



House of Commons  
Procedure Committee

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# Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report

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**First Report of Session 2017–19**

*Report, together with formal minutes relating  
to the report*

*Ordered by the House of Commons  
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## Procedure Committee

The Procedure Committee is appointed by the House of Commons to consider the practice and procedure of the House in the conduct of public business, and to make recommendations.

### Current membership

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### Powers

The powers of the Committee are set out in House of Commons Standing Orders, principally in SO No. 147. These are available on the internet via [www.parliament.uk](http://www.parliament.uk).

### Publication

Committee reports are published on the Committee's website at [www.parliament.uk/proccom](http://www.parliament.uk/proccom) and in print by Order of the House.

Evidence relating to this report is published on the [inquiry publications page](#) of the Committee's website.

### Committee staff

The current staff of the Committee are Martyn Atkins (Clerk), Leoni Kurt (Second Clerk), Jim Lawford (Committee Assistant), and Alasdair Rendall (Media Officer).

### Contacts

All correspondence should be addressed to the Clerk of the Procedure Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 3351; the Committee's email address is [proccom@parliament.uk](mailto:proccom@parliament.uk).

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## Summary

The Procedure Committee has examined the provision made in the European Union (Withdrawal) Bill for Parliamentary scrutiny of the secondary legislation proposed to be enacted under the powers the Government claims in the Bill. We recommend ways in which the Bill should be amended to provide for a scrutiny structure in this House adequate for the purpose, and we recommend how such a system might operate. In particular we recommend the establishment of a committee to examine the legislative changes the Government proposes and identify those of political and/or legal importance. We will issue a further report with more detailed recommendations for changes to rules and practices necessary to establish the system we envisage.

The Bill as it stands makes no provision for amendment to the standard statutory procedures for control and approval of delegated legislation which have been in effect since 1947. There is considerable concern in the House and elsewhere about the scale and scope of the powers claimed to amend existing legislation. While these powers may be necessary, in view of the task which the Government envisages, their exercise must be subject to thorough and appropriate scrutiny by Parliament. The Government's proposals for Parliamentary scrutiny, resting as they do entirely on existing procedures, do not go far enough. The task for the House is unique and unprecedented and requires a scrutiny mechanism to suit.

The scrutiny system we propose will have achieved its aims if the House is thereby recognised to have overseen all the necessary changes contemplated under the Bill by exit day, to have taken its scrutiny responsibilities seriously, to have taken ownership of the parliamentary processes, to have represented the interests of constituents, and to have improved the outcomes for the people of the UK. We think these aims are best achieved through a committee of the House which has an overview of the entire process of legislative change proposed and which has the capacity to swiftly develop both specialist expertise in the field and judgment as to which proposals made by the Government merit further examination. The scrutiny model operated by the European Scrutiny Committee can readily be adapted to this purpose.

A committee based on the European Scrutiny Committee model would examine each instrument, whether affirmative or negative, laid before the House and would determine which was of sufficient political and/or legal importance to require further consideration by the House. It would recommend such instruments for debate in a general committee or, in exceptional circumstances, on the floor of the House. It would also be empowered to recommend that defective or inadequate instruments be revoked and re-made or, if in draft, withdrawn and re-submitted. External stakeholders would have an opportunity to make representations to the committee about the content of any instrument. The committee would be required to take account of the reports of the Joint Committee on Statutory Instruments, which we envisage would undertake technical scrutiny of all such instruments.

A resolution of the House would place a duty on Ministers not to bring any instrument into force until it had been cleared from scrutiny by the committee or the House had completed any further consideration of the instrument. This would apply equally to

negative resolution instruments under the Bill: although they will have been made before they are laid before Parliament, the majority of them will not in any case be intended to enter into force until exit day.

The size and scale of the task which the Government proposes has clear implications for the scrutiny capacity of the House. The Government must assist in this by publishing, and regularly updating, a schedule for the laying of instruments before Parliament, and it must manage the flow of instruments so as not to occasion any unnecessary peaks and troughs in workload.

At this stage we make no recommendations for bicameral working. If a bicameral approach to the challenge before both Houses is not adopted, we nevertheless trust that the bodies of both Houses charged with scrutiny of these instruments will find it beneficial to share information and move in step as far as possible.

We make recommendations for amendments to be drafted and tabled to the Bill to provide a legislative structure within which the system we envisage can operate effectively.

# 1 Introduction

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1. The European Union (Withdrawal) Bill was introduced on 13 July 2017 and received its Second Reading on Monday 11 September. On the same day the membership of this Committee was appointed by the House.
2. At our first meeting, on 13 September, we opened an inquiry into *Exiting the European Union: scrutiny of delegated legislation*, with an initial focus on the provisions of the European Union (Withdrawal) Bill.<sup>1</sup> In doing so we took up the work of the predecessor committee in the 2015 Parliament: before the House resolved that there should be an early general election, that committee was examining the Government's proposals for a 'Great Repeal Bill' first announced in September 2016.<sup>2</sup>
3. In this interim report we examine the provision made by the European Union (Withdrawal) Bill for Parliamentary scrutiny of the secondary legislation which the Government proposes to enact under the delegated powers which it is claiming in the Bill. We recommend amendments to the Bill which we consider necessary to ensure adequate scrutiny in this House of the legislation to be proposed by Ministers, and we indicate how such a system might operate.
4. Once both Houses have considered in detail the scrutiny provisions of the Bill we will report again. In that subsequent report we expect to make more detailed recommendations for the changes to rules and practices necessary to establish a system to assess and scrutinise the delegated legislation the Government proposes.
5. The European Scrutiny Committee and the Joint Committee on Statutory Instruments—two Parliamentary committees with remits directly concerning the matters we discuss below—were nominated on Monday 30 October. We shall of course consult these committees as we prepare our subsequent report.
6. We received 11 memoranda in the course of the inquiry.<sup>3</sup> We took oral evidence from Rt Hon Dominic Grieve QC MP, the Hansard Society, the SNP Shadow Leader of the House, Pete Wishart MP, the shadow Leader of the House, Valerie Vaz MP, the shadow Secretary of State for Exiting the European Union, Rt Hon Keir Starmer QC MP, the Leader of the House, Rt Hon Andrea Leadsom MP, and the Parliamentary Under-Secretary of State, Department for Exiting the European Union, Mr Steve Baker MP. We are grateful to all who have assisted us in this inquiry.

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1 The terms of reference relating to this stage of our inquiry are published at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/inquiries/parliament-2017/exiting-eu-scrutiny-delegated-legislation-17-19/>

2 The evidence taken in that Committee's inquiry is available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/inquiries/parliament-2015/delegated-powers-great-repeal-bill-16-17/>

The Committee reported on the progress of that inquiry in its Seventh Report of Session 2016–17, *Matters for the Procedure Committee in the 2017 Parliament*, HC 1091, paras 3–17.

3 The written evidence received is listed on page 23. The oral evidence taken is listed on page 22.

Both are published at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/inquiries/parliament-2017/exiting-eu-scrutiny-delegated-legislation-17-19/publications/>

## 2 The Bill's provisions for amendment of legislation

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7. The European Union (Withdrawal) Bill “ends the supremacy of European Union (EU) law in UK law and converts EU law as it stands at the moment of exit into domestic law. It also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Bill also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU.”<sup>4</sup>

8. The memorandum from the Clerk of the House sets out succinctly how this purpose is to be achieved:

- Clause 2 provides that all EU law, which has been implemented in the UK through UK domestic legislation under the provisions of the 1972 Act, shall continue to be law after exit day.
- Clause 3 provides that all directly-applicable EU legislation, currently in force in the UK, shall also continue to be law after exit day.
- Clause 4 provides that all rights, powers, liabilities, obligations and restrictions, which arise from EU Treaties and are recognised and available in UK domestic law, shall continue to be recognised and available after exit day.
- Everything covered by clauses 2, 3 and 4 is defined, for the purposes of the remainder of the Bill, as retained EU law.<sup>5</sup>

“Retained EU law” is defined by the Government as the body of EU legislation with direct effect which has been converted into UK law, and the body of preserved domestic law formerly given effect in the UK under the European Communities Act 1972.

9. The regulation-making powers in the Bill relate principally to three separate (although closely linked) areas:

- Correcting deficiencies in retained EU law (clause 7)
- Complying with international obligations (clause 8)
- Implementing the withdrawal agreement (clause 9).

In all three cases the powers include the power to make any provision which could be made by an act of parliament, which includes the power to amend or repeal primary legislation.

10. The parliamentary procedures to which the regulations would be subject are set out in Schedule 7 to the Bill. They provide that all regulations may be subject to the negative procedure unless they:

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4 [Explanatory Notes](#) to Bill 5-EN of Session 2017–19

5 Clerk of the House of Commons ([EUX 0010](#)), para 18

- create a public authority, or transfer the functions of any EU authority or entity to a UK public authority;
- impose or relate to a fee for a function undertaken by a public authority;
- create or widen the scope of a criminal offence; or
- create or amend a power to legislate.

All instruments falling within the categories above are to be subject to the affirmative procedure. Ministers have the discretion to designate any instrument falling outside the categories above as subject to the affirmative procedure, though the default is that the negative procedure will apply to these instruments.

11. Both the affirmative and the negative procedures are established by statute in the Statutory Instruments Act 1946. These procedures provide for parliamentary control of delegated legislation as follows:

- Under the **affirmative procedure** an instrument is laid before both Houses in draft form. The draft is unamendable. If both Houses approve it (by a motion agreed to on the floor of each Chamber), the Minister may ‘make’ (in other words enact, and then bring into force) the instrument in the form of the draft.
- Under the **negative procedure**, the Minister lays the instrument in its final form: by then it has typically been ‘made’ or signed into law. The Minister may bring the instrument into force on any date from that of its laying, although by convention (rather than statute) a period of at least 21 days is normally provided. It remains on the statute book unless either House, within 40 days of its laying date, resolves that it should be annulled. Periods of dissolution, prorogation and adjournment of more than four days are not included in the calculation of the 40 days.
- A variant on the affirmative procedure provides for an instrument to be made and brought into force immediately, but to continue in force only if approved by resolution of both Houses within a defined period of time. In the European Union (Withdrawal) Bill this period is set at one month from the date of laying, not including periods of dissolution, prorogation and adjournment of more than four days.<sup>6</sup>

The Clerk of the House indicated to us that while there were a number of variations on, or alternatives to, these procedures (established under acts other than the 1946 Act), these procedures account for the substantial majority of statutory instruments laid before the House, and govern the principal regulation-making powers in the Bill.<sup>7</sup>

6 Schedule 1 to the [Interpretation Act 1978](#) provides that, unless there is provision to the contrary, ‘one month’ in legislation is taken to mean one calendar month.

7 654 of the 757 statutory instruments laid before the House in Session 2015–16 were subject to one of these two procedures: Clerk of the House of Commons ([EUX 0010](#)), para 5

## Use of the powers in the Bill

12. The Government has given certain assurances about the purpose of the powers in the Bill and how they are intended to be used.<sup>8</sup> The Government claims that their use is to be restricted to the overall objective of ensuring that the legal framework in operation the day before exit day, based as it is on the operation of the European Communities Act 1972, is able to operate effectively immediately after the point of exit when the 1972 Act has been repealed.

13. We note the considerable concern which has been expressed in the House and elsewhere about the scale and scope of the powers. The Bill's provision in this respect has been subject to criticism by two House of Lords committees and by several of our witnesses.<sup>9</sup> Rt Hon Dominic Grieve QC MP, a former Attorney-General, suggested to us that the Government was likely to be uncertain over the extent to which the powers claimed would have to be used:

[...] I very much hope, particularly in the light of what the Government [has] said, that 90% of all this, perhaps even 95% for all I know, turns out just to be straightforward technical amendment. The Government must have some anxiety and doubt about this because if it did not it would not have had to have cast its powers so widely. That suggests to me that within Government there is an understanding that there are unpredictable aspects to this legislation, which could require at different moments the Government to bring about significant change to existing primary legislation in order to achieve its objectives.<sup>10</sup>

14. The scale and scope of the powers to be conferred, and in particular the powers to amend primary and secondary legislation, merit the most serious consideration by the House. We do not in this report make express recommendations about the powers claimed by the Government. We acknowledge that the Government, in order to achieve the objective of legal certainty on exit day, must be able to amend existing legislation without using the primary legislative process. The use of such so-called 'Henry VIII' powers is required to amend existing acts of parliament which incorporate 'a degree of EU influence'. The House of Commons Library has estimated that there were 186 acts of parliament passed between 1980 and 2009 in this category and a further 105 such acts between 2010 and 2014.<sup>11</sup> Without any 'Henry VIII' powers to amend primary legislation,

8 [Legislating for the United Kingdom's withdrawal from the European Union](#), Cm. 9446, paras 3.16–3.18; Department for Exiting the European Union, [Memorandum concerning the delegated powers in the European Union \(Withdrawal\) Bill submitted to the House of Lords Delegated Powers and Regulatory Reform Committee](#), July 2017, paras 37–44

9 [European Union \(Withdrawal\) Bill](#), Third Report of the House of Lords Delegated Powers and Regulatory Reform Committee, Session 2017–19, HL Paper 22; [European Union \(Withdrawal\) Bill: interim report](#), Third Report of the House of Lords Select Committee on the Constitution, Session 2017–19, HL Paper 19; written evidence from *inter alia* Professor Michael Dougan, University of Liverpool ([EUX 0001](#)), the Equality and Diversity Forum ([EUX 0002](#)), Dr Michael Gordon, Liverpool Law School, University of Liverpool ([EUX 0006](#)), Which? ([EUX 0008](#)) and Unlock Democracy ([EUX 0011](#)).

10 Q 12

11 [How much legislation comes from Europe?](#), House of Commons Library Research Paper 10/62, 13 October 2010, p. 19, quoted in [Legislating for the United Kingdom's withdrawal from the European Union](#), Cm. 9446, para 2.6; [EU obligations: UK implementing legislation since 1993](#), House of Commons Library Briefing Paper 07092, June 2015, p. 5, both cited in Simon Patrick, [Scrutiny of Delegated Legislation in Relation to the UK's Withdrawal from the European Union](#), The Constitution Society, 2017, p. 13.

all the necessary modifications to those acts of parliament with ‘EU influence’ would have to be in primary legislation. The scope of the powers delegated from Parliament, and their exercise, must nevertheless be subject to thorough scrutiny by Parliament.

15. In the case of the present Bill, therefore, *we draw to the special attention of the House the report on the European Union (Withdrawal) Bill made by the Delegated Powers and Regulatory Reform Committee of the House of Lords, the committee of Parliament which specialises in the scrutiny and control of Government proposals for the delegation of powers in legislation.*<sup>12</sup> *The views of this committee—which has, exceptionally, reported on the Bill before it has entered the Lords—merit the attention of the whole House.*

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12 [European Union \(Withdrawal\) Bill](#), Third Report of the House of Lords Delegated Powers and Regulatory Reform Committee, Session 2017–19, HL Paper 22

### 3 Parliamentary scrutiny of the Government's proposals for legislative change

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16. The Bill makes no express provision for any scrutiny structure additional to the existing statutory provision for Parliamentary control of delegated legislation. In evidence to us, the Leader of the House and the Parliamentary Under-Secretary of State at the Department for Exiting the European Union both suggested that the use of these 'tried and tested' procedures would provide an appropriate framework for Parliamentary control of the process.<sup>13</sup>

17. In the White Paper which preceded the Bill, the Government recognised the need for discussion with both Houses on the means appropriate for scrutiny of the process, having regard to the scale of the exercise and the requirement to complete it by exit day.<sup>14</sup> We therefore regard the Government's proposals as set out in the Bill as a starting point for discussion, rather than as a prescription. As we have noted above, two committees in the Lords have expressed their own views on the structure which should be in place. Several amendments have already been tabled for Committee stage on the Bill.<sup>15</sup> Rt Hon Keir Starmer QC MP, shadow Secretary of State for Exiting the European Union, and Valerie Vaz MP, shadow Leader of the House, gave evidence to us on the amendments proposed by the Opposition,<sup>16</sup> and Rt Hon Dominic Grieve QC MP discussed with us the purpose of his amendments,<sup>17</sup> which had much in common with a scrutiny system proposed by the Hansard Society.<sup>18</sup>

18. What all these proposals have in common is a system which allows Parliamentary bodies to take views on the merits of proposals for legislative change and to recommend further scrutiny in debate, and in certain circumstances the amendment of the proposal. This seems to us to be the crux of the issue: should decisions on the appropriate level of scrutiny for specific but so far undefined instruments be made by Ministers before they are presented to Parliament, or should they be matters for the House? It is of primary importance that the process by which European law is repatriated is, and is seen to have been, subject to proper parliamentary scrutiny. **In our view, the Government's proposals for scrutiny as provided for in the European Union (Withdrawal) Bill establish a system over which elected Members of Parliament have insufficient control over the means by which adequate scrutiny and consequential changes are to be achieved. We believe that it would be preferable to have a system for exercising control which could not give rise to any suspicion that the motives of the Government are to avoid scrutiny rather than ensure the means whereby from exit day the statute book contains a workable framework of law seamlessly transposed from existing EU law.**

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13 Q 41

14 [Legislating for the United Kingdom's withdrawal from the European Union](#), Cm. 9446, para 3.23

15 A summary and overview of the amendments tabled up to 15 October 2017 is given in Simon Patrick, [Scrutiny of Delegated Legislation in Relation to the UK's Withdrawal from the European Union](#), The Constitution Society, 2017, para 50.

16 Qq 79–83

17 Qq 5, 12, 122

18 Qq 120–21; Hansard Society, [Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union \(Withdrawal\) Bill](#), September 2017

19. It is generally acknowledged that the scrutiny task for Parliament is unique and unprecedented. It is nevertheless a task which is, in theory, discrete and time-limited: there are a finite number of amendments to be made to existing statute to enable UK law to function effectively after exit day. **Given the pressure of time and the need to establish a functioning system from the outset, we are not at present persuaded of any requirement for new and innovative structures to tackle the undoubted challenge for the House presented by the proposals in this Bill.**

20. As we continue our inquiry into the use of delegated legislation for the process of exit from the EU, we will further consider the adequacy of the House's existing structures for the control of delegated legislation, in particular in the context of the 'Brexit bills'—several of which were announced in the Queen's Speech of June 2017—which are intended to make substantive changes to existing legislation to reflect the Government's policy choices.

## **A system for effective control of the delegated legislation proposed under the Bill**

### ***Purpose***

21. We outline in this report a system to examine, and authorise the exercise by Government, of the powers it has claimed in the Bill to change existing law by regulations. We consider that the scrutiny system we propose will have achieved its aims if the House is thereby recognised:

- to have overseen the implementation of all the necessary changes contemplated under the Bill by exit day;
- to have taken its scrutiny responsibilities seriously;
- to have taken ownership of the parliamentary processes;
- to have represented the interests of constituents; and
- to have improved the outcomes for the people of the UK.<sup>19</sup>

### ***A scrutiny committee***

22. The aim we have outlined above can, we consider, best be achieved through a committee of the House which has an overview of the entire process of legislative change proposed and which has the capacity to swiftly develop both specialist expertise in the field and judgment as to which proposals made by the Government merit further examination.

23. *In our view this requirement ought to be met by establishing a new committee which could adapt the working methods of the European Scrutiny Committee, a body which has long experience of examining legislative proposals and determining which of them are of sufficient political and/or legal importance to require further consideration by the House.* The work of that committee is effectively underpinned by the scrutiny reserve

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19 Clerk of the House of Commons ([EUX 0010](#)), para 26

resolution, a resolution of the House which injuncts Ministers against further action on a legislative proposal until either the Committee has cleared it from scrutiny or the further consideration recommended in the House has taken place. This structure could, we believe, be swiftly adapted to meet the particular challenges posed by the Bill.

24. The committee would be required to examine every instrument laid before the House under the powers in the Bill, whether affirmative, made affirmative or negative. It would be charged with determining which such instruments were of political and/or legal importance: whether, for instance, a change in legislation proposed was of a substantive character amounting to a policy change, or whether a change proposed was outside the powers authorised by Parliament. The committee would have the power to recommend that any instrument identified as important should be further considered by the House: usually in a general committee, the form and operation of which the House would determine, but in exceptional circumstances on the floor of the House. It would be under an instruction to complete its scrutiny of an instrument within a defined period.

25. Alongside this regime *we propose to invite the House to agree a scrutiny reserve resolution which would constrain Ministers from bringing any legislation into force unless and until it had first been cleared from scrutiny by the committee or had been considered in the manner recommended by the committee.*

- For **affirmative instruments**, this would typically mean that the draft regulations in question would be considered in a general committee before an approval motion was put to the House for decision forthwith, as is the case at present. Affirmative instruments found to raise no issues of political or legal importance might be sent for approval forthwith by the House without the requirement for debate in committee. Those which raised the most serious political or legal issues might be recommended by the committee for debate on the floor of the House.
- For **negative instruments**, Ministers would be unable to bring them into force until the scrutiny process had been completed. Since the Government anticipates that the vast majority of negative instruments will be of a technical nature, this should raise no issues of timing, provided that the Government arranges the throughput of instruments in such a way as to avoid backlogs in the committee. It is assumed that the majority of instruments of this nature will not in any case be required to enter into force—and change UK law—until the designated exit day. Those which would require entry into force at an earlier date could be prioritised by the Government, in recognition that sufficient time ought to be allowed for the scrutiny process to be completed, and any potential issues to be addressed, between the date of laying and the anticipated date of entry into force.
- **Made affirmative instruments**—which for reason of urgency have to be brought into force immediately and then confirmed by approval in both Houses within a calendar month—would naturally require express consideration by the committee: by their very nature they would be candidates for immediate consideration in a general committee prior to a decision in the House as to whether they should be approved.

26. Witnesses expressed to us significant concern about the difficulty at present in amending proposed delegated legislation, whether in made or draft form.<sup>20</sup> **Key stakeholders without access to the drafting process may identify significant concerns with published drafts which cannot be effectively addressed through the present scrutiny process. *The committee we propose ought to be able to receive and consider representations made by interested organisations and individuals outside Parliament.***

27. Delegated legislation is by definition not susceptible to amendment by Parliament: as our witnesses explained, provision for Parliament to amend delegated legislation would run counter to the principle of delegation.<sup>21</sup> It is nevertheless appropriate that, ***in common with legislative provision in other Acts which employ a form of super-affirmative procedure, the committee to be established should consider issues raised by the drafting of each instrument. Where appropriate, the committee should recommend that an instrument either be withdrawn and re-laid in a more acceptable form or (if a negative) be revoked and re-made.***

28. ***The system we propose ought to be designed around the following key features:***

- ***The timely, effective and consistent consideration of all instruments laid before the House under the powers in the Bill;***
- ***A method for swift sifting of material to allow for the unimpeded passage of uncontroversial instruments;***
- ***A mechanism to bring to the attention of the House, for further debate, any instrument considered to have political or legal importance;***
- ***A route for stakeholders to express to the committee their views on the political importance and/or the drafting of the instrument;***
- ***Provision for the committee to challenge the Government on the content or the drafting of an instrument and where necessary to recommend amendments;***
- ***A requirement for the committee to have regard to the reports of the Joint Committee on Statutory Instruments, the committee specialised in technical scrutiny of delegated legislation;***
- ***The strength and flexibility to work within the timetable constraints of leaving the EU by exit day while ensuring that changes to the statute book are thoroughly and consistently examined by Parliament, and***
- ***A time limit on the committee's operation: its functions should cease once it has cleared from scrutiny the last instrument to be laid before Parliament under the powers in the Bill.***

### **Workload and timing**

29. The committee would be required to undertake a substantial workload and work to exacting timescales. Those timescales are at present entirely in the hands of the Government, which is yet to publish any detailed scheme for the exercise contemplated in

20 For example The Association of British Insurers ([EUX 0004](#)) and UK Finance ([EUX 0009](#))

21 Qq 14–16 (Mr Grieve; Hansard Society); Q 106 (Mr Starmer)

the Bill. The Government is still estimating that between 800 and 1,000 instruments will have to be brought into force between the notification of Royal Assent and exit day, which Ministers have told us is to be 29 March 2019.<sup>22</sup>

30. The Leader of the House indicated to us that the Government had introduced a process of quality control of delegated legislation, by requiring each proposal to be considered in the Cabinet Committee on Parliamentary Business and Legislation (PBL)<sup>23</sup>. Ordinarily secondary legislation needs only to have been agreed by the relevant Minister before it is laid before Parliament. No further details have been offered on how the additional control is to function, nor on its impact on timescales for the laying and expected approval of instruments.

**31. A commitment on the part of the Government to increased quality control of delegated legislation is welcome. We do not, however, consider that this prior scrutiny in Cabinet Committee can, or should, substitute for the scrutiny of delegated legislation in this House.**

32. Similarly, the Government must guard against the evident risk of delay occasioned by introducing a potential bottleneck into the system. *We recommend that the Government publish, as soon as possible, a statement on the process whereby delegated legislation under the Bill is to be processed and approved for presentation to Parliament, together with an outline schedule for the laying of instruments before the House. This schedule must be updated regularly and at a minimum within seven days of each meeting of the Parliamentary Business and Legislation Committee where relevant delegated legislation is considered.*

33. *Departments ought to aid effective scrutiny of their proposals by publishing in advance, wherever possible, exposure drafts of instruments for comment.*

34. *In order to balance the requirements of effective scrutiny and efficient despatch of business, decisions on the exercise of the scrutiny reserve ought to be taken by the committee which we propose within a defined period to be set out in its order of reference. The efficiency of the committee's operation will depend on the flow of instruments to be laid by the Government and the readiness of Departments to respond to any issues raised by the committee. Departments, and the Parliamentary Business and Legislation Committee, should therefore plan for a steady flow of instruments to be laid before Parliament, to allow the committee to schedule its programme and to avoid unnecessary peaks and troughs in its workload.*

### **Scrutiny in the House of Lords**

35. In this report we make no recommendations relating to the House of Lords. We recognise that the other House has its own structures for consideration of delegated legislation, most notably through the Secondary Legislation Scrutiny Committee, and we would not wish at this stage to recommend a structure which would presuppose any decision the Lords might take on scrutiny of regulations under the Bill. We are grateful for the submissions made by committees of that House to our predecessor committee's

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22 Qq 51–2 (Mr Baker)

23 Q 65 (Leader of the House)

inquiry.<sup>24</sup> Those submissions, and the reports on the Bill made to date by the Constitution Committee,<sup>25</sup> have identified many of the issues of principle and of practical scrutiny raised by the Government's proposals.

36. Whatever structures are established in the two Houses, we hope that conditions will be established for them to work together as constructively as possible. A practical step would be provision in the standing orders governing the operation of relevant committees of each House that evidence submitted to one be automatically passed to the other, to reduce the burden on external stakeholders of making dual submissions. We are confident that separate bodies working on the same subject matter would find it productive to share information informally and to move in step as far as is possible, following the model of comity between the Regulatory Reform Committee and the Delegated Powers and Regulatory Reform Committee.

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24 [House of Lords Delegated Powers and Regulatory Reform Committee \(GRB 0014 and GRB 0031\)](#) and House of Lords Secondary Legislation Scrutiny Committee ([GRB 0001](#) and [GRB 0030](#))

25 House of Lords Select Committee on the Constitution, *The 'Great Repeal Bill' and delegated powers*, Ninth Report of Session 2016–17, HL Paper 123, and [European Union \(Withdrawal\) Bill: interim report](#), Third Report of Session 2017–19, HL Paper 19

## 4 Amendments to the Bill

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37. Under the system we propose above, the key requirements on Ministers will not lie in legislation, but in a resolution of the House and in amendments to our Standing Orders. Breaches of the resolution—for instance, bringing a negative instrument into force before it has cleared scrutiny—would be monitored by the committee, which should be empowered to require the Minister concerned to give an explanation for any breach in oral evidence.

38. *Some statutory provision will be required to support the system we propose. While we do not specify the drafting of any amendment to the Bill, we consider that Schedule 7 to the Bill should be amended to provide that:*

- a) *Ministers shall present to Parliament, alongside each instrument to be made under the Bill, an explanatory memorandum setting out material relevant to the House’s consideration of the instrument, to include:*
  - *an explanation of how each provision of the instrument amends existing law, why each such provision is required and whether each such provision would make a substantial change to the effect of the law;*
  - *for regulations to be made under clause 7 of the Bill, an explanation of how the regulations will correct any failure of retained EU law to operate effectively;*
  - *for regulations to be made under clause 8 of the Bill, an explanation of how the regulations would prevent or remedy any breach of the UK’s international obligations arising from the UK’s withdrawal from the EU, and*
  - *for regulations to be made under clause 9 of the Bill, an explanation of why it is necessary for the proposed provision of the withdrawal agreement to be in force before, or on, exit day.*
- b) *The House of Commons may designate a committee to consider each instrument proposed to be made under the powers delegated in the Bill;*
- c) *Ministers shall have regard to the report of such a committee on any such instrument;*
- d) *In respect to a committee report on any such instrument, a Minister shall be under a duty*
  - i) *to provide such further information as the committee may require; and*
  - ii) *either*
    - *to revoke and re-make a negative instrument, or to withdraw and re-lay an affirmative instrument, in accordance with the committee’s recommendation, or*
    - *to lay before the House a statement as to why the Minister considers that an instrument subject to negative resolution should nevertheless come into force or an instrument subject to affirmative resolution should be proceeded with in its original form.*

# Conclusions and recommendations

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## The Bill's provisions for amendment of legislation

1. *We draw to the special attention of the House the report on the European Union (Withdrawal) Bill made by the Delegated Powers and Regulatory Reform Committee of the House of Lords, the committee of Parliament which specialises in the scrutiny and control of Government proposals for the delegation of powers in legislation. The views of this committee—which has, exceptionally, reported on the Bill before it has entered the Lords—merit the attention of the whole House.* (Paragraph 15)

## Parliamentary scrutiny of the Government's proposals for legislative change

2. In our view, the Government's proposals for scrutiny as provided for in the European Union (Withdrawal) Bill establish a system over which elected Members of Parliament have insufficient control over the means by which adequate scrutiny and consequential changes are to be achieved. We believe that it would be preferable to have a system for exercising control which could not give rise to any suspicion that the motives of the Government are to avoid scrutiny rather than ensure the means whereby from exit day the statute book contains a workable framework of law seamlessly transposed from existing EU law. (Paragraph 18)
3. Given the pressure of time and the need to establish a functioning system from the outset, we are not at present persuaded of any requirement for new and innovative structures to tackle the undoubted challenge for the House presented by the proposals in this Bill. (Paragraph 19)
4. As we continue our inquiry into the use of delegated legislation for the process of exit from the EU, we will further consider the adequacy of the House's existing structures for the control of delegated legislation, in particular in the context of the 'Brexit bills'—several of which were announced in the Queen's Speech of June 2017—which are intended to make substantive changes to existing legislation to reflect the Government's policy choices. (Paragraph 20)
5. We outline in this report a system to examine, and authorise the exercise by Government, of the powers it has claimed in the Bill to change existing law by regulations. We consider that the scrutiny system we propose will have achieved its aims if the House is thereby recognised:
  - to have overseen the implementation of all the necessary changes contemplated under the Bill by exit day;
  - to have taken its scrutiny responsibilities seriously;
  - to have taken ownership of the parliamentary processes;
  - to have represented the interests of constituents; and
  - to have improved the outcomes for the people of the UK. (Paragraph 21)

6. The aim we have outlined above can, we consider, best be achieved through a committee of the House which has an overview of the entire process of legislative change proposed and which has the capacity to swiftly develop both specialist expertise in the field and judgment as to which proposals made by the Government merit further examination. (Paragraph 22)
7. *In our view this requirement ought to be met by establishing a new committee which could adapt the working methods of the European Scrutiny Committee, a body which has long experience of examining legislative proposals and determining which of them are of sufficient political and/or legal importance to require further consideration by the House.* (Paragraph 23)
8. *We propose to invite the House to agree a scrutiny reserve resolution which would constrain Ministers from bringing any legislation into force unless and until it had first been cleared from scrutiny by the committee or had been considered in the manner recommended by the committee.* (Paragraph 25)
9. Key stakeholders without access to the drafting process may identify significant concerns with published drafts which cannot be effectively addressed through the present scrutiny process. (Paragraph 26)
10. *The committee we propose ought to be able to receive and consider representations made by interested organisations and individuals outside Parliament.* (Paragraph 26)
11. *In common with legislative provision in other Acts which employ a form of super-affirmative procedure, the committee to be established should consider issues raised by the drafting of each instrument. Where appropriate, the committee should recommend that an instrument either be withdrawn and re-laid in a more acceptable form or (if a negative) be revoked and re-made.* (Paragraph 27)
12. *The system we propose ought to be designed around the following key features:*
  - *The timely, effective and consistent consideration of all instruments laid before the House under the powers in the Bill;*
  - *A method for swift sifting of material to allow for the unimpeded passage of uncontroversial instruments;*
  - *A mechanism to bring to the attention of the House, for further debate, any instrument considered to have political or legal importance;*
  - *A route for stakeholders to express to the committee their views on the political importance and/or the drafting of the instrument;*
  - *Provision for the committee to challenge the Government on the content or the drafting of an instrument and where necessary to recommend amendments;*
  - *A requirement for the committee to have regard to the reports of the Joint Committee on Statutory Instruments, the committee specialised in technical scrutiny of delegated legislation;*

- *The strength and flexibility to work within the timetable constraints of leaving the EU by exit day while ensuring that changes to the statute book are thoroughly and consistently examined by Parliament, and*
  - *A time limit on the committee's operation: its functions should cease once it has cleared from scrutiny the last instrument to be laid before Parliament under the powers in the Bill. (Paragraph 28)*
13. *A commitment on the part of the Government to increased quality control of delegated legislation is welcome. We do not, however, consider that this prior scrutiny in Cabinet Committee can, or should, substitute for the scrutiny of delegated legislation in this House. (Paragraph 31)*
  14. *We recommend that the Government publish, as soon as possible, a statement on the process whereby delegated legislation under the Bill is to be processed and approved for presentation to Parliament, together with an outline schedule for the laying of instruments before the House. This schedule must be updated regularly and at a minimum within seven days of each meeting of the Parliamentary Business and Legislation Committee where relevant delegated legislation is considered. (Paragraph 32)*
  15. *Departments ought to aid effective scrutiny of their proposals by publishing in advance, wherever possible, exposure drafts of instruments for comment. (Paragraph 33)*

### Amendments to the Bill

16. *In order to balance the requirements of effective scrutiny and efficient despatch of business, decisions on the exercise of the scrutiny reserve ought to be taken by the committee which we propose within a defined period to be set out in its order of reference. The efficiency of the committee's operation will depend on the flow of instruments to be laid by the Government and the readiness of Departments to respond to any issues raised by the committee. Departments, and the Parliamentary Business and Legislation Committee, should therefore plan for a steady flow of instruments to be laid before Parliament, to allow the committee to schedule its programme and to avoid unnecessary peaks and troughs in its workload. (Paragraph 34)*
17. *Some statutory provision will be required to support the system we propose. While we do not specify the drafting of any amendment to the Bill, we consider that Schedule 7 to the Bill should be amended to provide that:*
  - a) *Ministers shall present to Parliament, alongside each instrument to be made under the Bill, an explanatory memorandum setting out material relevant to the House's consideration of the instrument, to include:*
    - *an explanation of how each provision of the instrument amends existing law, why each such provision is required and whether each such provision would make a substantial change to the effect of the law;*
    - *for regulations to be made under clause 7 of the Bill, an explanation of how the regulations will correct any failure of retained EU law to operate effectively;*

- *for regulations to be made under clause 8 of the Bill, an explanation of how the regulations would prevent or remedy any breach of the UK's international obligations arising from the UK's withdrawal from the EU, and*
  - *for regulations to be made under clause 9 of the Bill, an explanation of why it is necessary for the proposed provision of the withdrawal agreement to be in force before, or on, exit day.*
- b) *The House of Commons may designate a committee to consider each instrument proposed to be made under the powers delegated in the Bill;*
- c) *Ministers shall have regard to the report of such a committee on any such instrument;*
- d) *In respect to a committee report on any such instrument, a Minister shall be under a duty*
- i) *to provide such further information as the committee may require; and*
  - ii) *either*
    - *to revoke and re-make a negative instrument, or to withdraw and re-lay an affirmative instrument, in accordance with the committee's recommendation, or*
    - *to lay before the House a statement as to why the Minister considers that an instrument subject to negative resolution should nevertheless come into force or an instrument subject to affirmative resolution should be proceeded with in its original form. (Paragraph 38)*

# Formal Minutes

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**Wednesday 1 November 2017**

Members present:

Mr Charles Walker, in the Chair

Bob Blackman	Chris Elmore
Mr Peter Bone	Helen Goodman
Dan Carden	Mr Ranil Jayawardena
Bambos Charalambous	David Linden
Mr Christopher Chope	Nick Smith
Ronnie Cowan	Mr William Wragg
Nic Dakin	

Draft Report (*Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 38 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the First Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 15 November at 2.30 pm.]

## Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Wednesday 11 October 2017

*Question number*

**Rt Hon Dominic Grieve QC MP**

[Q1–11](#)

**Rt Hon Dominic Grieve QC MP**, and **Dr Ruth Fox**, Director and Head of Research and **Joel Blackwell**, Senior Researcher, Hansard Society

[Q12–16](#)

### Wednesday 18 October 2017

**Pete Wishart MP**, Scottish National Party Shadow Leader of the House of Commons

[Q17–33](#)

**Rt Hon Andrea Leadsom MP**, Lord President of the Council and Leader of the House of Commons, and **Mr Steve Baker MP**, Parliamentary Under-Secretary, Department for Exiting the European Union

[Q34–76](#)

### Wednesday 25 October 2017

**Rt Hon Keir Starmer QC MP**, Shadow Secretary of State for Exiting the European Union, and **Valerie Vaz MP**, Shadow Leader of the House of Commons

[Q77–118](#)

**Rt Hon Dominic Grieve QC MP**, and **Dr Ruth Fox**, Director and Head of Research and **Joel Blackwell**, Senior Researcher, Hansard Society

[Q119–135](#)

## Published written evidence

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The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

EUX numbers are generated by the evidence processing system and so may not be complete.

- 1 38 Degrees ([EUX0005](#))
- 2 Association of British Insurers ([EUX0004](#))
- 3 Clerk of the House of Commons ([EUX0010](#))
- 4 Dr Mike Gordon ([EUX0006](#))
- 5 Equality and Human Rights Commission ([EUX0007](#))
- 6 Professor Michael Dougan ([EUX0001](#))
- 7 Social Security Advisory Committee ([EUX0003](#))
- 8 The Equality and Diversity Forum ([EUX0002](#))
- 9 UK Finance ([EUX0009](#))
- 10 Unlock Democracy ([EUX0011](#))
- 11 Which? ([EUX0008](#))