or after a specified period of time. The extent to which they will be a viable means of mitigating the constitutional risks posed by the delegation of extensive powers to the Government under the 'Great Repeal Bill' will depend on the specifics of the Bill. We do not therefore recommend in detail how they should be used or developed.

We note, however, that sunset clauses might be used either in relation to the exercise of delegated powers granted to the Government, or with respect to

the content of secondary legislation passed under those powers. With respect to the former, we consider that the Government would need to present a very strong justification for not including sunset clauses in relation to extensive powers conferred for the purpose of converting EU law into UK law. Regarding the latter: if it is clear that parliamentary scrutiny of particular issues will be curtailed during the transposition process—perhaps as a result of time pressures close to the day of Brexit—then we would expect that sunset provisions be used to ensure that those provisions were brought before Parliament again for proper consideration after the UK's exit from the EU.

### **Parliamentary scrutiny of secondary legislation laid under the 'Great Repeal Bill'**

Turning to Parliamentary scrutiny of secondary legislation laid under the 'Great Repeal Bill', we recommend that:

- (1) The Minister sign a declaration in the Explanatory Memorandum to each statutory instrument amending the body of EU law stating whether the instrument does no more than necessary to ensure that the relevant aspect of EU law will continue to make sense in the UK following the UK's exit from the EU, or that it does no more than necessary to implement the outcome of negotiations with the EU.
- (2) The Explanatory Memorandum to each statutory instrument sets out clearly what the EU law in question currently does (before Brexit); what effect the amendments made by the statutory instrument will have on the law (as it will apply after Brexit) or what changes were made in the process of conversion; and why those amendments or changes were necessary.
- (3) The Government makes a recommendation for each statutory instrument as to the appropriate level of parliamentary scrutiny that it should undergo. We would expect that a statutory instrument which amends EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure.
- (4) A parliamentary committee(s) consider the Government's recommendation, and decide the appropriate level of scrutiny for each statutory instrument laid under the 'Great Repeal Bill'. If the two Houses perform this function separately, then it would seem appropriate in the House of Lords for this sifting function be performed by the Secondary Legislation Scrutiny Committee. Alternatively, a Joint Committee could be established to carry out this role on a bi-cameral basis.
- (5) Where the relevant committee(s) determines that a statutory instrument laid under the 'Great Repeal Bill' amends EU law in a manner that determines matters of significant policy interest or principle, it should undergo a strengthened scrutiny procedure. We do not attempt at this stage to define exactly how this strengthened scrutiny procedure should operate, or whether one of the existing statutory models should be adopted. We recognise that existing models for enhanced scrutiny can prove resource intensive and time-consuming—in our view, the only essential element of whatever

strengthened procedure is selected is that it should provide an opportunity for a statutory instrument to be revised in the light of parliamentary debate.

### **Resourcing**

The volume and complexity of secondary legislation likely to be laid under the 'Great Repeal Bill', and indeed under other primary legislation related to Brexit, will put significant strains on Parliament's current processes. Scrutiny committees will need to have the capacity, expertise and legal support to cope with the additional workload. We look to the Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments, both of which have extensive experience in the scrutiny of secondary legislation, to advise the Liaison Committee as to what will be required to deal with the secondary legislation flowing from the 'Great Repeal Bill' and other Brexit-related legislation.

### **EU law and the devolved institutions**

The UK Government will need to make clear what it envisages the role of the devolved institutions to be in the process of domesticating EU law. Will ministers for the devolved institutions be responsible for preparing amendments to those elements of EU law that will, following Brexit, fall within their competence? Or will the UK Government have exclusive responsibility for such matters prior to Brexit day, following which the devolved institution will take on responsibility for elements within devolved competence?

The domestication of EU law will also have implications for the devolution settlements. The UK's exit from the EU will provide the devolved legislatures with the freedom to legislate in devolved areas that are currently circumscribed by EU law. This will mean that the UK Government and the devolved administrations will need to manage new interfaces—and potentially overlapping responsibilities—between reserved matters and devolved competence in areas where the writ of EU law no longer runs. The UK Government and devolved administrations will need to agree, before Brexit, how those new interfaces will be managed.





# The ‘Great Repeal Bill’ and delegated powers

## CHAPTER 1: INTRODUCTION

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1. Our normal practice is to report on bills when they are introduced in the House of Lords. However, during the process of taking evidence for our continuing inquiry on *The Legislative Process*, a number of witnesses drew to our attention the possibility that the ‘Great Repeal Bill’, expected to be introduced in Parliament early in the next Session in mid-2017 (assuming, of course, that Article 50 is triggered by the Government as expected), might contain exceptionally broad delegated powers, enabling the Government effectively to re-write the law across whole swathes of the statute book. In the light of this possibility, the Committee concluded that it would be appropriate for it to take the unusual step of publishing a report at this preliminary stage, in order to set out the issues liable to be raised by the ‘Great Repeal Bill’ in their wider constitutional context.
2. We have drawn heavily upon the evidence given to us, both oral and written, for our inquiry on *The Legislative Process*—we thank all those who submitted written material or gave evidence to us in person. We would like to thank Professor John Bell from the University of Cambridge and Professors Paul Craig and Alison Young from the University of Oxford who came to speak to us about the ‘Great Repeal Bill’ in particular, and we would also like to express our appreciation to the Lords Delegated Powers and Regulatory Reform Committee and the Lords Secondary Legislation Scrutiny Committee for taking the time to meet us to discuss these matters.

### Background

3. At the Conservative Party Conference in October 2016, the Prime Minister announced that a ‘Great Repeal Bill’ would be included in the next Queen’s Speech. Detailed information about the Bill is not yet in the public domain. However, in her conference speech, the Prime Minister made two key points clear: that the Bill will repeal the European Communities Act 1972, and that it will convert the ‘*acquis*’—that is the existing body of European Union law that has effect in the United Kingdom—into UK law. This was subsequently confirmed in a White Paper on Brexit published on 2 February 2017.<sup>1</sup>
4. The ‘Great Repeal Bill’ is distinct from the legislation that will authorise the triggering of Article 50. That legislation—the need for which was confirmed by the Supreme Court’s judgment on 24 January 2017 in *R (Miller) v Secretary of State for Exiting the European Union*—is currently before Parliament as the European Union (Notification of Withdrawal) Bill. The Committee published its views on that Bill on 23 February in its report, *European Union (Notification of Withdrawal) Bill*.<sup>2</sup>

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1 HM Government, *The United Kingdom’s exit from and new partnership with the European Union*, Cm 9417, February 2017, pp 9–11: <https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2> [accessed 1 March 2017]

2 Constitution Committee, *European Union (Notification of Withdrawal) Bill* (8th Report, Session 2016–17, HL Paper 119)

5. The Government faces a unique challenge in converting the current body of EU law into UK law. As we discuss in more detail later in this report (see paragraph 10) the body of EU law is found in a number of different places, and in a number of different forms. Some is embodied in existing UK primary legislation; some in secondary legislation. Other elements of EU law are directly effective in the UK (by virtue of the European Communities Act 1972), but are not actually written anywhere in the UK's statute book. Other elements of the body of EU law are non-legislative in nature, consisting, for example, of judgments made by the Court of Justice of the European Union or regulatory rulings by EU regulators.
6. The task of amending this body of law to fit the UK's circumstances following Brexit is complicated not only by the scale and complexity of the task, but also by the fact that in many areas the final shape of that law will depend on the outcome of the UK's negotiations with the EU. This law will need to be amended *before* it comes into effect on the day of Brexit—sometimes in minor ways, for example by removing references to EU institutions, and sometimes substantially, such as where an EU regulatory regime needs to be replaced with a UK regime.
7. This will probably require, as we explore later in this report, the delegation of extensive legislative powers to the Government to ensure that the complex and time-consuming process of amending EU law as required can be completed by the day of the UK's exit from the European Union. The challenge that Parliament will face is in balancing the need for speed, and thus for Governmental discretion, with the need for proper parliamentary control of the content of the UK's statute book. It is on this constitutional issue—the balance of legislative authority between Parliament and the Government—that our report focuses.
8. **At present, little detail is publicly available as to how the Government intend to take forward this process—the conclusions and recommendations set out in this report are therefore necessarily conditional and framed in general terms. What is clear is that the process of converting the body of EU law into UK law will be extremely complicated. It will also be done to an external deadline, imposed by the completion of negotiations and the timing of the UK's exit from the EU.**
9. **It is in everyone's interests that, following the UK's exit from the EU, the statute book is clear, consistent and unambiguous. In that light, we welcome the Government's commitment to publishing a White Paper on the 'Great Repeal Bill'.<sup>3</sup> It should contain sufficient detail—including draft clauses—to allow for a proper debate on the Government's approach. This vital task must be taken forward in a way that takes due account not only of the practical imperatives that will flow from the exit process but also of the fundamental importance of maintaining constitutional propriety.**

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3 HC Deb, 2 February 2017, [col 1216](#). See also HM Government, *The United Kingdom's exit from and new partnership with the European Union*, p 9

## CHAPTER 2: THE 'GREAT REPEAL BILL'

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### The European Communities Act 1972

10. The European Communities Act 1972 (the ECA) is the primary legislative vehicle whereby the UK meets its EU Treaty obligations in respect of giving domestic effect to EU law. The ECA facilitates fulfilment of those Treaty obligations in two ways:
- *EU law that has domestic effect without the need for national implementing measures:* Some EU legislation, known as 'regulations', is 'directly applicable'.<sup>4</sup> This means that once enacted by the EU, regulations become part of the body of law applicable within individual Member States without any need for Member States to take steps to implement regulations (e.g. by enacting domestic legislation). It is also possible for EU law (whether it is a regulation or some other type of EU law) to have 'direct effect', provided that it fulfils certain criteria pertaining to matters such as its clarity. If EU law has direct effect, it can give rise to rights and obligations that are enforceable within Member States' legal systems. The expressions 'directly applicable' and 'directly effective' are often used interchangeably,<sup>5</sup> so in the remainder of this Report, we will use the term 'directly effective' to refer to those aspects of EU law that take effect in the UK without the need for national implementing measures. Such effect is possible as a matter of UK constitutional law thanks to section 2(1) of the ECA, which provides for directly effective EU law to operate within the UK legal system.
  - *EU law that needs to be implemented via domestic legislation:* Some EU law—in particular, EU law that takes the form of 'directives'—is neither directly applicable nor directly effective. A directive requires Member States to adjust their domestic law so as to achieve whatever results are specified in the directive. Section 2(2) of the ECA authorises the making of secondary legislation for the purpose of implementing directives (as well as other EU obligations that lack direct effect).
11. In the light of this, the effect of repealing the ECA would (for present purposes) be twofold. First, repealing section 2(1) would excise from the domestic legal system all directly effective EU law. Second, repealing section 2(2) would deprive secondary legislation that implements EU law of any legal basis, rendering such secondary legislation invalid.<sup>6</sup>
12. This would result in the removal from UK law of the vast majority of EU law. However, not all EU law that requires domestic implementation has been implemented via the ECA. Some has been given domestic effect by enacting other primary legislation (notable examples include the Equality Act 2010 and the Consumer Rights Act 2015) or through delegated legislation made under primary legislation other than the ECA. Repealing the ECA will not affect EU law that has been given effect in those ways, although of course it will be open to Parliament, via the 'Great Repeal Bill', to make changes to UK legislation other than the ECA that implements EU obligations.

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4 Article 288, Treaty of the Functioning of the European Union, [OJ C 326](#) (consolidated version of 26 October 2012)

5 Dashwood, Dougan, Rodger, Spaventra and Wyatt, *Wyatt and Dashwood's European Union Law* (Oxford: Hart Publishing, 2011) 6th Edition, p 245

6 Although EU law would still have a residual effect under the Interpretation Act 1978, [section 16](#).

### The preservation of EU law

13. Its working title notwithstanding, the 'Great Repeal Bill' may not in fact repeal much EU law. The Government's intention, set out in the White Paper *The United Kingdom's exit from and new partnership with the European Union*, is that the Bill will "preserve EU law where it stands at the moment before we leave the EU".<sup>7</sup> In effect, a snapshot will be taken of EU law as it exists immediately prior to the UK's departure from the EU, and EU law as recorded by that snapshot will be transformed by the 'Great Repeal Bill' into domestic law.
14. The preservation of the existing body of EU law does not, of course, imply that the Government, or indeed future Governments, will retain all existing EU law post-Brexit. Rather, the intention seems to be that the initial preservation of EU law will give the Government and Parliament the time, following Brexit day, to undertake a proper process whereby the body of EU law can be sifted, and decisions taken as to which aspects of (what was) EU law are to be retained, amended or replaced.<sup>8</sup> What is envisaged can therefore be thought of as forming two distinct phases:
  - (1) the initial preservation of EU law by converting it into UK law; and
  - (2) a longer-term process that will determine the extent to which (what was) EU law remains part of UK law.
15. As we note below however (see paragraphs 19–21), the Government has announced that some areas of the law will be the subject of separate pieces of primary legislation—presumably to allow more substantive changes to be made to what is now EU law at the same time as it is transposed into UK law.
16. **It is vital that a distinction be drawn between these two discrete processes: the more mechanical act of converting EU law into UK law, and the discretionary process of amending EU law to implement new policies in areas that previously lay within the EU's competence. The 'Great Repeal Bill' is intended to facilitate the first aspect of the process. The second should be achieved through normal parliamentary processes. While we expect that much of the latter process will take place after Brexit, the Government have stated that they will introduce primary legislation to make substantive changes to certain areas currently covered by EU law, including immigration and customs law, alongside the process of domesticating the body of EU law through the 'Great Repeal Bill'.<sup>9</sup>**

### The 'Great Repeal Bill'

17. The mechanics by which the 'Great Repeal Bill' will achieve the conversion of the body of EU law into UK law are not yet clear, but it is likely that the Bill will provide a new legal basis for delegated legislation passed under the European Communities Act 1972 (once that Act has been repealed). Meanwhile, EU law given effect by or under other primary legislation will remain in force anyway, the ECA's repeal notwithstanding, unless or until specific steps are taken to repeal or revoke it.

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7 UK Government, *The United Kingdom's exit from and new partnership with the European Union*, p 10

8 UK Government, *The United Kingdom's exit from and new partnership with the European Union*, paras 1.1–1.2

9 HC Deb, 2 February 2017, [col 1217](#)

18. In addition, however, the Bill will need to provide a mechanism for incorporating directly effective EU law (see paragraph 10 above) into UK law. This is likely to be achieved by a general provision to the effect that, following the UK's exit from the EU, all directly effective EU law is to have continuing effect in UK law as it stood at the time of the UK's exit. It is possible to conceive of an alternative approach to transposing directly effective EU law by giving Ministers the power to transpose individual elements of EU law (such as particular regulations) by making statutory instruments.
19. Whatever approach is chosen will, no doubt, be subject to certain exceptions. For example, the Government have said that, in order to allow votes on "substantive policy choices ... we expect to bring forward separate legislation in areas such as customs and immigration".<sup>10</sup> It can be surmised, therefore, that certain areas of the law—perhaps those which are most likely to need amendment following negotiations during the withdrawal process (see paragraph 15 above)—may well be excepted from the scope of the 'Great Repeal Bill' altogether so that they can be dealt with separately in primary legislation.
20. However, we note in passing that if this is what is envisaged, it raises questions about how primary legislation enacted alongside the 'Great Repeal Bill' will be scrutinised. In particular, if such primary legislation is intended to deal with matters that are likely to be dependent upon what is agreed as part of the withdrawal negotiations, it is unlikely to be possible to finalise the content of such legislation until relatively close to the end of the two-year negotiation period—raising the spectre that these pieces of primary legislation will also contain extensive delegated powers to allow the Government to adapt the legislation to the contents of the final withdrawal agreement.
21. In addition, of course, if the matters addressed by such primary legislation are carved out of the 'Great Repeal Bill'—such that they do not form part of the snapshot of EU law that will be preserved by it—it will be necessary to ensure that the legislation, like the 'Great Repeal Bill' itself, is ready to be brought into force immediately upon Brexit.
22. It is also worth noting that the position in relation to EU law that will form part of the snapshot taken by the 'Great Repeal Bill' will be complicated by two factors. First, EU law will continue changing up until the date that the UK leaves the EU. This is not in itself problematic, since the snapshot will not be taken until immediately prior to Brexit. However, the evolving content of the body of EU law that will eventually form the snapshot will complicate the task of ensuring that the snapshot can sensibly be accommodated, immediately upon Brexit, within the broader framework of UK law.
23. Secondly, what the snapshot will need to contain will depend on the outcome of the UK's negotiations with the EU. As Professor Alison Young told us, "the problem is you are almost chasing a moving target."<sup>11</sup> In some cases this will involve not only planning for the UK's eventual relationship with the EU, but also providing a legal base for transition arrangements that will be temporarily put in place following Brexit. The Secretary of State for Exiting the European Union, David Davis MP, told the House of Commons that

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10 HC Deb, 2 February 2017, [col 1217](#)

11 [Q 133](#)

“Delivering a smooth, mutually beneficial exit, while avoiding a disruptive cliff-edge, will be the key. A never-ending transitional status is emphatically not what we seek, but a phased process of implementation for new arrangements—whether immigration controls, customs systems, the way we operate and co-operate on criminal and civil justice matters, or future regulatory and legal frameworks for business—will be necessary for both sides. ... [T]he time needed to phase in new arrangements in different areas may vary.”<sup>12</sup>

*Non-legislative elements of the EU body of law*

24. There is another element of EU law that the ‘Great Repeal Bill’ will need to address. Professor Paul Craig explained that:

“for an EU lawyer the *acquis* includes, among other things, the case law of the CJEU [Court of Justice of the European Union] and the General Court ... If you want a true snapshot of the *acquis* it has to include the CJEU and GC case law. ... [I]f it does not you do not have a complete snapshot of the *acquis*—it is as simple as that.”<sup>13</sup>

25. Professor Alison Young added a final strand: “in addition ... you have situations where we have UK laws that expressly rely on interpretations or implementation measures from European agencies.” Following the Article 50 negotiations, it is likely that the UK will no longer be affected by the decisions of many of these agencies. In the event, however, that these agencies continue to play a role for the UK following Brexit, Professor Young notes that “we have the question of whether we still want to continue to be bound by any forms of decisions relating to interpretations from those agencies that we are using in national law.”<sup>14</sup>
26. **We note that, in addition to transposing the body of EU legislation as set out above, the Government will need to consider how to treat those elements of EU law that are not legislative in nature—for example, the case law of the Court of Justice of the European Union or the history of regulatory decisions by European institutions. In particular, the Bill should provide clarity as to the status of the Court of Justice’s judgments, including the extent (if any) to which those judgments can or must be followed or taken account of by UK courts following Brexit. It will also be necessary to consider whether a distinction should be drawn in this regard between judgments given before and after the date on which the UK leaves the EU.**
27. **In our view, it would be politically unlikely that UK courts would have to continue to follow the judgments of the Court of Justice following Brexit. UK law will start to diverge from EU law (even where UK law is derived from what was, before Brexit, EU law)—that is an inevitable consequence of the UK’s exit from the EU. That being the case, the Government may wish to consider whether the Bill should provide that, as a general rule, UK courts “may have regard to” the case law of the Court of Justice (and we stress that it should be optional) in relation to judgments made both before and after the UK’s exit from the EU in order to assist in the interpretation of UK law. This will**

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12 HC Deb, 2 February 2017, [col 1217](#)

13 [Q 133](#)

14 [Q 133](#)

**allow UK courts to take into account the judgments of the Court of Justice, but not be bound by them.**

*The process of converting EU law into UK law*

28. While some EU law can simply be converted into UK law without further amendment, significant areas of EU law will require amendment. EU law in its amended form cannot be made operative until the UK leaves the EU since until then the UK remains bound to comply with EU law. However, preparations for the modification of EU law on the day of Brexit must be anticipated by the 'Great Repeal Bill'. Amendment will be needed:
- Where EU law would have no relevance or make no sense following Brexit (for example, because it concerns arrangements, such as the 'four freedoms', that will have no application to the UK following Brexit unless provided for in a withdrawal or transitional agreement);
  - Where EU law needs to be amended to fit into UK law (for example, to remove reference to EU institutions and insert reference to UK institutions, or to create a new domestic regulatory regime to replace an EU regime).
29. Further amendments to domesticated EU law (i.e. the body of EU law that will be made part of UK law after Brexit) will be needed in order to implement the final withdrawal agreement. While the Government will need to get the separate approval of Parliament to this agreement, it may well choose to use powers granted under the 'Great Repeal Bill' to prepare some of the necessary changes to domesticated EU law to take effect on Brexit-day.
30. Some of the amendments required to the body of EU law will be technical in nature: these might involve, for example, replacing references to EU institutions with UK institutions or changing definitions which may not be workable in the domestic context. Thought will need to be given to ambulatory references to EU law in existing UK law. Other changes will require more substantive decisions to be taken on issues of policy or principle. The British Bankers' Association gave us examples of when substantive decisions might be required:
- “We anticipate such questions arising in areas where transposition necessarily involves some amendment because there is no way under national law to replicate directly a particular provision. For example, where a provision only works because there is reciprocity within the EU. There may also be EU legislation where the underlying regulatory technical standards have yet to be issued by the applicable EU body and it will be necessary to determine whether the UK will implement these standards (even after Brexit) or take a different approach.”
31. The Leader of the House of Commons, David Lidington MP, gave us a similar explanation:
- “[I]t is clearly necessary, to ensure some predictability for British business, that we are able to provide a UK legal basis for the acquis. That is particularly the case when it comes to those items of European legislation that do not have specific transposing legislation here—most obviously EU regulations that have direct effect by virtue of the 1972

Act. It will then be necessary for the repeal Bill to include delegated powers of some kind. The most obvious need will be that where a piece of European legislation refers to an EU-level regulator or arbitrator of some kind, we will need to substitute a UK regulator or arbitrator instead.”<sup>15</sup>

32. There are, therefore, at least two things which will need to happen in this context before Brexit. First, it will be necessary to identify which aspects of EU law can be straightforwardly domesticated; which aspects would make no sense if domesticated; and which aspects need to be amended prior to Brexit day. Second, legislative provisions will need to be put in place before Brexit day (even though they will not be able to take effect until Brexit day) to make those necessary amendments of relevant aspects of EU law.

### *Mechanisms for amending EU law*

33. The Government’s White Paper states that “the Bill will enable changes to be made by secondary legislation to the law that would otherwise not function sensibly once we have left the EU, so that our legal system continues to function correctly outside the EU”.<sup>16</sup> David Lidington expanded on this description in evidence to us. He stated that the “primary legislation is what will repeal the 1972 Act and provide a UK legal basis for the *acquis*. The secondary legislative powers will be intended to ensure that the *acquis* remains operable in the UK unless and until such time as Parliament in the future wants to make amendments.”<sup>17</sup>
34. In addition, the Department for Exiting the EU has indicated that the Bill will include delegated powers “giving the Government the flexibility to take account of the negotiations with the EU as they proceed”.<sup>18</sup> This reliance on delegated legislation to make the necessary changes to EU law being brought across into UK law (see paragraphs 28–32 above), as well as to make certain changes that might be required as a result of negotiations with the EU, has been widely expected.<sup>19</sup>
35. In general, our witnesses felt that managing the necessary amendments to EU law via delegated legislation, rather than through primary legislation, was justified. The Association of British Insurers noted that “The ‘Great Repeal Bill’ brings the prospect of considerable further delegation of powers ... We do not object to this in principle and it is hard to see any other way in which the volume of regulation can be managed”.<sup>20</sup> The British Bankers’ Association agreed, and justified this approach by stating that “the Government will not be introducing new legislation via this route, rather it

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15 Q 97

16 HM Government, *The United Kingdom’s exit from and new partnership with the European Union*, p 10

17 Q 97

18 Department for Exiting the European Union, ‘Government announces end of European Communities Act’, 2 October 2016: <https://www.gov.uk/government/news/government-announces-end-of-european-communities-act> [accessed 1 March 2017]

19 See, for example, written evidence from Dr Richard Lang (LEG0048), The Scottish Parliament (LEG0043), British Bankers’ Association (LEG0047), The Chartered Institute of Taxation (LEG0044), Bar Council (LEG0042), Association of British Insurers (LEG0041), Mark Ryan (LEG0034), Professor Colin T. Reid (LEG0033) and Secondary Legislation Scrutiny Committee (LEG0050)

20 Written evidence from Association of British Insurers (LEG0041)



will be ensuring the continuation of existing law,”<sup>21</sup> an argument echoed by the Bar Council.<sup>22</sup>

36. The WWF-UK drew a distinction between the task of transposing directly effective EU law, and the need to amend EU law already enacted in UK primary and secondary legislation (see paragraph 10 above). In relation to the former, they stated that: “we ... accept the sheer scale of the legislative task facing the Government, and that it may be unrealistic to insist that every piece of transposition is done by primary legislation.”<sup>23</sup> In the latter case, however, they suggested that:

“in the context of environmental legislation ... it is particularly important that, where existing EU laws have been implemented into UK laws (either by way of primary or secondary legislation), these are in the main amended or repealed only by Parliament, or only after sufficient parliamentary scrutiny has been provided. It must only be in exceptional and limited circumstances that Henry VIII clauses are used to amend existing environmental legislation or that transposed by way of the GRB in secondary legislation.”<sup>24</sup>

37. We are not convinced that this distinction—between the amendment of EU law already embodied in UK legislation and that which currently has direct effect—is important. The key distinction, as we conclude in paragraph 16 above, is between the necessary amendments that must be made to the existing body of EU law as a consequence of the UK’s exit from the EU, and substantive, more discretionary changes that the Government may seek to make to implement new policies in areas that previously lay within the EU’s competence.

38. Many of the concerns we heard were related to the possibility that the Government might use delegated powers granted under the ‘Great Repeal Bill’ to overhaul EU law following Brexit without going through proper parliamentary processes. Liberty, for example, told us that “Whilst it is accepted that lawmakers face a serious challenge in legislating for withdrawal [from the EU], Ministers must not be handed virtually untrammelled power to make and unmake matters needing real democratic scrutiny and legitimacy.” In particular, they noted that

“it would therefore be an extraordinary and unprecedented abuse of these powers to allow Ministers to pull apart longstanding provisions of UK law after Brexit. Whilst there may be some areas in which technical or tying-up changes may be needed, and in which these powers may be appropriate, Henry VIII clauses cannot be permissibly used in respect of substantive areas of law—much less to repeal fundamental rights by Ministerial fiat.”<sup>25</sup>

39. The point was made by several of our witnesses<sup>26</sup> that the need to amend EU law already embodied in UK primary legislation mean the Government

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21 Written evidence from British Bankers’ Association ([LEG0047](#))

22 Written evidence from Bar Council ([LEG0042](#))

23 Written evidence from WWF-UK ([LEG0045](#))

24 Written evidence from WWF-UK ([LEG0045](#))

25 Written evidence from Liberty ([LEG0037](#))

26 See, for example, written evidence from Bingham Centre for the Rule of Law ([LEG0052](#)), British Bankers’ Association ([LEG0047](#)), Liberty ([LEG0037](#)) and Low Incomes Tax Reform Group ([LEG0039](#))

will likely seek Henry VIII powers from Parliament. This Committee has historically urged Parliament to exercise especial caution when considering Henry VIII powers.<sup>27</sup> In the context of the 'Great Repeal Bill', however, the usual distinction between Henry VIII powers (that can be used to enact secondary legislation amending or repealing primary legislation) and other delegated powers (that do not extend to amending or repealing primary legislation) is of less import. As we discuss below (see paragraphs 55–67), directly effective EU law has legal status in the UK only by virtue of the ECA, much of it through delegated legislation made under the ECA, and it is unclear what status it will have when transposed into UK law. Much of the legislation laid under, or that has effect through, the ECA would, if it had originated in the UK Parliament rather than in Brussels, been passed as primary rather than secondary legislation.

40. In these circumstances, it is essential that Parliament consider each of the powers in the Bill with additional caution, considering in each case what body of law will actually be affected by a particular delegated power. Parliament must not assume that, simply because a particular delegated power would only affect a piece of secondary legislation or an element of what is currently directly effective EU law, the delegation of power requires less scrutiny than a delegation of power that happens to affect an element of EU law that is currently embodied in primary legislation (and would thus have to take the form of a Henry VIII power). In short, **the distinction between Henry VIII and other delegated powers is not in this exceptional context a reliable guide to the constitutional significance of such powers, and should not be taken by Parliament to be such.**
41. Which? made this point in its written evidence to our inquiry, stating that existing secondary legislation passed under the ECA “should not now be treated as capable of amendment as though it was similar to other secondary legislation”. It argued that it was only appropriate to enact this law via secondary legislation in the first place “due to the fact that there was little if any discretion” as to its content. They concluded: “Secondary legislation passed using the powers in the EC Act should be considered for amendment in the same way as the processes that enable scrutiny of primary legislation.”<sup>28</sup>
42. Yet the challenge faced by both Parliament and Government is that, given the complexity of the task undertaken by the 'Great Repeal Bill', it will be difficult tightly to define, in advance, the limits of the delegated powers granted under the Bill without potentially hobbling the Government's ability to adapt EU law to fit the UK's circumstances following Brexit. We do not think it is realistic to assume that the Government will have worked out, in advance of the Bill being considered by Parliament, what amendments will be needed to the corpus of EU law. That being the case, it is unrealistic to assume that Parliament will be able tightly to limit the delegated powers granted under the Bill—because it will not be clear what, exactly, they will be required to do.
43. What is important is that the Bill should recognise the distinction we draw above in paragraph 16, between necessary amendment to the law to adapt it to Brexit, and discretionary amendments that are intended to implement changes to policy. The delegated powers granted by the Bill should allow the

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<sup>27</sup> See, for example, Constitution Committee, *Legislative and Regulatory Reform Bill* (11th Report, Session 2005–06, HL Paper 194).

<sup>28</sup> Written evidence from Which? ([LEG0038](#))

Government significant leeway to adapt EU law, without allowing those same powers to be used to effect substantive change to implement Government policy.

44. We have considered various ways in which the Government could be granted a greater degree of latitude in the delegated powers granted under the 'Great Repeal Bill' while simultaneously restricting their exercise to the task of converting relevant aspects of EU law into UK law. Professor Craig suggested that a "substantive constraint" could be built into the Bill, explaining that "By substantive constraint I mean a constraint which would say, 'There are certain types of things which you simply cannot do by delegated legislation. ...'"<sup>29</sup> We believe there is merit in this suggestion. An overarching restriction that constrains the use of the powers contained in the Bill to a very limited number of purposes would, at least to some extent, offset concerns about other aspects of the breadth of the powers.
45. **The 'Great Repeal Bill' will likely propose that Parliament delegate to the Government significant powers to amend and repeal (primary) and revoke (secondary) legislation to enable it to carry out the significant task of preparing the ground for the conversion of the body of EU law into UK law within the timeframe set out for the UK's exit from the EU.**
46. **Parliament should ensure that the delegated powers granted under the 'Great Repeal Bill' are as limited as possible. However, the degree of uncertainty as to what exactly the process of converting EU law into UK law will involve—and, in particular, the unknown outcomes of the UK's ongoing Article 50 negotiations with the EU—will almost certainly necessitate the granting of relatively wide delegated powers to amend existing EU law and to legislate for new arrangements following Brexit where necessary.**
47. **The 'Great Repeal Bill' is thus likely to involve a massive transfer of legislative competence from Parliament to Government. This raises constitutional concerns of a fundamental nature, concerning as it does the appropriate balance of power between the legislature and executive.**
48. **Parliament must consider how best to limit and to exercise oversight of the Government's use of these extensive delegated powers. In addition, it is important that both parties recognise that the 'Great Repeal Bill' will be an exceptional piece of legislation, necessitated by the extraordinary circumstances of Brexit: while the Government may make a case for a wide array of discretionary powers, this should in no way be taken as a precedent when considering the appropriate bounds of delegated powers in future. Nor should the exceptional circumstances constituted by Brexit be taken in and of themselves to be a sufficient answer to legitimate concerns relating to the proper balance of constitutional authority as between Parliament and the Government.**
49. **We recognise that, following the UK's exit from the EU, the Government will no doubt wish to implement new policies in areas which were formerly within EU competence. We would be concerned,**

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29 [Q 134](#)

however, should the Government seek to do so using delegated powers which were granted for the purpose of converting the body of EU law into UK law. We would be similarly concerned if the Government, via the 'Great Repeal Bill', sought to secure delegated powers for the broader purpose of implementing new policies post-Brexit. EU law should initially be transferred into UK law with as few changes as possible (taking into account the result of the Article 50 negotiations with the EU and the need to adapt EU law to make sense in the UK's domestic legal framework). If the Government subsequently wish to make changes of a substantive nature then those changes should be brought forward as primary legislation and be subject to the usual degree of parliamentary scrutiny.

50. Parliament may, therefore, wish to consider implementing a general restriction on the use of delegated powers granted under the 'Great Repeal Bill'. Whilst this will be a matter for detailed scrutiny by the Lords Delegated Powers and Regulatory Reform Committee when the Bill is introduced, we would suggest that a general provision be placed on the face of the Bill to the effect that the delegated powers granted by the Bill should be used only:
- so far as necessary to adapt the body of EU law to fit the UK's domestic legal framework; and
  - so far as necessary to implement the result of the UK's negotiations with the EU.
51. The Bill should also clearly set out a list of certain actions that *cannot* be undertaken by the delegated powers contained in the Act, as another means of mitigating concerns that may arise over this transfer of legislative competence.

#### *Contingency planning*

52. As a final aside, we note that when the outcome of negotiations becomes clearer, the Government will no doubt start preparing amendments to the body of EU law that will be domesticated by the 'Great Repeal Bill' upon Brexit, as well as drafting other primary legislation to implement the outcome of those negotiations. Yet it must not be forgotten that the withdrawal agreement negotiated between the UK Government and the EU might fail to pass close to the end of the two-year period triggered by Article 50. This might occur, for example, as a result of the European Parliament failing to agree to the withdrawal agreement. Alternatively, the UK Parliament might reject the negotiated agreement. In either case, it is possible that, as Mr David Jones, Minister of State in the Department for Exiting the EU, stated in the House of Commons, "we will have to fall back on other arrangements ... ultimately we would be falling back on World Trade Organisation arrangements".<sup>30</sup>
53. Professor Bell told us that:

"I could put it in a more stark form: the European Parliament, in its session in March 2019, which is practically its final session before the elections, chooses not to agree and therefore pushes the UK out without a soft landing. At that point, Parliament would have to convene to do

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30 HC Deb, 7 February 2017, [cols 270](#) and [272](#)

something in an emergency in the last week in March 2019. I think that may be different from, as it were, the planning. I do not think you plan towards having to do everything in March 2019, but you may have to have a contingency plan for what might happen should the European Parliament, for whatever reason, not agree in that session.”<sup>31</sup>

54. Should this occur, the UK will need to have a version of EU law, amended to fit the circumstances of a non-negotiated Brexit, put in place by the date of the UK’s exit from the EU. **The Government must give careful consideration to what kind of contingency plan would be needed in order to deal with any rejection of the Brexit deal by either side.**

#### **The status of domesticated EU law**

55. A question arises as to the status of any EU law converted to UK law under the ‘Great Repeal Bill’. In this respect, it may be helpful to distinguish between:

- (1) *Existing UK primary legislation that has its origins in EU law* (e.g. primary legislation enacted in order to implement EU obligations). Such primary legislation will continue to have legal effect, and to have the status of primary legislation, in spite of Brexit and in spite of the ‘Great Repeal Bill’ (unless the ‘Great Repeal Bill’ provides otherwise).
- (2) *Secondary legislation made under primary legislation other than the ECA in order to implement EU obligations*. Such secondary legislation will remain in force as secondary legislation notwithstanding Brexit and notwithstanding the repeal of the ECA.
- (3) *Secondary legislation made under the ECA in order to implement EU obligations*. The repeal of the ECA will cause such secondary legislation to cease to have effect unless (as is likely) the ‘Great Repeal Bill’ provides otherwise.<sup>32</sup>
- (4) *Domesticated EU law that was previously directly effective*. If domesticated via a general provision, this will have whatever status the ‘Great Repeal Bill’ accords it. If instead individual elements are converted by statutory instrument, it will have the status of secondary legislation.

56. The status of EU law embodied in existing UK primary legislation or in secondary legislation made under Acts other than the ECA (categories (1) and (2) above) is clear—it will continue to have legal effect notwithstanding Brexit and with no change to its hierarchical status. The situation is more complicated with regard to categories (3) and (4). We consider each in turn below.

#### *Secondary legislation laid under the European Communities Act*

57. As stated earlier in this report (paragraph 17), it is likely that the ‘Great Repeal Bill’ will ‘save’ secondary legislation made under the ECA (category (3) above) by providing a continuing legal basis for such legislation notwithstanding that repeal of the ECA. However, while this would make the status of such legislation clear—in that it would retain the status of secondary legislation

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31 [Q 138](#)

32 Although, as noted in footnote 6, there would be a residual effect by virtue of [section 16](#) of the Interpretation Act 1978.

within the UK's legal order—there is a question over whether that law is all embodied in the appropriate legislative form. The Bar Council, for example, drew our attention to the secondary legislation passed under section 2(2) of the ECA and stated that:

“It would be a matter of great constitutional concern if the ‘Great Repeal Bill’ were to contemplate the possibility that repeal, or other significant change to the substantive content, of law currently deriving from EU Directives could be effected by a process similar to the making of ECA s. 2(2) instruments. Such a process would bring about a significant democratic deficit which would undermine the legitimacy of resulting legislation. It is one thing to use a secondary instrument to implement legislation that has been the subject of an extensive legislative process at European level. It is another thing entirely to use that process to implement policy which simply emerges from ministerial decision-making within the confines of Whitehall departments or Cabinet committees.”<sup>33</sup>

58. So while EU law embodied in secondary legislation made under section 2(2) of the ECA will technically be secondary legislation, that is a consequence of the fact that it simply implemented law agreed at an EU level—it does not mean that the law it encompasses is not important enough to be worthy of primary legislative status.
59. At present, UK legislation, including primary legislation, that is incompatible with EU law given effect under section 2(2) of the ECA is not an obstacle to the legal effect of delegated legislation made under that provision. This is so both because the ECA accords primacy to EU law over UK law, and because the ECA is a ‘constitutional statute’, meaning that it can continue to provide a legal basis for delegated legislation made under section 2(2) notwithstanding incompatible primary legislation (unless such legislation is explicitly incompatible). **We note that, following the repeal of the ECA, secondary legislation made under section 2(2) of the ECA will no longer be afforded primacy over incompatible UK law (unless the ‘Great Repeal Bill’ seeks to provide otherwise). The Government may wish to consider whether this change has the potential to unsettle the clarity of any current areas of the law.** A similar issue would arise if the Bill were to grant Ministers the power to domesticate individual elements of directly effective EU law by enacting such law in the form of statutory instruments (see paragraph 18 above).

*The status of domesticated directly effective EU law*

60. The situation is more complicated as regards category (4): domesticated law that was previously directly effective. At present, the ECA 1972 provides EU law with a unique status—it takes precedence over any conflicting UK law. This will no longer be the case following the repeal of the ECA 1972. If individual elements of such law are transposed by statutory instrument they will, of course, merely have the status of secondary legislation. However, if instead EU law is domesticated by the ‘Great Repeal Bill’ via a general provision (see paragraph 18) it will presumably have the same hierarchical constitutional status as the Bill itself: i.e. it will have the status of UK primary legislation. As a result, in the event of conflict with other UK primary legislation, it will take priority over legislation enacted prior to

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33 Written evidence from The Bar Council ([LEG0042](#))

the 'Great Repeal Bill' but will cede priority to subsequent UK legislation that is explicitly or implicitly incompatible with it. Since this category of law currently has a status that is *superior* to primary legislation, we can see no constitutional objection to according it the status of (regular) primary legislation.

61. However, even if EU law domesticated by the 'Great Repeal Bill' via a general provision has the status of primary legislation in this hierarchical sense, such domesticated EU law will not actually be primary legislation, in the sense that it will not appear on the face of the 'Great Repeal Bill' or on the face of any other UK primary legislation. Rather, it will be incorporated into UK law by virtue of the reference made to it in the 'Great Repeal Bill'. There are two issues arising from this fact that we will briefly explore.
62. First, if a general provision is used to transpose directly effective law, then the Government will need to provide for a copy of the body of EU law as brought across by the Bill to be publicly available. At present, the official text of EU law is recorded and maintained at an EU level, and is available through websites such as EUR-Lex. It would obviously be inappropriate for UK law to only be accessible through an EU database—particularly given that EU law will continue to evolve, making finding the exact texts that make up the 'snapshot' of EU law preserved by the Bill more difficult as time goes by. **The Government should make clear how it intends to preserve and publish the exact text of the 'snapshot' of (what was) directly effective EU law if imported by means of a general provision in the 'Great Repeal Bill'.** This will clearly not be necessary if the Government instead chooses to convert individual elements of directly effective law by statutory instrument (see paragraph 18).
63. Secondly, while the whole body of directly effective EU law (i.e. category (4) above) domesticated by the 'Great Repeal Bill' via a general provision will have the same hierarchical status for the purposes of judicial interpretation, a more nuanced approach will need to be adopted in relation to its amendment or repeal.
64. If this category of EU law had been enacted domestically, it would naturally have been split between primary and secondary legislation according to its content (and indeed the same is true of the body of EU law currently enacted by secondary legislation under the ECA). This in turn raises questions about how in the future amendments will be made to EU law domesticated by the 'Great Repeal Bill', whether the Bill should make specific provision in this regard and, if so, what provision should be made.
65. If the Bill were to make no such provision at all, then it would give effect to a 'snapshot' of EU law, as it existed immediately prior to Brexit. If it were (as it will inevitably be) necessary to amend any part of the body of domesticated EU law in the future, that could be done by Parliament enacting primary legislation. Such primary legislation could provide that a given element of EU law (e.g. a particular regulation) no longer formed part of the body of EU law domesticated by the 'Great Repeal Bill'. The new primary legislation could then, on the face of the legislation, set out replacement provisions. Alternatively, the new primary legislation could provide that the relevant EU law is to be treated as having been amended in some respect; the 'Great Repeal Bill' would then bite upon the relevant EU law in its 'amended' form.

66. Requiring primary legislation every time a change needed to be made to the body of domesticated EU law would, however, be extremely cumbersome, particularly if the matter was technical or otherwise minor. It is therefore likely that the Government will seek delegated powers to perform surgery upon the body of domesticated EU law. Yet this would raise difficulties of its own. In particular, it could mean that large volumes of (what would then be) UK law would, because of its unusual pedigree, be susceptible to amendment using delegated powers.
67. **The 'Great Repeal Bill' will need to make provision not only in relation to processes by which (i) directly effective EU law is selected for domestication and (ii) amended in the course of domestication, but also in relation to (iii) the process by which domesticated EU law can subsequently be amended. It is likely that this will need to involve a distinction between—or a mechanism for drawing a distinction between—technical amendments to be accomplished via secondary legislation and larger amendments involving policy choices that can be accomplished only via primary legislation. If this is not done, the risk arises of certain areas of law—simply as a result of the happenstance that they began life as directly effective EU law—being permanently vulnerable to being reshaped through the use of delegated powers. Similar issues arise with respect to statutory instruments passed under section 2(2) of the ECA which will, over time, need to be re-enacted in a way that reflects a more appropriate division between primary and secondary legislation.**

### Sunset clauses

68. One tool available to Parliament to reduce the constitutional risks associated with wide-ranging delegated powers is sunset clauses. Sunset clauses provide that a particular provision or power ceases to have effect on a certain date or after a specified period of time.
69. If the overarching restriction proposed in paragraph 50 above is included in the Bill, it may be unnecessary to include wide-ranging sunset clauses since, following the conversion of the body of EU law into UK law and the implementation of negotiations with the EU, there would be no legal basis for the Government to use the delegated powers contained in the Bill. In this event, however, particular consideration would need to be given to how the body of EU law would be maintained until re-enacted on a more balanced footing of primary and secondary legislation in future (see paragraphs 55-67 above on the status of EU law). Provision might need to be made for a separate set of powers, exempt from the overarching restriction, to come into effect upon termination of a limited time period following Brexit to allow the Government to keep the body of EU law up to date, but not to make any substantive changes.
70. Alternatively, sunset clauses could be placed to come into effect once a particular delegated power had been used. It is hard to see how a hard and fast deadline could be applied—some aspects of EU law might be subject to a transition period (see paragraph 23 above), meaning that the domestication of a certain aspect of EU law might take place well after Brexit day. But it might be possible for the Bill to allow the Government to use a particular power for a defined purpose—to bring into UK law a particular aspect of EU law—following which the power would lapse.



71. Baroness Fookes suggested that there was “a possibility of using sunset clauses ... in the sense that you would say, ‘Right, we will give you—the Government—the power you need to do X, Y and Z, but, at the end of a certain period of time, that will come to an end and you will have to produce something fresh’. Then it could be considered in the more measured way that I would hope would be in the best interests of the country.”<sup>34</sup>
72. We note above (see paragraphs 57–67) that much of the body of EU law will be brought across either as a single category of primary legislation or as a single body of secondary legislation. It will be necessary, over time, to re-enact much of the body of EU law, with an appropriate division between primary and secondary legislation. Parliament may wish to consider whether, as a way of providing impetus to this project, they wish to include sunset powers that will repeal domesticated EU law after a set period of time, necessitating that it be re-enacted as UK legislation rather than simply being incorporated in UK law by operation of the ‘Great Repeal Bill’. This period might be lengthy—for example, 10 years—but it would ensure that, in time, the whole body of EU law would be properly debated and enacted by the UK Parliament.
73. **The extent to which sunset clauses will be a viable means of controlling the powers granted to the Government under the ‘Great Repeal Bill’ will depend on the specifics of the Bill. We do not, therefore, attempt to recommend how they might best be used or developed. But if the Government seek discretion to domesticate and amend significant elements of the body of EU law by secondary legislation, then it is essential Parliament consider how that discretion might be limited over time. The Government would need to present a very strong justification for not including sunset clauses in relation to extensive powers conferred for the purpose of transposing UK law into EU law. In addition, if it is clear that parliamentary scrutiny of particular issues will be curtailed during the transposition process—perhaps as a result of time pressures close to the day of Brexit—then we would expect that sunset provisions be used to ensure that those provisions were brought before Parliament again for proper consideration after the UK’s exit from the EU.**

### CHAPTER 3: PARLIAMENTARY SCRUTINY OF DELEGATED LEGISLATION LAID UNDER THE 'GREAT REPEAL BILL'

74. Parliament will face an unprecedented challenge in scrutinising secondary legislation passed under the 'Great Repeal Bill'. The Bill itself will no doubt be scrutinised in detail, and we expect Parliament's attention will also fall heavily on any primary legislation brought forward to convert particular elements of EU law into UK law. As we have concluded above, however, there will still be substantial sections of what is currently EU law which will need to be amended—most likely by secondary legislation—in order to adjust them to work in a post-Brexit context.
75. In respect of the scale of the task, we note that the House of Commons library has stated that “there are at present nearly 20,000 EU legislative acts in force. These are mainly directives, regulations, decisions and international agreements, but they include a range of other instruments. Of these, around 5,000 EU regulations are directly applicable in all EU Member States.”<sup>35</sup>

#### Parliamentary scrutiny of secondary legislation

76. Before considering what changes might be required to deal with the particular challenges of the 'Great Repeal Bill', it is necessary to consider how well the process by which Parliament currently scrutinises secondary legislation works.

#### Box 1: Secondary legislation—an explanation

Secondary legislation is law made by Ministers (and certain public bodies such as regulators) using powers that have been conferred by primary legislation. It usually takes the form of statutory instruments. Statutory instruments are not amendable.<sup>36</sup>

It is well known that bills go through a number of stages in both Houses before becoming Acts of Parliament. In contrast, delegated legislation is subject to much simpler procedures:

- some statutory instruments do not have to be laid before Parliament at all;<sup>37</sup>
- some are required only to be laid before Parliament without any subsequent scrutiny procedure; and
- some are laid before Parliament and are then subject to a scrutiny procedure.

Of those subject to a scrutiny procedure, most are subject to one of two procedures:

- The negative procedure under which an instrument is laid before both Houses, usually after being made. Either House may within 40 days pass a motion that the instrument be annulled (that is, revoked). The instrument may come into force at any time after it is made and remains in force until it expires or is revoked or annulled. Negative instruments are only debated if a Member specifically requests a debate.

35 House of Commons Library Briefing Paper, *Legislating for Brexit: directly applicable EU law*, [CBP 7863](#), 12 January 2017

36 Except in the very small number of cases where the parent act specifically provides for such amendment, e.g. Census Act 1920 [section 1\(2\)](#), Civil Contingencies Act 2004 [section 27\(3\)](#).

37 For example, commencement orders.

- The affirmative procedure under which an instrument is usually laid before Parliament in draft and must be approved by both Houses before it may be made. Affirmative instruments are always debated. Although there is no set timing for such debates, under House of Lords Standing Order 72 no motion to approve a draft affirmative can be taken until the Joint Committee on Statutory Instruments has reported on the instrument.

There are variations on these two procedures. For example, some Acts make provision for draft negatives (instruments subject to a negative procedure that must be laid before Parliament in draft for a period before they may be made) or made affirmatives (instruments which are made, and may even come into force, before being laid before Parliament for affirmative approval).

There are also a number of delegated powers which Parliament has determined should be subject to a level of Parliamentary scrutiny more rigorous than that required even under the affirmative procedure. More detail on these procedures is provided in Box 2 below.

Source: *Delegated Powers and Regulatory Reform Committee (DPRRC), [Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers](#) (3rd Report, Session 2012–13, HL Paper 19)*

77. Following the Strathclyde Review of delegated legislation in December 2015, a number of committees, from both the Commons and Lords, published reports commenting on Parliament's scrutiny of delegated legislation.<sup>38</sup>

78. This Committee's report explained some of challenges faced by Parliament in scrutinising delegated legislation:

“Delegated legislation cannot be amended, so there is little scope for compromise. Far less time is spent by Parliament debating delegated legislation than primary legislation, and there is little incentive for members of either House, but particularly the House of Commons, to spend their precious time debating legislation that they cannot change. Finally, established practice is that the House of Lords does not vote down delegated legislation except in exceptional circumstances. The result is that the Government can pass legislative proposals with greater ease and with less scrutiny where they are able to do so through secondary, rather than primary, legislation.”<sup>39</sup>

79. These are, in a nutshell, the reasons why it is generally considered inappropriate for secondary legislation to determine matters of significant policy interest. Yet, as we note above (see paragraph 46), those limitations are likely to be relaxed in relation to the delegated powers granted under the 'Great Repeal Bill'. While we accept that this will, to some extent, be necessary Parliament must consider how, as a consequence, to address some of the issues we have identified with the current process of scrutinising secondary legislation.

38 See Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review* (9th Report, Session 2015–16, HL Paper 116); Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (25th Report, Session 2015–16, HL Paper 119); Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective parliamentary scrutiny of secondary legislation* (32nd Report, Session 2015–16, HL Paper 128); Public Administration and Constitutional Affairs Committee, *The Strathclyde Review: Statutory Instruments and the power of the House of Lords* (Eighth Report, Session 2015–16, HC 752)

39 Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, Summary

*The role of the House of Commons*

80. The Commons Public Administration and Constitutional Affairs Committee noted in its response to the Strathclyde Review that even the current volume of secondary legislation “makes it difficult for Parliament to scrutinise more than a small proportion effectively and rigorously.” They add that “The sheer size and scale of the use of statutory instruments makes scrutiny, particularly in the House of Commons, an incredibly difficult task and Parliament has relied heavily on the House of Lords for the expertise and skill it has cultivated in scrutinising SIs [statutory instruments].”<sup>40</sup>
81. A number of witnesses to those inquiries stressed that the House of Lords is able to devote more time and attention to the scrutiny of secondary legislation than the House of Commons, particularly through the work of the Lords Secondary Legislation Scrutiny Committee, which considers the policy merits of all instruments laid before Parliament that are subject to a parliamentary procedure. Yet, as this Committee concluded in its report on the Strathclyde Review:
- “We recognise the leading role that elected members of the House of Commons play in holding the Government to account. Consequently, effective scrutiny of delegated legislation depends as much on the House of Commons as the Lords. ... Both Houses of Parliament, however, either together or separately, need to play an active role in considering how powers should be delegated appropriately in primary legislation, how those powers should be exercised by Government and the way in which both Houses scrutinise and approve delegated legislation.”<sup>41</sup>
82. This conclusion—that the scrutiny of secondary legislation must be carried out appropriately by both Houses of Parliament—is particularly true in the light of the expected volume of statutory instruments likely to result from the ‘Great Repeal Bill’, and the fact that they may well contain significant policy decisions or issues of principle that would, under less exceptional circumstances, be dealt with in primary legislation. **We therefore welcome the inquiry announced by the House of Commons Procedure Committee on delegated powers in the ‘Great Repeal Bill’, which will include addressing the issue of the “changes (if any) desirable to Commons procedures related to the delegation of powers or secondary legislation to address the likely scale and volume of ‘Great Repeal Bill’ legislation”.**<sup>42</sup>

*Amending and rejecting secondary legislation*

83. The Strathclyde Review was initiated after a Government defeat in the House of Lords on the Draft Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015. We do not intend to explore the details of those events—they have already been exhaustively explored in a number of other reports (see paragraph 77 above).

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40 Public Administration and Constitutional Affairs Committee, *The Strathclyde Review: Statutory Instruments and the power of the House of Lords*, paras 12 and 50

41 Constitution Committee, *Delegated Legislation and Parliament: A response to the Strathclyde Review*, para 90

42 House of Commons Procedure Committee, ‘Delegated powers in the ‘Great Repeal Bill’ inquiry launched’, 2 February 2017: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/news-parliament-2015/delegated-powers-great-repeal-bill-launch-16-17/>

84. We note, however, that the difficulties arose partly because of the all-or-nothing nature of the current secondary legislation process. There is no mechanism for either House to amend statutory instruments, for the Government to be made to reconsider (save by the rather extreme route of rejecting an instrument in its entirety), or for the two Houses to reconcile any differing views that they might have. Some believe that the answer is for Parliament to have the ability to amend secondary legislation. Lord Newby, for example, told us that he was “rather keener on making it easier to amend SIs formally, because if—particularly in the context of Brexit—we have a whole stream of them, a lot of them will be done at great pace by the Civil Service.”<sup>43</sup>
85. The Secondary Legislation Scrutiny Committee addressed this issue in evidence to us:
- “We acknowledge that some members of the House take the view that procedures should be introduced to enable amendment of secondary legislation. This may be the case, in particular, where the substance of an instrument is of such significance that the power to amend secondary legislation would provide a welcome opportunity to challenge the instrument in a targeted and effective way.
- We note however that secondary legislation is intended to enable more efficient use of parliamentary time so that, as commented in Erskine May (2011) at page 667, “more time will be available for the discussion of major matters of public concern”. A general power to amend secondary legislation could, we believe, defeat that purpose. Arguably a preferable approach would be for Government to ensure that secondary legislation is used only for provision of “essentially subsidiary or procedural character” and to avoid lengthy, composite instruments. If this were the case, then the likelihood of any demand to amend an instrument would, we believe, be significantly lessened.”<sup>44</sup>
86. Baroness Smith of Basildon, Leader of the Opposition on the House of Lords, echoed these concerns: “My worry about amendment is that it could then apply across the board to SIs, so we will deal with them in the same way we deal with primary legislation, and we will go through the same arguments again.”<sup>45</sup>
87. We recognise that the existing procedures may be appropriate for the vast majority of statutory instruments, particularly when the scope of those instruments are strictly limited by the scope of the delegated powers set out in primary legislation. Problems arise, however, when the matters being dealt with by secondary legislation go beyond merely technical or administrative changes, or when the delegated power under which the statutory instrument is made is broad enough that Parliament cannot know, at the time at which it delegates that power, exactly how it will be used (particularly if the Government give no detailed indication of its expected use during the passage of the relevant bill.).
88. In the context of the ‘Great Repeal Bill’, when pressures of time mean that the changes required to EU law will most likely be unclear at the time

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43 [Q 149](#)

44 Written evidence from the Secondary Legislation Scrutiny Committee ([LEG0050](#))

45 [Q 149](#)

the Bill is passed by Parliament, there must be subsequent opportunities for Parliament's views to be taken into account by the Government when the delegated powers granted by the Bill come to be exercised. This need not be a formal mechanism for amendments—as Baroness Smith noted, “There may need to be a willingness from the Government to say, “I am going to take this away and bring it back”, because that would cover off the same point.”<sup>46</sup> **Given the likely uncertainty as to what exactly will be required to convert EU law into UK law, there will be occasions on which Parliament should be able to affect the content of secondary legislation determining matters of significant policy interest or principle.** We consider how this might be achieved below.

### Scrutinising secondary legislation laid under the ‘Great Repeal Bill’

89. There seems little doubt that Parliament will need to reconsider how it deals with secondary legislation to cope with the consequences of the ‘Great Repeal Bill’. As Dr Ruth Fox told us:

“It is inconceivable to me that, given the pressure of dealing with statutory instruments under existing procedures, the House of Commons in particular, but also this House, will be able to deal with a significant review of that much legislation, even over an extended period of time. I think that with the procedures and time constraints it will collapse under it.”<sup>47</sup>

90. David Lidington MP agreed that Parliament might need to re-evaluate its current processes:

“What we may have to look at, given the volume of possible secondary legislation, is whether we need to ask Parliament to have some bespoke arrangement for handling those things, given that, in order for business to have certainty, we will need to make sure we have a workable statute book on day one after exit.”<sup>48</sup>

91. We received a variety of suggestions as to how Parliament should scrutinise the delegated legislation laid under the ‘Great Repeal Bill’. The British Bankers’ Association felt that “either a Parliamentary Brexit sub-committee should be set up to scrutinise all delegated legislation and/or that the House of Lords’ Delegated Powers and Regulatory Reform Committee and the House of Lords’ Secondary Legislation Scrutiny Committee be upgraded and resourced appropriately to ensure that delays in decision-making are minimised.”<sup>49</sup>

92. WWF-UK told us that we:

“might want to consider whether it is necessary to ... suggest that a new committee of each House dealing exclusively with GRB secondary legislation is warranted due to the volume, complexity and controversy of the ensuing secondary legislation. Such a committee could be divided into specialisms and be given the task of examining secondary legislation affecting environmental law, employment law, competition law etc. The committee could have powers to approve, amend or block

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46 [Q 149](#)

47 [Q 12](#)

48 [Q 101](#)

49 Written evidence from British Bankers’ Association ([LEG0047](#))

statutory instruments or to refer them to the whole House for approval—such measures would ensure the proper level of scrutiny, clarity and procedure needed in order to uphold environmental protections.”<sup>50</sup>

93. The Bar Council suggested “adopting a Committee-based approach to scrutinising EU Exit legislation. It could, in particular, establish specialist Select Committees to scrutinise legislation on particular aspects of the acquis, where members could become specialists and be supported by expert staff. This would reduce the risk that important issues would be missed, and bring consistency within sectors.” They added that there should be an “adequate Parliamentary power of amendment of instruments.” They stated that:

“our present view is that cases appropriate for such a power would at least include provisions that:

- would make a material change to the scope of content of rights currently granted by EU legislation (or by domestic legislation which implements it), or that
- amend or repeal primary legislation (though a power of amendment might not be necessary where the change is de minimis; for example, where the instrument makes a purely incidental or consequential amendment to primary legislation).”<sup>51</sup>

94. The Secondary Legislation Scrutiny Committee meanwhile, suggested that while it would “be appropriate for some changes to be made by statutory instruments subject to the standard affirmative and negative procedures ... other, more significant changes may require some form of strengthened scrutiny procedures.”<sup>52</sup>

95. While we agree that not all statutory instruments laid under the ‘Great Repeal Bill’ should be open to amendment, we recognise concerns that the sheer volume of delegated legislation that Government must produce is likely to lead to mistakes. As we stated at the very beginning of this report, we hope that the Government will see Parliament as a partner in this endeavour, and be willing to listen in an open and responsive manner to concerns raised about technical inaccuracies, or to views expressed about the manner in which EU law is being amended.

96. In our view, there are three challenges facing Parliament:

- (1) How to deal with the volume of secondary legislation flowing from the ‘Great Repeal Bill’;
- (2) How to ensure that Parliament can identify for more detailed scrutiny those statutory instruments that determine matters of significant policy interest or principle; and
- (3) How to enable Parliament meaningfully to affect the content of those statutory instruments selected for additional scrutiny.

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50 Written evidence from WWF-UK ([LEG0045](#))

51 Written evidence from The Bar Council ([LEG0042](#))

52 Written evidence from the Secondary Legislation Scrutiny Committee ([LEG0050](#))

97. Parliament must therefore put in place procedures that allow the majority of delegated legislation laid under the Bill (those making changes of an uncontroversial nature) to pass without delay, while ensuring that delegated legislation which contains significant policy decisions is subject to meaningful scrutiny by Parliament—i.e. in a manner that allows the content of the instrument to be changed depending on the views expressed by both Houses.
98. As the Committee heard from its witnesses,<sup>53</sup> that delineation cannot occur during the passage of the 'Great Repeal Bill'—the task is simply too great for the Government to distinguish in advance all those areas where policy decisions will be needed. Professor Craig suggested that “The problem is identifying in advance, ahead of time, what will be an important change. It might be easy to identify when you see it, but to write in a legislative format which would be able to predict that in advance, I think, is extremely difficult.” He continued to suggest a solution:
- “you would have to start thinking of a regime whereby you have these different processes on the table and you would have to build in an extra stage at which, when it became apparent how important the policy shift or the amendment was, there was the possibility of saying, “Okay, now it is clear that we need a super-affirmative procedure”, or something of that kind. One is going to have to build in, in process terms, that extra stage in order to ensure effective scrutiny.”<sup>54</sup>
99. This scrutiny would also guard against the risk that the Government might attempt—wittingly or unwittingly—to use the powers granted under the Bill to do more than is required simply to convert EU law into UK law. As Sir Richard Mottram told us: “there must be a massive risk that the Government will try to come forward with a whole series of changes that impact very directly on people and all aspects of their lives, cloaked under a rather more generalised formulation [of delegated powers].”<sup>55</sup>
100. The solution would seem to be a sifting mechanism within Parliament that considers whether a particular piece of delegated legislation contains policy decisions that should trigger an enhanced form of parliamentary scrutiny. Examples of enhanced forms of parliamentary scrutiny already exist (see box 2), and we draw the House’s attention to the recommendation of the Delegated Powers and Regulatory Reform Committee (DPRRC) in its report *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*, that “in proposing a strengthened scrutiny procedure in any future Bill the Government should normally use an existing model rather than creating a new variation”.<sup>56</sup> Parliament and the Government may therefore wish to consider whether it is possible to adopt one of the existing models of enhanced scrutiny procedures, rather than attempting to start from scratch.

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53 See, for example, [Q 134](#) (Professor Young)

54 [Q 134](#)

55 [Q 12](#)

56 DPRRC, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*, para 25



## Box 2: Enhanced scrutiny procedures

According to the DPRRC, there are currently 11 different strengthened scrutiny procedures.<sup>57</sup> The DPRRC has previously<sup>58</sup> set out the common features between these different procedures as follows:

### **Requirement to consult prior to laying**

Most of these statutory scrutiny procedures place a duty on the Secretary of State or the Minister to undertake a consultation before a draft order can be laid.

### **Requirement to lay supporting documents**

All but one of these statutory procedures place an obligation on the Government to lay supporting documents at the outset of the Parliamentary process. This additional information is designed to support Parliament in carrying out effective scrutiny. There are variations about what supporting documents are required.

### **Power for a committee or either House to determine the level of scrutiny**

Some of these statutory procedures give each House or a committee of each House charged with considering the orders (the relevant committee) the power to determine the level of scrutiny. In the other cases, the scrutiny procedure is fixed in the parent Act.

### **Power for relevant committee to veto a draft order**

The Legislative and Regulatory Reform Act 2006 gives the relevant committee in either House a power to veto a draft order laid under that Act by recommending that “no further proceedings be taken in relation to the draft order”.<sup>59</sup> This power of veto is mirrored in the three statutory procedures contained in the Localism Act 2011,<sup>60</sup> two of which apply sections 15 to 19 of the 2006 Act and the other of which appears to be modelled on a modified form of those provisions. There is no similar power of veto in any of the seven other types of statutory scrutiny procedure.

### **Obligation on Government to consider recommendations or resolutions**

Seven of these statutory scrutiny procedures place a legal duty on the Government to “take account of”, “consider” or “have regard to” recommendations made by the relevant committee or resolutions passed by either House. By contrast, the other four procedures all contain a more general provision for the Government to consider representations.

57 To be found in the following Acts: Northern Ireland Act 1998 [section 85](#); Human Rights Act 1998 [Schedule 2](#); Local Government Act 1999 [section 17](#); Local Government Act 2000 [section 9](#); Local Government Act 2003 [section 98](#); Fire and Rescue Services Act 2004 [section 5E](#) (as inserted by the Localism Act 2011); Legislative and Regulatory Reform Act 2006 [sections 12 to 19](#); Local Transport Act 2008 [section 102](#); Public Bodies Act 2011 [section 11](#); Localism Act 2011 [section 7](#); and, Localism Act 2011 [section 19](#)

58 DPRRC, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*, paras 15–21

59 Legislative and Regulatory Reform Act 2006, [sections 17\(3\)](#) and [18\(5\)](#); [section 16\(4\)](#) (the equivalent for draft negatives) is also relevant.

60 Fire and Rescue Services Act 2004 [sections 5](#) and [15](#), and section [5C\(1\)](#) and [\(2\)](#) (inserted by section 9 of the Localism Act 2011).

### **Provisions laid either as proposals or draft orders**

For six of the 11 statutory scrutiny procedures, the parent Act specifies that what is laid is a proposal containing a draft order and then after a specified scrutiny period, the draft order itself may be laid. For the remaining five procedures, the process is different: the Government lays a draft order (rather than a proposal) for scrutiny and the procedure contains the provision for the Government to lay a revised draft after the scrutiny period has expired. Although the statutory provisions are inconsistent, in practice both procedures offer an opportunity for the Government to respond to issues raised during the Parliamentary scrutiny process by revising the original draft of the order without having to re-start the statutory procedure from scratch.

Source: DPRRC, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*

101. We note, in addition, that the DPRRC has already considered the possibility of expanding the use of these strengthened scrutiny procedures. In the same report it states that “We have considered whether the strengthened scrutiny procedures covered in this Report might appropriately be made available in respect of delegated powers which, while they are not Henry VIII powers, nonetheless give Ministers discretion to legislate widely across important areas of public policy. This could provide Parliament with an enhanced scrutiny role over significant statutory instruments that would otherwise be subject only to the affirmative procedure. We draw this possibility to the attention of the House.”<sup>61</sup> The ‘Great Repeal Bill’ would seem a suitable candidate for such an expanded use of a strengthened scrutiny procedure.
102. **Parliament is likely to face a significant challenge dealing with secondary legislation laid under the ‘Great Repeal Bill’. In order to mitigate the constitutional risks that will arise if the Government are given relatively wide discretionary powers to convert the body of EU law into UK law, we recommend the following:**
- (1) **That the Minister sign a declaration in the Explanatory Memorandum to each statutory instrument amending the body of EU law stating whether the instrument does no more than necessary to ensure that the relevant aspect of EU law will operate sensibly in the UK following the UK’s exit from the EU, or that it does no more than necessary to implement the outcome of negotiations with the EU. We note that, if the overall restriction set out in paragraph 50 above is included on the face of the Bill, the Joint Committee on Statutory Instruments<sup>62</sup> will have the role of assessing whether each statutory instrument laid under the Bill complies with that restriction, given that its remit includes considering whether each statutory instrument laid before Parliament is *intra vires*.**
  - (2) **That the Explanatory Memorandum to each statutory instrument sets out clearly what the EU law in question currently does (before Brexit); what effect the amendments made by the statutory instrument will have on the law (as it will apply after**

61 DPRRC, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*, para 31

62 The JCSI consider the “technical qualities” of all delegated legislation laid before Parliament and considers each against a number of technical criteria, including whether “there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make” and whether “its drafting appears to be defective”.

**Brexit) or what changes were made in the process of conversion; and why those amendments or changes are necessary.**

- (3) **That the Government make a recommendation for each statutory instrument as to the appropriate level of parliamentary scrutiny that it should undergo. We would expect that a statutory instrument which amends EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure.**
- (4) **That a parliamentary committee(s) consider the Government's recommendation, and decide the appropriate level of scrutiny for each statutory instrument laid under the 'Great Repeal Bill'. If the two Houses perform this function separately, then it would seem appropriate in the House of Lords for the Secondary Legislation Scrutiny Committee to perform this function. Alternatively, a Joint Committee could be established to carry out this role on a bi-cameral basis.**
- (5) **That where the relevant committee(s) determines that a statutory instrument laid under the 'Great Repeal Bill' amends EU law in a manner that determines matters of significant policy interest or principle, it should undergo a strengthened scrutiny procedure. We do not, in this report, attempt to define exactly how this strengthened scrutiny procedure should operate, or whether one of the existing statutory models should be adopted. We recognise that existing models for enhanced scrutiny can prove resource intensive and time-consuming<sup>63</sup>—in our view, the only essential element of whatever strengthened procedure is selected is that it should provide an opportunity for a statutory instrument to be revised in the light of parliamentary debate.**

### External engagement

103. The parliamentary committee(s) referred to above will most likely face a significant challenge in determining whether an instrument determines matters of significant policy interest or principle, given the sheer volume and complexity of the secondary legislation expected to be laid under the 'Great Repeal Bill'. The Government's recommendation as to an appropriate level of scrutiny will no doubt help this process. However, given the range of areas covered by the body of EU law, and the technical nature of some of that law, it will be important for the committee(s) to have, and use, the ability to draw upon the expertise of stakeholders and the wider public to ensure that the Government is held to account for the choices it makes during this process. Parliament will benefit from assistance not just in assessing the impact of instruments laid under the 'Great Repeal Bill', but in having its attention drawn to instruments which require detailed parliamentary scrutiny. The Secondary Legislation Scrutiny Committee told us that "The public may also wish to know what secondary legislation is before the House at any given date so that they can interact with Parliamentarians where they have

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63 See, for example, Department for Business, Innovation & Skills, *Memorandum to the Business, Innovation and Skills Committee: Post Legislative assessment of the Legislative and Regulatory Reform Act 2006*, Cm 8948, November 2014: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/371318/bis-14-1198-44042-Cm-8948-memorandum-to-the-business-innovation-and-skills-committee-post-legislative-assessment-of-the-legislative-and-regulatory-reform-act-2006-accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/371318/bis-14-1198-44042-Cm-8948-memorandum-to-the-business-innovation-and-skills-committee-post-legislative-assessment-of-the-legislative-and-regulatory-reform-act-2006-accessible.pdf) [accessed 1 March 2017]

concerns. Effective, accessible and transparent information resources will therefore be essential.”<sup>64</sup>

104. Dr Ruth Fox was among those who suggested that Parliament could seek external support and technical assistance in dealing with secondary legislation laid under the Bill:

“There is a good case, depending on how this goes, for Parliament to think about whether it wants a mechanism or mechanisms for providing it with expert advice and capacity to do this work, or at least to support it in doing some of that work, perhaps modelled on the way the NAO supports the Public Accounts Committee, looking possibly at the Law Commission and what its role will be.”<sup>65</sup>

105. **Given the volume of secondary legislation expected to be required to implement the conversion of EU law to UK law, effective use of external expertise and public consultation may well prove an essential tool for committees tasked with scrutinising secondary legislation laid under the ‘Great Repeal Bill’.**

### Resourcing

106. In addition to external expertise, Parliament will need to consider the resourcing of committees scrutinising this secondary legislation. The Secondary Legislation Scrutiny Committee told us that “The Lords has a well-established scrutiny process but more resources may need to be committed to it if the current, high standard of scrutiny is to be maintained.”<sup>66</sup>
107. The workload of the Joint Committee on Statutory Instruments meanwhile will dramatically increase, both because it will be required to scrutinise a far greater volume of instruments and because of the expected size and complexity of some of those instruments. Additional legal support will be required for it to meet this challenge.
108. Parliament’s committees and members will be tested by the challenge of giving the expected volume of secondary legislation laid under the ‘Great Repeal Bill’ the level of scrutiny it deserves. While we do not, in this report, make any specific recommendations as to how the question of resources should be addressed, **we note that scrutiny committees will need the capacity, expertise and legal support to cope with the increased volume and complexity of secondary legislation. We look to the Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments, both of which have extensive experience in the scrutiny of secondary legislation, to advise the Liaison Committee as to what will be required to deal with the secondary legislation flowing from the ‘Great Repeal Bill’ and other Brexit-related legislation. Given that there can be a long lead-in time for recruiting and training new staff, thought will need to be given at an early stage to ensuring that these additional resources are in place and up to speed by the time the ‘Great Repeal Bill’ has completed its passage through Parliament.**

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64 Written evidence from Secondary Legislation Scrutiny Committee ([LEG0050](#))

65 [Q 12](#)

66 Written evidence from Secondary Legislation Scrutiny Committee ([LEG0050](#))

## EU law and the Devolved Institutions

### *Amending EU law within devolved competence*

109. Professor Alan Page, in his paper *The implications of EU withdrawal for the devolution settlement*, prepared for the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee, concludes that "most existing EU competences are reserved to the UK Parliament ... the policy responsibilities that would fall to the Scottish Parliament are correspondingly few, the principal ones being in respect of justice and home affairs, agriculture, fisheries and the environment".<sup>67</sup>
110. In March 2016, the Scottish Parliament's European and External Affairs Committee commented that:
- "In the event of the UK leaving the EU, and the repeal of the European Communities Act 1972, the Committee notes that the Scottish Parliament's legislative competence, and the Scottish Government's executive and policy competence, will be extended as they will be able to legislate in fields where the European Union had previously had competence."<sup>68</sup>
111. Our witnesses noted that this would give the devolved institutions in Northern Ireland, Scotland and Wales the ability to maintain existing EU law in areas of devolved competence, if they wished. Using the example of Scotland, Professor Bell told us that:
- "if a matter, for example, remains within the devolved competence of Scotland in a post-Brexit world and Scotland chooses to modify its laws in the devolved area so as to make them accord with what was the pre-existing EU law in that area, short of changing the Scotland Act and putting constraints on what Scotland can do, pursuant to its devolved competence, I cannot see any legal or constitutional constraint on Scotland taking that course."<sup>69</sup>
112. With the repeal of the ECA, the duty upon the devolved institutions not to act incompatibly with European Union law will, in effect, be redundant. Therefore, subject to any provision made expressly by the 'Great Repeal Bill' or any other UK primary legislation, the devolved legislatures will be free to legislate in those areas of devolved competence which had previously also fallen within the jurisdiction of the European Union and which had been subject to the primacy of EU law. It is in this way that devolved legislatures will be free, as Professor Craig notes, to pursue their own legislative agendas—including by choosing to remain aligned with EU law—in areas in which EU law previously demanded uniformity. However, the situation will be greatly complicated by the fact that many areas of EU law, both that which is directly effective and that which has been transposed, falls across the boundaries of devolved and reserved competences. Indeed, these areas of law will only increase as the areas of overlap between devolved and reserved

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67 Professor Alan Page, *The implications of EU withdrawal for the devolution settlement*, paras 5-6: [http://www.parliament.scot/General%20Documents/The\\_implications\\_of\\_EU\\_withdrawal\\_for\\_the\\_devolution\\_settlement.pdf](http://www.parliament.scot/General%20Documents/The_implications_of_EU_withdrawal_for_the_devolution_settlement.pdf) [accessed 1 March 2017]

68 Scottish Parliament European and External Relations Committee, *EU reform and the EU referendum: implications for Scotland* (2nd Report, SP Paper 978, March 2016), p. 7: [http://www.parliament.scot/S4\\_EuropeanandExternalRelationsCommittee/Reports/EUS042016R02.pdf](http://www.parliament.scot/S4_EuropeanandExternalRelationsCommittee/Reports/EUS042016R02.pdf) [accessed 1 March 2017]

69 [Q 137](#). See also Professor Young's response to the same question.

competence increase with the implementation of the Scotland Act 2016—and the same is true in respect of areas currently, or soon to be, within the competence of the National Assembly for Wales.

113. It may prove difficult to agree on where that overlap lies. As Professor Bell told us, “there will be significant issues about which departments and which parts of the devolved settlement are involved in these things. If you make an agreement for free movement of persons from some countries, say, that has implications for the health service, which happens to be run by the various devolved assemblies.”<sup>70</sup>
114. **The UK’s exit from the EU will provide the devolved legislatures with the freedom to legislate in devolved areas that are currently circumscribed by EU law. This will mean that the UK Government and the devolved administrations will need to manage new interfaces—and potentially overlapping responsibilities—between reserved matters and devolved competence in areas where the writ of EU law no longer runs. The UK Government and devolved administrations will need to agree, before Brexit, how those new interfaces will be managed.**

*The Sewel Convention in the context of the ‘Great Repeal Bill’*

115. Paragraphs 109–114 are primarily concerned with the situation following the UK’s exit from the EU. Of more immediate concern is how the UK Government intend to prepare for the necessary amendment of domesticated EU law in the run-up to Brexit upon which, following Brexit, the devolved legislatures will be free to legislate.
116. The power, in anticipation of Brexit, to amend the body of EU law that will, following Brexit, be brought across by the ‘Great Repeal Bill’ (or indeed other primary legislation) will only exist as granted by the Bill. As noted above, once Brexit takes effect, the devolved institutions will be able to amend domesticated EU law to the extent that it pertains to matters that are within devolved competence. However, it is not clear that, under the devolution settlements, the devolved institutions will have the competence to pass legislation making anticipatory amendments to the body of EU law that will be domesticated by the ‘Great Repeal Bill’ but *that has yet to come into effect* as UK law.
117. It may be, of course, that all anticipatory provisions, in respect of both reserved and devolved matters, are made by Parliament through the ‘Great Repeal Bill’ As Professor Alan Page notes “This would then open up the possibility of relying on UK subordinate legislation in disentangling UK law from EU law, which in turn raises the question of Scottish parliamentary control over such legislation.”<sup>71</sup>
118. It is generally accepted that the Sewel convention does not apply in relation to delegated legislation. Therefore, as Professor Page goes on to note:

“Were [EU] obligations to be transposed by UK Act of Parliament the Scottish Parliament’s consent would be required, but if they are transposed by subordinate legislation its consent is not required. The situation could thus arise in which the UK legislated extensively in

<sup>70</sup> Q 134

<sup>71</sup> Professor Alan Page, *The implications of EU withdrawal for the devolution settlement*, para 13

areas devolved to Scotland without seeking the consent of the Scottish Parliament as there would be no requirement of its consent in relation to subordinate legislation altering the effects of EU law in the devolved areas.”<sup>72</sup>

119. It may well be, therefore, that if the UK Government alone is responsible for amending the body of EU law in preparation for its transposition into UK law, it would put the accepted limitation that the Sewel convention does not apply to secondary legislation under considerable strain. This concern might be mitigated by the fact that, following the UK’s exit from the EU and once the body of EU law has been incorporated into UK law, the devolved institutions will be free to legislate within their areas of devolved competence and change whatever ‘snapshot’ of EU law is in force following Brexit. It is likely, however, that the some form of consultation or consent would be considered appropriate.
120. A number of solutions were proposed in evidence to this Committee. Professor Bell argued that “You need to have a way of incorporating the devolved assemblies in processes of scrutiny to make sure that their prerogatives and budgets are properly protected by what is being agreed.”<sup>73</sup> The Law Society of Scotland suggested that where circumstances require the UK Government to make subordinate legislation to deal with EU legal issues that fall with the competence of the devolved institutions, “[a]t the least discussions should take place at the Joint Ministerial Council and agreement reached on the terms of such UK delegated legislation. Following on such a Ministerial agreement this legislation should be laid in each of the devolved legislatures for information only.”<sup>74</sup> Dr Richard Lang proposed a parliamentary solution by suggesting that the JSCI appoint sub-committees to consider any potential ramifications of delegated legislation made under the ‘Great Repeal Bill’ for the devolved nations.<sup>75</sup>
121. **The UK Government should make clear whether the ‘Great Repeal Bill’ will provide for the UK Government to amend the whole body of EU law in preparation for the UK’s exit from the EU, following which the devolved institutions will take responsibility for those matters that fall within devolved competence, or whether they intend that the ‘Great Repeal Bill’ will leave to ministers in the devolved administrations the ability to prepare amendments to those elements of EU law that will, following Brexit, fall within their competence.**
122. **If the former, then the devolved institutions will need to be appropriately consulted on the amendments to EU law in areas that fall within their jurisdiction. If the latter, it is essential that the devolved institutions work closely with the UK Government to ensure that EU law does not ‘fall between the cracks’ of their respective jurisdictions and that decisions on the repeal or adoption of domesticated EU law are taken in a way that has regard to the coherence of the Union.**

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72 Professor Alan Page, *The implications of EU withdrawal for the devolution settlement*, para 13

73 [Q 134](#)

74 Written evidence from The Law Society of Scotland ([LEG0046](#))

75 Written evidence from Dr Richard Lang ([LEG0048](#))

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

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### Introduction

1. At present, little detail is publicly available as to how the Government intend to take forward the process of converting the body of EU law into UK law—the conclusions and recommendations set out in this report are, therefore, necessarily conditional and framed in general terms. What is clear is that this process will be extremely complicated. It will also be done to an external deadline, imposed by the completion of negotiations and the timing of the UK's exit from the EU. (Paragraph 8)
2. It is in everyone's interests that, following the UK's exit from the EU, the statute book is clear, consistent and unambiguous. In that light, we welcome the Government's commitment to publishing a White Paper on the 'Great Repeal Bill'. It should contain sufficient detail—including draft clauses—to allow for a proper debate on the Government's approach. This vital task must be taken forward in a way that takes due account not only of the practical imperatives that will flow from the exit process but also of the fundamental importance of maintaining constitutional propriety. (Paragraph 9)

### The 'Great Repeal Bill'

3. It is vital that a distinction be drawn between two discrete processes: the more mechanical act of converting EU law into UK law, and the discretionary process of amending EU law to implement new policies in areas that previously lay within the EU's competence. The 'Great Repeal Bill' is intended to facilitate the first aspect of the process. The second should be achieved through normal parliamentary processes. While we expect that much of the latter process will take place after Brexit, the Government have stated that they will introduce primary legislation to make substantive changes to certain areas currently covered by EU law, including immigration and customs law, alongside the process of domesticating the body of EU law through the 'Great Repeal Bill'. (Paragraph 16)
4. We note that, in addition to transposing the body of EU legislation, the Government will need to consider how to treat those elements of EU law that are not legislative in nature—for example, the case law of the Court of Justice of the European Union or the history of regulatory decisions by European institutions. In particular, the Bill should provide clarity as to the status of the Court of Justice's judgments, including the extent (if any) to which those judgments can or must be followed or taken account of by UK courts following Brexit. It will also be necessary to consider whether a distinction should be drawn in this regard between judgments given before and after the date on which the UK leaves the EU. (Paragraph 26)
5. In our view, it would be politically unlikely that UK courts would have to continue to follow the judgments of the Court of Justice following Brexit. UK law will start to diverge from EU law (even where UK law is derived from what was, before Brexit, EU law)—that is an inevitable consequence of the UK's exit from the EU. That being the case, the Government may wish to consider whether the Bill should provide that, as a general rule, UK courts "may have regard to" the case law of the Court of Justice (and we stress that it should be optional) in relation to judgments made both before and after the UK's exit from the EU in order to assist in the interpretation of UK law.



This will allow UK courts to take into account the judgments of the Court of Justice, but not be bound by them. (Paragraph 27)

6. The distinction between Henry VIII and other delegated powers is not in this exceptional context a reliable guide to the constitutional significance of such powers, and should not be taken by Parliament to be such. (Paragraph 40)
7. The 'Great Repeal Bill' will likely propose that Parliament delegate to the Government significant powers to amend and repeal (primary) and revoke (secondary) legislation to enable it to carry out the significant task of preparing the ground for the conversion of the body of EU law into UK law within the timeframe set out for the UK's exit from the EU. (Paragraph 45)
8. Parliament should ensure that the delegated powers granted under the 'Great Repeal Bill' are as limited as possible. However, the degree of uncertainty as to what exactly the process of converting EU law into UK law will involve—and, in particular, the unknown outcomes of the UK's ongoing Article 50 negotiations with the EU—will almost certainly necessitate the granting of relatively wide delegated powers to amend existing EU law and to legislate for new arrangements following Brexit where necessary. (Paragraph 46)
9. The 'Great Repeal Bill' is thus likely to involve a massive transfer of legislative competence from Parliament to Government. This raises constitutional concerns of a fundamental nature, concerning as it does the appropriate balance of power between the legislature and executive. (Paragraph 47)
10. Parliament must consider how best to limit and to exercise oversight of the Government's use of these extensive delegated powers. In addition, it is important that both parties recognise that the 'Great Repeal Bill' will be an exceptional piece of legislation, necessitated by the extraordinary circumstances of Brexit: while the Government may make a case for a wide array of discretionary powers, this should in no way be taken as a precedent when considering the appropriate bounds of delegated powers in future. Nor should the exceptional circumstances constituted by Brexit be taken in and of themselves to be a sufficient answer to legitimate concerns relating to the proper balance of constitutional authority as between Parliament and the Government. (Paragraph 48)
11. We recognise that, following the UK's exit from the EU, the Government will no doubt wish to implement new policies in areas which were formerly within EU competence. We would be concerned, however, should the Government seek to do so using delegated powers which were granted for the purpose of converting the body of EU law into UK law. We would be similarly concerned if the Government, via the 'Great Repeal Bill', sought to secure delegated powers for the broader purpose of implementing new policies post-Brexit. EU law should initially be transferred into UK law with as few changes as possible (taking into account the result of the Article 50 negotiations with the EU and the need to adapt EU law to make sense in the UK's domestic legal framework). If the Government subsequently wish to make changes of a substantive nature then those changes should be brought forward as primary legislation and be subject to the usual degree of parliamentary scrutiny. (Paragraph 49)
12. Parliament may, therefore, wish to consider implementing a general restriction on the use of delegated powers granted under the 'Great Repeal Bill'. Whilst this will be a matter for detailed scrutiny by the Lords Delegated Powers

and Regulatory Reform Committee when the Bill is introduced, we would suggest that a general provision be placed on the face of the Bill to the effect that the delegated powers granted by the Bill should be used only:

- so far as necessary to adapt the body of EU law to fit the UK's domestic legal framework; and
  - so far as necessary to implement the result of the UK's negotiations with the EU. (Paragraph 50)
13. The Bill should also clearly set out a list of certain actions that cannot be undertaken by the delegated powers contained in the Act, as another means of mitigating concerns that may arise over this transfer of legislative competence. (Paragraph 51)
  14. The Government must give careful consideration to what kind of contingency plan would be needed in order to deal with any rejection of the Brexit deal by either side. (Paragraph 54)
  15. We note that, following the repeal of the ECA, secondary legislation made under section 2(2) of the ECA will no longer be afforded primacy over incompatible UK law (unless the 'Great Repeal Bill' seeks to provide otherwise). The Government may wish to consider whether this change has the potential to unsettle the clarity of any current areas of the law. (Paragraph 59)
  16. The Government should make clear how it intends to preserve and publish the exact text of the 'snapshot' of (what was) directly effective EU law if imported by means of a general provision in the 'Great Repeal Bill'. (Paragraph 62)
  17. The 'Great Repeal Bill' will need to make provision not only in relation to processes by which (i) directly effective EU law is selected for domestication and (ii) amended in the course of domestication, but also in relation to (iii) the process by which domesticated EU law can subsequently be amended. It is likely that this will need to involve a distinction between—or a mechanism for drawing a distinction between—technical amendments to be accomplished via secondary legislation and larger amendments involving policy choices that can be accomplished only via primary legislation. If this is not done, the risk arises of certain areas of law—simply as a result of the happenstance that they began life as directly effective EU law—being permanently vulnerable to being reshaped through the use of delegated powers. Similar issues arise with respect to statutory instruments passed under section 2(2) of the ECA which will, over time, need to be re-enacted in a way that reflects a more appropriate division between primary and secondary legislation. (Paragraph 67)
  18. The extent to which sunset clauses will be a viable means of controlling the powers granted to the Government under the 'Great Repeal Bill' will depend on the specifics of the Bill. We do not, therefore, attempt to recommend how they might best be used or developed. But if the Government seek discretion to domesticate and amend significant elements of the body of EU law by secondary legislation, then it is essential Parliament consider how that discretion might be limited over time. The Government would need to present a very strong justification for not including sunset clauses in relation to extensive powers conferred for the purpose of transposing UK law into EU law. In addition, if it is clear that parliamentary scrutiny of particular

issues will be curtailed during the transposition process—perhaps as a result of time pressures close to the day of Brexit—then we would expect that sunset provisions be used to ensure that those provisions were brought before Parliament again for proper consideration after the UK's exit from the EU. (Paragraph 73)

### **Parliamentary scrutiny of delegated legislation laid under the 'Great Repeal Bill'**

19. We welcome the inquiry announced by the House of Commons Procedure Committee on delegated powers in the 'Great Repeal Bill', which will include addressing the issue of the "changes (if any) desirable to Commons procedures related to the delegation of powers or secondary legislation to address the likely scale and volume of 'Great Repeal Bill' legislation". (Paragraph 82)
20. Given the likely uncertainty as to what exactly will be required to convert EU law into UK law, there will be occasions on which Parliament should be able to affect the content of secondary legislation determining matters of significant policy interest or principle. (Paragraph 88)
21. Parliament is likely to face a significant challenge dealing with secondary legislation laid under the 'Great Repeal Bill'. In order to mitigate the constitutional risks that will arise if the Government are given relatively wide discretionary powers to convert the body of EU law into UK law, we recommend the following: (Paragraph 102)
  - That the Minister sign a declaration in the Explanatory Memorandum to each statutory instrument amending the body of EU law stating whether the instrument does no more than necessary to ensure that the relevant aspect of EU law will operate sensibly in the UK following the UK's exit from the EU, or that it does no more than necessary to implement the outcome of negotiations with the EU. We note that, if the overall restriction set out in paragraph 50 above is included on the face of the Bill, the Joint Committee on Statutory Instruments will have the role of assessing whether each statutory instrument laid under the Bill complies with that restriction, given that its remit includes considering whether each statutory instrument laid before Parliament is *intra vires*. (Paragraph 102(1))
  - That the Explanatory Memorandum to each statutory instrument sets out clearly what the EU law in question currently does (before Brexit); what effect the amendments made by the statutory instrument will have on the law (as it will apply after Brexit) or what changes were made in the process of conversion; and why those amendments or changes are necessary. (Paragraph 102(2))
  - That the Government make a recommendation for each statutory instrument as to the appropriate level of parliamentary scrutiny that it should undergo. We would expect that a statutory instrument which amends EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure. (Paragraph 102(3))
  - That a parliamentary committee(s) consider the Government's recommendation, and decide the appropriate level of scrutiny for each

statutory instrument laid under the 'Great Repeal Bill'. If the two Houses perform this function separately, then it would seem appropriate in the House of Lords for the Secondary Legislation Scrutiny Committee to perform this function. Alternatively, a Joint Committee could be established to carry out this role on a bi-cameral basis. (Paragraph 102(4))

- That where the relevant committee(s) determines that a statutory instrument laid under the 'Great Repeal Bill' amends EU law in a manner that determines matters of significant policy interest or principle, it should undergo a strengthened scrutiny procedure. We do not, in this report, attempt to define exactly how this strengthened scrutiny procedure should operate, or whether one of the existing statutory models should be adopted. We recognise that existing models for enhanced scrutiny can prove resource intensive and time-consuming—in our view, the only essential element of whatever strengthened procedure is selected is that it should provide an opportunity for a statutory instrument to be revised in the light of parliamentary debate. (Paragraph 102(5))
22. Given the volume of secondary legislation expected to be required to implement the conversion of EU law to UK law, effective use of external expertise and public consultation may well prove an essential tool for committees tasked with scrutinising secondary legislation laid under the 'Great Repeal Bill'. (Paragraph 105)
  23. We note that scrutiny committees will need the capacity, expertise and legal support to cope with the increased volume and complexity of secondary legislation. We look to the Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments, both of which have extensive experience in the scrutiny of secondary legislation, to advise the Liaison Committee as to what will be required to deal with the secondary legislation flowing from the 'Great Repeal Bill' and other Brexit-related legislation. Given that there can be a long lead-in time for recruiting and training new staff, thought will need to be given at an early stage to ensuring that these additional resources are in place and up to speed by the time the 'Great Repeal Bill' has completed its passage through Parliament. (Paragraph 108)
  24. The UK's exit from the EU will provide the devolved legislatures with the freedom to legislate in devolved areas that are currently circumscribed by EU law. This will mean that the UK Government and the devolved administrations will need to manage new interfaces—and potentially overlapping responsibilities—between reserved matters and devolved competence in areas where the writ of EU law no longer runs. The UK Government and devolved administrations will need to agree, before Brexit, how those new interfaces will be managed. (Paragraph 114)
  25. The UK Government should make clear whether the 'Great Repeal Bill' will provide for the UK Government to amend the whole body of EU law in preparation for the UK's exit from the EU, following which the devolved institutions will take responsibility for those matters that fall within devolved competence, or whether they intend that the 'Great Repeal Bill' will leave to ministers in the devolved administrations the ability to prepare amendments to those elements of EU law that will, following Brexit, fall within their competence. (Paragraph 121)

26. If the former, then the devolved institutions will need to be appropriately consulted on the amendments to EU law in areas that fall within their jurisdiction. If the latter, it is essential that the devolved institutions work closely with the UK Government to ensure that EU law does not 'fall between the cracks' of their respective jurisdictions and that decisions on the repeal or adoption of domesticated EU law are taken in a way that has regard to the coherence of the Union. (Paragraph 122)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Lord Beith  
 Lord Brennan  
 Baroness Dean of Thornton le Fylde  
 Lord Hunt of Wirral  
 Lord Judge  
 Lord Lang of Monkton (Chairman)  
 Lord Maclennan of Rogart  
 Lord MacGregor of Pulham Market  
 Lord Morgan  
 Lord Norton of Louth  
 Lord Pannick  
 Baroness Taylor of Bolton

### Declarations of interest

Lord Beith  
*No relevant interests*

Lord Brennan  
*No relevant interests*

Baroness Dean of Thornton-le-Fylde  
*No relevant interests*

Lord Hunt of Wirral  
*Partner, DAC Beachcroft LLP*  
*Chairman, Society of Conservative Lawyers*

Lord Judge  
*No relevant interests*

Lord Lang of Monkton (Chairman)  
*No relevant interests*

Lord MacGregor of Pulham Market  
*No relevant interests*

Lord Maclennan of Rogart  
*No relevant interests*

Lord Morgan  
*No relevant interests*

Lord Norton of Louth  
*No relevant interests*

Lord Pannick  
*Practising Queen's Counsel specialising in constitutional, administrative and European law*

Baroness Taylor of Bolton  
*No relevant interests*

A full list of members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Mark Elliott, Professor of Public Law at the University of Cambridge, and Professor Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh, acted as specialist advisers for the inquiry. They both declared no relevant interests.