



HOUSE OF LORDS

Select Committee on the Constitution

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Sessional report 2019–21

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Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session “to examine the constitutional implications of public bills coming before the House; and to keep under review the operation of the constitution and constitutional aspects of devolution.”

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Sessional report 2019–21

Introduction

1. The House of Lords Constitution Committee is appointed by the House “to examine the constitutional implications of public bills coming before the House; and to keep under review the operation of the constitution and constitutional aspects of devolution”. Accordingly, we conduct bill scrutiny, carry out in-depth policy inquiries and hold annual evidence sessions with holders of certain public offices whose work has an especial bearing on the constitution.
2. The aims of our sessional reports are:
 - to summarise the work we have undertaken during the session;
 - to assess the effectiveness of that work; and
 - to comment on any general matter which we consider important.
3. The 2019–21 session was dominated by Brexit and COVID-19. During the session we published 19 reports on bills and corresponded with ministers on a further four. We concluded our inquiry into the effectiveness of the Fixed-term Parliaments Act 2011 which we began in the previous session, completed a short inquiry on the United Kingdom Internal Market Bill and conducted a large inquiry into the constitutional implications of the COVID-19 pandemic. Towards the end of the session, we began a short inquiry on the revision of the Cabinet Manual and a longer inquiry on the future governance of the UK. We will continue this work in the new session.
4. As part of our regular programme of scrutiny, we took evidence from the President and Deputy President of the Supreme Court of the United Kingdom twice.¹ We heard evidence from the Lord Chief Justice² and the Lord Chancellor,³ including as part of the courts strand of our inquiry into the constitutional implications of COVID-19. We held an additional evidence session with the Lord Chancellor as part of our scrutiny of the United Kingdom Internal Market Bill.⁴

Fixed-term Parliaments Act 2011

5. In our report on the Fixed-term Parliaments Act 2011 (FTPA) we explored whether parliaments should have a fixed length and, if not, what the appropriate mechanisms were for bringing about an early general election. We focused on setting out the evidence and clarifying these issues to inform Parliament’s choices rather than making conclusive recommendations.⁵

1 Oral evidence from Lord Reed of Allermuir, President, and Lord Hodge, Deputy President, Supreme Court of the United Kingdom, 4 March 2020, [QQ 1–12](#), and 17 March 2021, [QQ 1–11](#)

2 Oral evidence from Lord Burnett of Maldon, Lord Chief Justice of England and Wales, 13 May 2020, [QQ 1–17](#)

3 Oral evidence from the Lord Chancellor and Secretary of State for Justice, 22 July 2020, [QQ 132–151](#)

4 Oral evidence from the Lord Chancellor and Secretary of State for Justice, 14 October 2020 [QQ 42–57](#)

5 Constitution Committee, *A Question of Confidence? The Fixed-term Parliaments Act 2011* (12th Report, Session 2019–21, HL Paper 121)

6. We concluded that repealing the FTPA without introducing a replacement provision was infeasible and undesirable. The FTPA is the only piece of legislation setting the length of a parliament, without which the current parliament would last indefinitely. Repealing the FTPA without replacement also risked bringing to the fore a contested legal debate about whether the prerogative power of the Monarch to dissolve Parliament would be revived, or whether the introduction of the FTPA abolished the power permanently. We concluded that any uncertainty about such a constitutionally important principle was undesirable and risked politicising the role of the Monarch.⁶
7. A joint committee of both Houses was subsequently appointed to consider a draft bill to replace the FTPA, which “makes express legal provision to revive the Monarch’s prerogative power to dissolve Parliament.”⁷ The joint committee reported in March 2021, including a recommendation to articulate clearly the Monarch’s role in the process.⁸

Constitutional implications of COVID-19

8. In May 2020 we began an inquiry into the constitutional implications of the COVID-19 pandemic. We focused on three areas: the impact on the courts, the impact on Parliament, and the use and scrutiny of emergency powers. In session 2019–21 we finished taking evidence on all three strands and published the first report, *COVID-19 and the Courts* (see below). We published our second and third reports, on the impact on Parliament, and the use and scrutiny of emergency powers, at the beginning of the 2021–22 session.

COVID-19 and the Courts

9. This report examined the workings of the courts and tribunals in response to the pandemic. We explored the adoption of remote hearings, the rising backlog of cases, deficiencies in court data and the future of the justice system. We concluded that the Government must take urgent steps to reduce the unacceptably high backlog of cases which has grown during the pandemic.⁹

COVID-19 legislative scrutiny

10. This session we scrutinised the emergency bills introduced by the Government in response to the COVID-19 pandemic.

Coronavirus Bill

11. The Coronavirus Bill was fast-tracked through both Houses to respond to the emerging threat of COVID-19. The Bill included provisions significantly to restrict civil liberties, including granting extensive delegated powers about detention, quarantine and free assembly.¹⁰ We concluded that the need to respond quickly to the pandemic constituted an exceptional circumstance that justified the passage of such significant measures, but reiterated our concerns about fast-tracking legislation.

6 Constitution Committee, *A Question of Confidence? The Fixed-term Parliaments Act 2011*, para 114

7 HM Government, Government response to the Constitution Committee’s report on the Fixed-term Parliament’s Act 2011, 4 December 2020: <https://committees.parliament.uk/publications/3841/documents/38846/default/>

8 Joint Committee on the Fixed-term Parliaments Act, *Report* (Session 2019–21, HC 1046, HL Paper 253)

9 Constitution Committee, *COVID-19 and the Courts* (22nd Report, Session 2019–21, HL Paper 257)

10 Constitution Committee, *Coronavirus Bill* (4th Report, Session 2019–21, HL Paper 44)

12. We welcomed the sunset provisions in the Bill and the cross-party agreement to reduce the length of these provisions from two years to six months. However, we recommended that the Government should consider amendments to modify and improve the legislation ahead of the six-month renewal vote, given the speed at which the Bill had been drafted.¹¹ We agreed with the Delegated Powers and Regulatory Reform Committee that, without the exceptional circumstances, sunset provisions, and mechanisms for parliamentary scrutiny, the broad delegated powers in the Bill would not have been acceptable.¹²

Corporate Insolvency and Governance Bill

13. The Corporate Insolvency and Governance Bill was introduced “to provide businesses with the flexibility and breathing space they need to continue trading”.¹³ The Bill was fast-tracked through both Houses in response to the pandemic. While we recognised that the temporary measures needed to respond to the exceptional circumstances may have warranted fast tracking, we found it was inappropriate to fast-track other, permanent, measures in the Bill.¹⁴ We recommended that these permanent provisions should be subjected to a sunset clause.
14. We were concerned by the retrospective provisions in the Bill and the broad Henry VIII power in clause 18 which allowed the Secretary of State to modify all “corporate insolvency and governance legislation.”¹⁵ We said that the Government needed to justify the use of retrospective provisions and assess their compliance with the rule of law. We recommended that clause 18 should be constrained so that it could be used only where such urgency was justified and that it should expire and not be renewed. Following our report, powers in the Bill were made subject to sunset clauses so that they could be exercised only to deal with the effects of COVID-19. The delegated power in clause 18 was amended in line with our recommendation so that it could be used only when the Secretary of State was satisfied that the situation was urgent.¹⁶

Business and Planning Bill

15. This Bill was designed to help businesses respond to the disruption caused by the COVID-19 pandemic. It contained measures on a range of subjects including pavement and alcohol licensing, vehicle licensing, construction working hours and the planning process.¹⁷ As with the other emergency bills, it was fast-tracked through both Houses and included permanent changes to the law. We recommended that permanent measures in the Bill should be subject to a sunset clause. The Bill was not amended by either House before it received Royal Assent.

11 Constitution Committee, *Coronavirus Bill* (4th Report, Session 2019–21, HL Paper 44), paras 8 and 9

12 Delegated Powers and Regulatory Reform Committee, *9th Report* (Session 2019–21, HL Paper 42)

13 Corporate Insolvency and Governance Bill, *Explanatory Notes*

14 Constitution Committee, *Corporate Insolvency and Governance Bill* (7th Report, Session 2019–21, HL Paper 76)

15 *Ibid.*, para 33

16 Department for Business, Energy & Industrial Strategy, Government response to the Constitution Committee’s report on the Corporate Insolvency and Governance Bill, 19 June 2020: <https://committees.parliament.uk/publications/1547/documents/15078/default/>

17 Constitution Committee, *Business and Planning Bill* (9th Report, Session 2019–21, HL Paper 101)

Brexit scrutiny

16. This session we produced 10 Brexit-related reports: one on the constitutional issues arising from the process of legislating for Brexit and nine on Brexit-related bills.

Brexit legislation: constitutional issues

17. In *Brexit legislation: constitutional issues* we analysed the constitutional issues raised in the process of legislating for Brexit,¹⁸ reflected on the legislative challenges of delivering Brexit and looked ahead to those still to come.
18. We observed that many of these bills were skeleton bills that provided ministers with broad delegated powers to create new policy and public bodies for the UK after Brexit. They included little or no detail on which policies they would be used to implement. In most cases they included Henry VIII powers allowing ministers to amend primary legislation with statutory instruments. We recommended that delegated powers should be included in bills only where their use could be clearly anticipated and defined. In the exceptional circumstances when broad delegated powers were necessary, they should be constrained in so far as possible.
19. We considered the impact of Brexit legislation on the devolution arrangements and found it “regrettable” that legislative consent from the devolved legislatures was not achieved for many of the bills.¹⁹ We noted that the reluctance and, in certain cases, refusal of devolved legislatures to consent to some of the bills had little impact on the legislative process in Westminster. We concluded that powers in Brexit bills that allowed for UK ministers to make delegated legislation in devolved areas were problematic. We recommended that these powers should include a requirement to consult devolved ministers or to seek their consent.
20. We recommended that ministers should make a statement to the House of Lords before the third reading of any bill that has not received legislative consent, setting out the issues and the efforts made to secure it. The Procedure and Privileges Committee endorsed our recommendation²⁰ and the House agreed it in October 2020.²¹ The first occasion it had effect was on 2 December 2020 for the third reading of the United Kingdom Internal Market Bill.²²

United Kingdom Internal Market Bill

21. Given the constitutional implications of the United Kingdom Internal Market Bill, we undertook a short inquiry on it.
22. The Bill provided for an internal market in the UK to replace the EU single market arrangements at the end of the UK’s implementation period.²³ We were concerned by the “unnecessarily heavy-handed”²⁴ approach taken by the Government to facilitating free trade in the UK. The Bill provided

18 Constitution Committee, *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71)

19 *Ibid.*, para 57

20 Procedure and Privileges Committee, *Fourth Report* (Session 2019–21, HL Paper 140), paras 40–43

21 HL Deb, 22 October 2020, [cols 1642–1644](#)

22 HL Deb, 2 December 2020, [col 760](#)

23 Constitution Committee, *United Kingdom Internal Market Bill* (17th Report, Session 2019–21, HL Paper 151)

24 *Ibid.*

the Government with powers to alter significantly the competences of the devolved administrations and to override future devolved legislation. It imposed new legal restrictions on the devolved administrations in the form of Market Access Principles and regarding mutual recognition and non-discrimination arrangements. We observed that the existing devolution arrangements were delicate and that the Bill risked undermining them. We recommended that these powers should be removed from the Bill or subjected to much clearer duties of consultation and joint decision-making with the devolved administrations.

23. We found the Bill unprecedented in setting out to break international law. Clauses 44 and 45 granted ministers extraordinary delegated powers to re-interpret and disapply parts of the Northern Ireland Protocol and the Withdrawal Agreement. The Secretary of State for Northern Ireland, Rt Hon Brandon Lewis MP, confirmed to the House of Commons that the Bill “does break international law in a very specific and limited way”.²⁵ We considered the Government’s intention to break international law a violation of the rule of law which, by setting a precedent, had the potential to jeopardise the UK’s observation of its international obligations more generally. We urged the Government to remove the provisions which authorised breaches of the UK’s international obligations under the Withdrawal Agreement. During its passage through the Houses, these provisions were removed from the Bill.²⁶

European Union (Withdrawal Agreement) Bill

24. The European Union (Withdrawal Agreement) Bill implemented the Withdrawal Agreement between the UK and the EU.²⁷
25. The Bill had significant implications for the devolution arrangements. Legislative consent was withheld by the Scottish Parliament and at the time of our report the Welsh Government had recommended that the Senedd not consent to the Bill. We observed that the Bill had specific implications for Northern Ireland as the Withdrawal Agreement contained the Northern Ireland Protocol. We recommended that the Government should set out what would be the process for consultation and engagement with the devolved administrations.
26. The Bill contained a range of delegated powers, including Henry VIII powers, intended to give effect to the Withdrawal Agreement. We agreed with the Delegated Powers and Regulatory Reform Committee²⁸ that, given the breadth and significance of these powers, they should be subjected to a sifting mechanism to scrutinise statutory instruments made under them.
27. The Bill raised constitutional concern by empowering ministers to order courts to depart from retained EU laws under clause 26. We were not convinced by the Government’s rationale for including this power in the Bill. We concluded that “allowing lower courts to reinterpret EU case law

25 HC Deb, 8 September 2020, [col 509](#)

26 HM Government, Government response to the Constitution Committee’s report on the United Kingdom Internal Market Bill, 23 December 2020: <https://committees.parliament.uk/publications/4256/documents/43295/default/>

27 Constitution Committee, *European Union (Withdrawal Agreement) Bill* (1st Report, Session 2019–21, HL Paper 5)

28 Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal Agreement) Bill* (1st Report, Session 2019–20, HL Paper 3)

risked causing significant legal uncertainty”.²⁹ We recommended that clause 26 should be removed from the Bill. Clause 26 was amended by the House of Lords to prevent the lower courts from departing from EU case law and requiring these courts to refer any decisions to do so to a higher court. However, these amendments were rejected by the House of Commons.

28. In our Brexit bills report we reflected on this and concluded that the Government should publish in draft any regulations it intends to make under the power, to ensure that substantive consultation can take place.

Private International Law (Implementation of Agreements) Bill [HL]

29. The Private International Law (Implementation of Agreements) Bill [HL] provided a new framework for incorporating international rules on private international law³⁰ in domestic law after the UK’s withdrawal from the European Union.³¹ We recognised the need for such framework but expressed concern about clause 2. That provided for a delegated power which allowed the Government to give effect to a category of international agreements via statutory instruments as opposed to Acts of Parliament. This would change a long-standing convention that international legal agreements which amend UK law are given domestic force by primary legislation.
30. We recommended that clause 2 be removed from the Bill and questioned why the Government had not consulted their advisory committee on private international law during the preparation of the Bill. The House of Lords removed clause 2 from the Bill at report stage, but the House of Commons reinstated it with related provisions. The Lords agreed to the Commons amendments and made further amendments, including to add a five-year sunset period to the regulation-making power that was extendable subject to the affirmative procedure. The Commons agreed to this amendment, among others.

Agriculture Bill

31. The Agriculture Bill addressed matters arising from the UK’s departure from the EU’s Common Agricultural Policy.³² Agriculture is a devolved matter. The Scottish Government recommended to the Scottish Parliament that it should consent to certain provisions in the Bill but withhold consent to others, including some relating to the World Trade Organisation Agreement on Agriculture, unless amendments were made. The UK Government maintained that these provisions did not engage devolved competence and so consent was not required. We concluded that the “UK Government must engage effectively with the devolved institutions on treaties that involve areas of devolved competence” and that if the UK Government had to rely on its ability to ensure that the Scottish Government complies with the UK’s international legal duties “it would indicate that intergovernmental relations had reached a low ebb”.³³

29 Constitution Committee, *European Union (Withdrawal Agreement) Bill* (1st Report, Session 2019–21, HL Paper 5), para 106

30 Private international law governs cases such as contractual disputes or family arrangements which engage cross-border parties or issues.

31 Constitution Committee, *Private International Law (Implementation of Agreements) Bill [HL]* (5th Report, Session 2019–21, HL Paper 55)

32 Constitution Committee, *Agriculture Bill* (8th Report, Session 2019–21, HL Paper 80)

33 *Ibid.*, paras 16–17

32. This Bill replaced a previous version of the Bill introduced in the 2017–19 session that included broad delegated powers, with little detail as to the policy use, some of which allowed for the creation of new criminal offences. We welcomed that the 2019–21 version of the Bill contained tighter restrictions and reporting requirements, and that the range of criminal offences that could be created had been reduced. Although the Bill remained skeletal in parts, we saw this as “evidence of the valuable effect that parliamentary scrutiny has on legislation and how constructive engagement by the Government can result in better law”.³⁴

Medicines and Medical Devices Bill

33. The Medicines and Medical Devices Bill created powers to amend and supplement the regulatory regime governing human and veterinary medicines and medical devices after the UK’s departure from the EU.³⁵ This had previously been regulated by EU law. The Bill provided for delegated powers to amend the regulatory framework at the end of the transition period, consolidated the enforcement provisions relating to medical devices, and allowed for sharing information held by the Secretary of State about medical devices. We recognised the need for an alternative regulatory regime but concluded that the delegated powers had few constraints on the extent of the changes that could be made, and that the exceptional justification required for such powers had not been provided. We recommended that the delegated powers be subjected to sunset clauses to allow Parliament to scrutinise a more detailed bill in future.
34. The Bill contained emergency powers to disapply existing health medicines regulation in certain situations to protect the public from serious risk. We recommended that these emergency powers should be subject to a time limit, periodic review and the made affirmative procedure. In response, the Government introduced “greater checks and balances in the exercise of delegated powers” in the Bill and subjected the emergency powers to the made affirmative procedure.³⁶

Immigration and Social Security Co-ordination (EU Withdrawal) Bill

35. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill ended free movement of persons under EU law and provided for the amendment of retained EU law on social security co-ordination.³⁷ This Bill, like many of the Brexit bills we scrutinised this session, was a skeleton bill that granted broad delegated powers, including Henry VIII powers. The Bill contained little detail on the intended policy use of these powers and insufficient safeguards and scrutiny processes. We concluded that the Government had failed to provide an acceptable justification for including such broad powers. We recommended removing clause 5, which empowered the Government to modify the EU Social Security Co-ordination Regulations retained under the 2018 Act. While amendments to place limits on the

³⁴ *Ibid.*, para 28

³⁵ Constitution Committee, *Medicines and Medical Devices Bill* (10th Report, Session 2019–21, HL Paper 119)

³⁶ Department of Health & Social Care, Government response to the Constitution Committee’s report on the Medicines and Medical Devices Bill, 23 December 2020: <https://committees.parliament.uk/publications/4257/documents/49187/default/>

³⁷ Constitution Committee, *Immigration and Social Security Co-ordination Bill* (11th Report, Session 2019–21, HL Paper 120)

powers under clause 5 were considered by the House of Lords, none were ultimately moved or agreed to.

36. We also noted that immigration law was already complex and that the provisions in this Bill were “worded in vague or subjective terms”.³⁸ The Bill threatened to add to this complexity. We reiterated a recommendation³⁹ that immigration law should be consolidated; the need for consolidation became more pressing as a result of this Bill.

Trade Bill

37. The Bill provided a legal framework for UK trade policy following the UK’s withdrawal from the European Union.⁴⁰ It replaced a Bill introduced in the 2017–19 session which did not pass. We reported on that Bill in October 2018 and made similar recommendations and criticisms of its successor.⁴¹ Clause 2 empowered UK ministers and devolved administrations to implement international trade agreements via secondary legislation. While the explanatory notes detailed constraints on this power, the Bill itself contained no such restrictions. We reiterated that these restrictions should be included in the Bill and were not persuaded by the Government’s position that it was sufficient for the power to be constrained presumptively rather than explicitly.⁴²
38. This was a skeleton Bill containing broad delegated powers. The Bill established the Trade Remedies Authority (TRA) but included little detail on its functions and powers. Instead, it gave the Secretary of State broad discretion as to its constitution, operations and appointment of members. We concluded that the skeletal approach to empowering the TRA was inappropriate and that it was unclear why the functions and powers of the TRA could not be set out in more detail considering that two years had passed since the introduction of the previous Bill.⁴³
39. We commended the agreement reached on legislative consent from the devolved legislatures to this Bill and expressed our hope that this process could be built on in future.

Fisheries Bill: Commons amendment 22

40. The Fisheries Bill provided a framework for fisheries management after the UK’s withdrawal from the EU’s Common Fisheries Policy.⁴⁴ The Bill was passed by the House of Lords and returned with amendments by the House of Commons. Commons amendment 22 inserted a ‘permissive extent clause’ which was not included when the Bill was first considered in the Lords. This amendment allowed for certain provisions of the Bill to be extended to the Channel Islands or the Isle of Man for the purpose of implementing

38 Constitution Committee, *Immigration and Social Security Co-ordination Bill* (11th Report, Session 2019–21, HL Paper 120), para 8

39 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), para 147

40 Constitution Committee, *Trade Bill* (15th Report, Session 2019–21, HL Paper 133)

41 *Ibid.*

42 Letter from Baroness Fairhead to the Chair, Trade Bill, 22 January 2019: <https://old.parliament.uk/documents/lords-committees/constitution/Correswithministers/Government%20response%20Trade%20Bill.pdf>

43 Constitution Committee, *Trade Bill* (15th Report, Session 2019–21, HL Paper 133), paras 15–16

44 Constitution Committee, *Fisheries Bill: Commons Amendment 22* (18th Report, Session 2019–21, HL Paper 166)

international obligations. We observed that the UK Government usually sought consent from the Crown Dependencies before it extended legislation to them and that in this case consent had not been given. We wrote to the minister outlining our concerns about the amendment and seeking clarification on the Government’s position.⁴⁵ In response, Lord Gardiner of Kimble, then Parliamentary Under Secretary of State for Rural Affairs,⁴⁶ said the clause would be used only “in the most extreme circumstances and after full consultation and the exhaustion of other options”.⁴⁷ We recommended that consent from the Crown Dependencies should be required prior to the use of these powers.

European Union (Future Relationship) Act 2020

41. The European Union (Future Relationship) Bill was published on 29 December 2020. It was fast-tracked through all its stages in both Houses the following day, receiving Royal Assent as the European Union (Future Relationship) Act 2020 on 30 December 2020.
42. The Act implemented the Trade and Cooperation Agreement⁴⁸ and the Security of Classified Information Agreement⁴⁹ (the Agreements)⁵⁰ between the UK and EU. It did so by:
 - (1) giving effect explicitly to certain provisions of the Agreements;
 - (2) creating wide-ranging delegated powers to give effect to the Agreements; and
 - (3) providing for the wholesale amendment of domestic law as necessary for their implementation.
43. We reported on the Bill on 29 December 2020, expressing regret that the Bill was published less than 24 hours before parliamentary scrutiny began. We observed that the fast-track process restricts parliamentary scrutiny, limits the possibility of amendments and potentially produces poor legislation.⁵¹ We agreed that the end of the transition period was an exceptional circumstance under which fast-tracking was acceptable. However, we disagreed with the Government’s view that post-legislative scrutiny was not suitable for this Bill.

45 Letter from the Chair to Lord Gardiner of Kimble on the Fisheries Bill: Commons Amendment 22, 28 October 2020: <https://committees.parliament.uk/publications/3214/documents/29763/default/>

46 Lord Gardiner of Kimble stepped down as a minister to become the Senior Deputy Speaker of the House of Lords in May 2021.

47 Letter from Lord Gardiner of Kimble to the Chair on the Fisheries Bill: Commons Amendment 22, 2 November 2020: <https://committees.parliament.uk/publications/3271/documents/30843/default/>

48 *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part* (24 December 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf [accessed 29 April 2021]

49 *Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland Concerning Security Procedures for Exchanging and Protecting Classified Information* (24 December 2020): https://ec.europa.eu/info/sites/default/files/draft_eu-uk_security_of_information_agreement.pdf [accessed 29 April 2021]

50 The Act also implements the Nuclear Cooperation Agreement. We do not consider the implementation of that Agreement in this report. *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy* (24 December 2020): https://ec.europa.eu/info/sites/default/files/draft_eu-uk_civil_nuclear_agreement.pdf [accessed 29 April 2021]

51 Constitution Committee, *European Union (Future Relationship) Bill 2020* (21st Report, Session 2019–21, HL Paper 205)

44. We returned to the European Union (Future Relationship) Act 2020 in a letter to the Cabinet Office in which we sought clarification about the Government’s intentions in respect of sections 29 and 31 of the Act.⁵² The Government responded over two months later, clarifying the intended effect of those sections.⁵³ Section 29 provides that domestic law has effect with the modifications that are required for the implementation of the Agreements. Those modifications apply only if and in so far as the Agreements are not implemented by other enactments. Section 31 grants a relevant national authority power to make secondary legislation for the purposes of implementing the Agreements.
45. Section 29 has introduced legal uncertainty. It does not define or set out the modifications that are required to implement the Agreements. Instead, it provides for the indeterminate modification of domestic law as required for the UK to comply with its international obligations under the Agreements.⁵⁴ The consequence is that determining the content of domestic law in any area covered by the Agreements becomes a complex process. In addition to reading the relevant legislation, a person seeking to identify the law would need to read the Agreements themselves, and then determine whether their contents have been implemented in domestic law. If not, by section 29 the domestic law must be treated as modified to the extent necessary. The extent to which modification is necessary for the UK to comply with its international obligations under the Agreements may itself be unclear.
46. It may be appropriate for section 29 to apply for a short period to give the Government time to introduce more precise legislation. However, section 29 is not time limited. It therefore renders domestic law uncertain for an indefinite period. This will inevitably result in litigation on whether the Agreements have been implemented and, if not, the extent to which modification of domestic law is necessary under the Agreements.
47. **We recommend that the Government commits to repealing section 29 of the European Union (Future Relationship) Act 2020 within a specified time—at the latest two years after the Act received Royal Assent (i.e. 30 December 2022). This period is sufficient for the Government to propose legislation setting out the precise modifications to domestic law that are necessary for implementing the Trade and Cooperation Agreement and the Security of Classified Information Agreement. Doing so will enhance legal certainty.**

Delegated powers and fast-track legislation

48. Many of the bills we reported on this session were skeleton bills, which included broad delegated powers, and some were fast-tracked through both Houses.
49. The Pension Schemes Bill [HL] was another example of a bill that included skeletal provisions and delegated powers. The Bill created a new type of pension scheme (collective money purchase benefits), gave new powers to the

52 Letter from the Chair to Lord True on the European Union (Future Relationship) Act 2020, 10 February 2021: <https://committees.parliament.uk/publications/4649/documents/46934/default/>

53 Letter from Lord Frost to the Chair on the European Union (Future Relationship) Act 2020, 20 April 2021: <https://committees.parliament.uk/publications/5688/documents/56095/default/>

54 More specifically, domestic law is modified by section 29 “so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement”.

Pensions Regulator and set out a legal framework for creating online pension dashboards.⁵⁵ We observed that the Bill contained broad delegated powers that we considered inappropriate. Most concerning was that Part 4 was skeletal and created regulation-making powers for online pension dashboards. We concluded that many of these powers could have been omitted until the policy had been fully prepared. We recognised the complexity of the issue and welcomed that the powers in Part 4 were subject to the affirmative procedure but concluded that complexity of the subject matter could not be an excuse for taking powers in lieu of policy development.

50. In September 2020, along with the Secondary Legislation Scrutiny Committee and the Delegated Powers and Regulatory Reform Committee, we wrote to Rt Hon Michael Gove MP, Chancellor of the Duchy of Lancaster, and Rt Hon Jacob Rees-Mogg MP, Leader of the House of Commons, on our concerns about the use of skeleton bills and skeleton provisions.⁵⁶ In response the Leader of the House of Commons agreed that “bills with substantial powers ... should not be a tool to cover imperfect policy development”; he would consider encouraging Secretaries of State “to minimise the use of delegated powers where possible and to ensure sufficient time is allowed at the outset for the development of policy”.⁵⁷
51. Another recurring theme was the Government’s resort to fast-tracking legislation. This session, fast-tracking was not limited to Brexit and COVID-19 emergency bills. The Terrorist Offenders (Restriction of Early Release) Bill was fast-tracked through both Houses to ensure that terrorist offenders were not automatically released before the end of their custodial term without the agreement of the parole board.⁵⁸ We concluded that fast-tracking this legislation restricted the time for parliamentary scrutiny and constrained the ability of other select committees to consider the Bill. During the Bill’s passage, at the start of the session, the House of Commons Home Affairs and Justice committees, and the Joint Committee on Human Rights, could not scrutinise the Bill as they were yet to be established.

Devolution

Abortion (Northern Ireland) Regulations 2021

52. The Committee does not generally report on secondary legislation but did so because of the constitutional issues raised by the Abortion (Northern Ireland) Regulations 2021.⁵⁹ The Regulations made provision for the Secretary of State to issue a “direction” to require the relevant authorities in Northern Ireland to take action to implement the recommendations in paragraphs 85 and 86 of a UN report made under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination

55 Constitution Committee, *Pension Schemes Bill [HL]* (2nd Report, Session 2019–21, HL Paper 22)

56 Letter from the Chairs of Constitution, DPRRC and SLSC Committees to Michael Gove MP, Chancellor of the Duchy of Lancaster, and Jacob Rees-Mogg MP, Leader of the House of Commons, on skeleton bills and skeleton provisions, 25 September 2020: <https://committees.parliament.uk/publications/2985/documents/28427/default/>

57 Letter from Jacob Rees-Mogg MP, Leader of the House of Commons, to the Chairs of Constitution, DPRRC and SLSC on skeleton bills and skeleton provisions, 19 October 2020: <https://committees.parliament.uk/publications/3206/documents/29704/default/>

58 Constitution Committee, *Terrorist Offenders (Restriction of Early Release) Bill* (3rd Report, Session 2019–21, HL Paper 23)

59 Constitution Committee, *Abortion (Northern Ireland) Regulations 2021* (23rd Report, Session 2019–21, HL Paper 269)

against Women (CEDAW). The CEDAW recommendations concerned the legalisation of abortion in Northern Ireland.

53. While noting the circumstances in which the Government was legislating in this area, we observed that abortion policy was devolved to the Northern Ireland Assembly, which was considering a bill in the same area. We concluded that the prospect of different laws on abortion operating in Northern Ireland would cause substantial legal and political difficulties and risked undermining the devolution arrangements. We urged the Government and the Northern Ireland Executive to adopt a more constructive approach to resolving this matter.

Other legislative scrutiny

Parliamentary Constituencies Bill

54. The Parliamentary Constituencies Bill amended the Parliamentary Constituencies Act 1986 to provide for the number of parliamentary constituencies, the setting of parliamentary constituency boundaries and the conduct of reviews by the four UK Boundary Commissions.⁶⁰ The Bill provided that Boundary Commission reviews would in future be implemented automatically, by Orders in Council, rather than requiring parliamentary approval. We welcomed this “constitutionally appropriate”⁶¹ decision to remove Parliament’s power to block Boundary Commission recommendations. We recognised that automatic implementation of the commissions’ recommendations would protect against political influence only if the commissions were genuinely independent. We concluded that the House might wish to consider what safeguards would be required to ensure the independence of the commissions. During the Bill’s consideration in the House of Lords, a new clause was inserted to alter the way Commissioners were appointed to safeguard their independence. However, this clause was not supported by the Government and was removed by the House of Commons.

Domestic Abuse Bill

55. The Government introduced the Domestic Abuse Bill to improve the effectiveness of the justice system in protecting victims of domestic abuse, bringing perpetrators to justice and strengthening the support available for victims.⁶² In our report we welcomed the extensive public consultation and pre-legislative scrutiny by a joint committee that preceded the bill.⁶³ We observed that parts of the Bill made potentially broad changes to criminal law on matters unrelated to domestic abuse. Clause 65 put the decision in *R v Brown* on a statutory footing and clauses 66 and 67 extended the circumstances in which a UK national, or a person habitually resident in the UK, could be prosecuted for violent offences committed abroad.⁶⁴ We concluded that these provisions were necessary in the context of domestic abuse but that the House might wish to consider whether the opportunity to scrutinise these provisions would be improved if they were provided for in separate criminal justice legislation.

60 Constitution Committee, *Parliamentary Constituencies Bill* (13th Report, Session 2019–21, HL Paper 122)

61 *Ibid.*, para 4

62 Constitution Committee, *Domestic Abuse Bill* (14th Report, Session 2019–21, HL Paper 128)

63 Joint Committee on the Domestic Abuse Bill, *Draft Domestic Abuse Bill* (First Report, Session 2017–19, HL Paper 378, HC 2075)

64 *R v Brown* [1993] UKHL 19

56. In response the Government emphasised that the inclusion of clauses 65, 66, 67 was justified in the context of domestic abuse.⁶⁵ The Government stated that clause 65 meant that defendants could no longer rely on the defence of “rough sex gone wrong” and that, given the extensive debate it received, it would not have been subjected to improved scrutiny in a criminal justice bill.

Counter-Terrorism and Sentencing Bill

57. The Counter-Terrorism and Sentencing Bill provided for changes to the sentencing and release of terrorist offenders and allowed for greater monitoring of terrorist offenders following their release from prison.⁶⁶ We considered the Bill to be of constitutional significance because of its encroachment on civil liberties and retrospective changes to the sentencing of terrorist offenders. We recommended that the House should consider whether the Government had provided adequate justifications for the retrospective effect and for subjecting individuals to Terrorism Prevention and Investigation Measures without having been convicted of any offence. We concluded these Measures represented a substantial interference with the liberty of those subject to them. The Government subsequently tabled amendments to raise the burden of proof for imposing a Measure, and to require the Independent Reviewer of Terrorism Legislation to produce an annual report on their operation.

Covert Human Intelligence Sources (Criminal Conduct) Bill

58. The Covert Human Intelligence Sources (Criminal Conduct) Bill authorised covert human intelligence sources (CHIS) to participate in conduct that would otherwise constitute a criminal offence.⁶⁷ We welcomed the clarification and legitimacy the Bill brought to the rules on CHIS but concluded that the purposes for which authorisations may be granted and the bodies empowered to authorise criminal conduct were too broad. We recommended that the House may wish to consider whether authorisation should require more specific justification and whether it was appropriate for all the bodies listed in the Bill to authorise criminal conduct. We observed that there was no requirement in the Bill for prior authorisation of criminal conduct and concluded that authorisation should be subject to prior judicial approval. Where prior judicial approval was not possible, we recommended that authorisation should be sought as soon as reasonably possible afterwards. An amendment was tabled during the House of Lords report stage, to require prior judicial approval for all criminal conduct, including provision for urgent cases, but this was not agreed to by the House.

Overseas Operations (Service Personnel and Veterans) Bill

59. This Bill concerned legal proceedings involving service personnel on overseas operations. It sought to introduce a statutory presumption against prosecution after five years, restrict the time limit for bringing civil actions and impose a duty on the Secretary of State to consider derogating from the European Convention of Human Rights (ECHR) in certain circumstances.⁶⁸

65 HM Government, Government response to the Constitution Committee’s report on the Domestic Abuse Bill, 14 October 2020: <https://committees.parliament.uk/publications/3018/documents/28594/default/>

66 Constitution Committee, *Counter-Terrorism and Sentencing Bill* (16th Report, Session 2019–21, HL Paper 134)

67 Constitution Committee, *Covert Human Intelligence Sources (Criminal Conduct) Bill* (19th Report, Session 2019–21, HL Paper 174)

68 Constitution Committee, *Overseas Operations (Service Personnel and Veterans) Bill* (20th Report, Session 2019–21, HL Paper 186)

We observed that the Bill's provisions setting out the factors prosecutors must take into account when deciding when to prosecute and the imposition of a duty to consider derogation would have little, if any, substantive effect. Part 2 imposed a time limit for when a civil action relating to overseas operations can be brought and amended the rules governing the court's discretion to extend these time limits. We recommended that the House question whether Part 2 was compatible with the principle of access to justice and recommended that the Government should set out why it was inappropriate for the court to exercise its discretion to extend time limits.

60. Under Schedule 1 the presumption against prosecution applied to most war crimes and crimes against humanity. We concluded that the House might wish to seek the Government's reason for their inclusion. The House subsequently agreed Government amendments to exclude war crimes from the presumption against prosecution and removed the clause on derogation from the ECHR.