Written evidence submitted by Public Law Project

Summary

1. This is a Public Law Project briefing on the ESC's inquiry into retained EU law. It is addressed to questions 1, 2 and 3 of the Committee's call for evidence. In particular this briefing examines the proposal from the Government that it will: "look at developing a tailored mechanism for accelerating the repeal or amendment of retained EU law". [1]

2. Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.

3. The Government has said it wishes to "provide a mechanism to allow retained EU law to be amended in a more sustainable way to deliver the UK's regulatory, economic and environmental priorities".[2] It is not presently known in what form this mechanism will take.

4. This briefing contends that it would be constitutionally inappropriate for a Bill to give the Government a broad general power to amend all categories of retained EU law by Statutory Instrument. Such a power is without precedent in the UK's legal system and would constitute an astonishing transfer of legislative competence from Parliament to the Executive.

5. Matters of former EU competence strike at the heart of the type of society the UK wants to be. They deal with matters of digital regulation, equality, labour law, agriculture, the environment and food safety among many others. It is therefore important that substantial changes to retained EU law are made through a considered parliamentary process that allow for full consultation, debate and democratic participation.

6. This briefing makes five key points about any potential fast-track procedure to amend retained EU law:
   a) Not all retained EU law suffers from a democratic deficit;
   b) Delegated legislation made under any proposed fast-track procedure should not be used to create policy;
   c) Different categories of retained EU law need different powers of amendment;
   d) Changes to retained EU law must be made in subject-matter specific Acts because any general power to amend retained EU law would be necessarily broad and would undermine parliamentary sovereignty; and
   e) Parliamentary scrutiny of delegated legislation alone cannot provide a sufficient check on overly broad delegated powers.

Not all EU law suffers from a democratic deficit

7. A general power to amend retained EU law has been justified on the basis that European law is democratically less legitimate than law made in the UK and therefore is deserving of more easy

[1] HC Deb 16 Sep 2021 vol 700, col 1149.
[2] HM Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU*, January 2022, p. 32.

amendment. Lord Frost has spoken of the risks of giving "undue precedence to laws derived from EU legislation over laws *made properly* by this Parliament".[3] This does not recognise that there are many areas of European law where the UK took the lead in the formation of that law and succeeded in steering through changes that were in the UK's best interests. Additionally, more recent EU law has been made using ordinary law-making procedures where UK MEPs in the EU Parliament had a say.

8. Furthermore, many important areas of EU derived law in the UK such as equality law or environmental law are policy areas in which it is highly likely the UK would have legislated independently had it not been in the EU at the time. These laws should not therefore be amended simply on the basis that they were within EU competence when it is likely the UK would have made the same reforms contemporaneously.

Delegated legislation made under the proposed fast-track procedure should not be used to create policy;

9. The Government's 'Benefits of Brexit' policy paper suggests that the power to amend retained EU law will only apply to matters of technical detail and not policy areas. While this sounds promising, in effect this distinction can be difficult to implement in practice. Many areas which appear to be technical in nature can have serious substantive policy effects.

10. For instance, the EU has requirements to review minimum residue levels of pesticides within 12 months of an active substance being authorised.[4] The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019 extended the 12-month review period to 36 months.[5] Those regulations also stated that current pesticides approvals may be extended further 'where the competent authority considers it necessary.'[6] These appeared to be minor technical changes to the law but in effect they meant that the UK would not be applying the latest scientific advice because pesticide products would exist on the market for longer and longer periods.

11. Furthermore it is the case that many other Brexit statutory instruments[7] were used to make policy changes despite the Government stating during the passage of the EU Withdrawal Act that it would "not be a vehicle for policy changes".[8] **Policy changes to retained EU law should only be implemented in primary legislation** where there can be democratic discussion on the specific sectors regulated by EU law and whether there are good reasons for change on policy grounds.

Different categories of retained EU law need different powers of amendment

12. Retained EU law in the UK comprises:

[3] HC Deb 16 Sep 2021 vol 700, col 1149.
[4] Regulation of the European Parliament and of the Council (EC) No 396/2005 of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin [2005] OJ L70/1.
[5] Explanatory Note to The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019 [7.25].
[6] Explanatory Note to The Pesticides (Maximum Residue Levels) (Amendment etc.) (EU Exit) Regulations 2019 [7.25].
[7] I define Brexit statutory instruments/regulations as all those where the explanatory memorandum stated the instrument was being made to facilitate the UK's departure from the EU.
[8] See foreword by Rt Hon David Davis MP, Secretary of State for Exiting the European Union, to Legislating for the United Kingdom's withdrawal from the European Union (Cm 9446 2017) 7. See also paras 3.10 and 3.17 of the White Paper and para 14 of the Explanatory Notes.

1. EU derived direct domestic legislation under s 2 of the EU Withdrawal Act ('EUWA') which is derived from primary EU law and in the UK is comprised of both Acts of Parliament and Statutory Instruments made under s 2 of the European Communities Act;
2. Direct principal legislation under s 3(2) of EUWA which is EU secondary law made up of EU regulations and decisions;
3. Direct minor legislation under s 3(2) of EUWA which is EU tertiary legislation that is analogous to delegated legislation in the UK; and
4. Directly effective residual rights, powers, liabilities, obligations, restrictions, remedies and procedures under s 4 of EUWA.

13. The different sources of EU law i.e. primary, secondary or tertiary correspond to its level of status and importance within the EU system. The Government's 'Benefits of Brexit' Policy Paper does not state whether the new proposed powers of amendment to retained EU law will apply to all types of retained EU law or will distinguish by its source.

14. EU derived domestic legislation in particular covers a wide range of policy areas that govern every aspect of daily life in the UK from the Equality and Data Protection Acts to food and product safety, net neutrality laws, labour laws, copyright regulation, air and water quality regulations and land and marine habitat conservation laws.

15. **Any proposed power to amend retained EU law needs to distinguish between primary, secondary and tertiary sources of EU law and should not treat them as all equally amendable by delegated legislation.** The categories of retained EU law were deliberately decided upon when the EUWA was drafted and the hierarchy of retained EU law dictates how easily provisions of retained EU law can be modified. For example at present it is more difficult to repeal retained direct principal EU legislation than retained direct minor EU legislation. This was a carefully struck balance which aimed to ensure legal continuity while also allowing for future evolution of retained EU law.

16. If all retained EU law became equally vulnerable to amendment this would lead to inconsistencies whereby Acts of Parliament that contained EU law would be more easily amendable than any other Act of Parliament simply by virtue of covering a policy area that had been an EU competence.

17. Furthermore, a power which proposed to 'bite' by amending 'retained EU law' would lead to further uncertainty. It would not be clear if any part of an Act of Parliament or SI that contained EU law would be amendable or in fact only those provisions of the Act that were derived from retained EU law. Many Acts of Parliament contain a mix of provisions, only some of which are derived from the EU.

18. Additionally it is not clear when the definition of retained EU law would stop 'biting' i.e would there be a point at which a provision had been amended sufficiently that it no longer had the quality of 'retained EU law' or would its status as retained EU law be enduring based on the original provenance of the provision?

A broadly drafted power would undermine parliamentary sovereignty

19. The Public Law Project is concerned that the proposed fast track procedure could take the form of a Bill with a broadly worded delegated power. Broadly worded powers are essentially a "huge transfer of legislative competence from Parliament to the Executive".[9] **To avoid this we recommend that**

changes to retained EU law are made in or under subject-matter specific Acts.

20. Broadly worded delegated powers undermine parliamentary sovereignty by enabling the Executive to make laws with minimal constraints due to the wide empowering provision. Furthermore broadly worded delegated powers serve to oust the court's supervisory function. The Constitution Committee has stated that more narrowly drafted powers offer the ''reassurance that the exercise of the power is more obviously litigable".[10] Broad delegated powers therefore prevent both Parliament and the Courts from acting as a check on Executive power.

21. We echo the words of the Hansard Society that it is "unclear how such a power could be drafted without it being excessively broad and thus transferring huge amounts of power from Parliament to the Executive".[11] We also echo the Hansard Society's statements that both the section 8 EUWA power to 'correct deficiencies' or the section 2(2) ECA power to implement EU law obligations were textually constrained. Whilst critics felt the powers were still used in ways that stretched the ordinary meanings of the provisions, "neither could be used to simply enact whatever policy the executive wished".[12]

22. A general power to make policy in areas of retained EU law would be necessarily broad because retained EU law in the UK covers such a wide variety of subject matters. Any one power that could allow for amendment in all of these different areas would have to be extremely wide to do so. Additionally, as the Hansard Society have pointed out, the Government's 'Benefits of Brexit' policy paper lists many different proposed changes to retained EU law from enabling a "secure independent digital marketplace" to "a new system of regulation to ensure the sustainability of English football" to a host of other affirmative policy proposals.[13] A power that could implement these many varied policy goals would be extraordinary in its breadth.

23. A wide delegated power for the Executive to make law on any area of former EU competence would in the words of the Hansard Society "risk perpetuating and entrenching the lack of control that Parliament has over policy decisions in areas previously covered by EU law which would create a further democratic deficit".[14] New areas of policy are deserving of scrutiny and democratic debate via the primary legislation process. One of the stated purposes of taking competence back from the EU was to put law-making power back in the hands of the legislature but a wide delegated power would instead enable Executive control.

24. **It is also crucial that any power to amend retained EU law that is introduced is made time limited.** If the power was indefinite then this would be giving the Executive an enduring power to amend any area of law that was within EU competence with virtually no parliamentary check. That would be an unprecedentedly wide power that would undermine any attempts by the legislature to make law in areas of EU competence while such a wide delegated power remained on the statute books.

---

[9] Constitution Committee, *The 'Great Repeal Bill' and delegated powers* (9th Report, Session 2016–17, 123) [47].
[10] Constitution Committee, *9th Report; European Union (Withdrawal) Bill* (HL 2017-2019, 69) [163].
[11] Hansard Society, *Evidence to the European Scrutiny Committee Inquiry into Retained EU Law*, 25 February 2022.
[12] Hansard Society, *Evidence to the European Scrutiny Committee Inquiry into Retained EU Law*, 25 February 2022.
13 HM Government, The Benefits of Brexit: How the UK is taking advantage of leaving the EU, January 2022, p. 44.
14 Hansard Society, Evidence to the European Scrutiny Committee Inquiry into Retained EU Law, 25 February 2022.

Parliamentary scrutiny of delegated legislation alone cannot provide meaningful oversight for overly broad delegated powers

25. The UK's system of scrutiny of delegated legislation does not have the capacity to provide proper parliamentary oversight for powers of wide breadth and scope. Delegated legislation in the UK is 'virtually invulnerable to defeat'.[15] Only 17 SIs have been voted down in the last 65 years and the House of Commons has not rejected an SI since 1979.[16] Not a single SI was defeated during the process of legislating for Brexit or Covid-19. Because SIs are unamendable, MPs and Peers can feel as if they cannot vote down an SI with problematic provisions because the instrument in its entirety will be lost. **It is recommended that if a general power to amend retained EU law is instituted then MPs and Peers are given a 'conditional' power of amendment to SIs made under it whereby Members could indicate the changes they would need to see in order to vote to approve the instrument.**

26. Furthermore instruments made under any new power may be dealing with important and highly complex matters of policy and former EU competence. The delegated legislation system is ill-suited to managing this.

27. During the process of legislating for Brexit and Covid-19, explanatory material was of a poor quality and had to be frequently replaced. The SLSC pointed out that between July and September 2021, 12.5% of Covid-19 explanatory memoranda had to be withdrawn for errors when the benchmark is 5%.[17] Similarly 15% of the explanatory material for all Brexit SIs required replacement.[18] The government also laid no Impact Assessments for Covid-19 SIs and failed to publish many during the Brexit process.[19]

28. The work of fully understanding instruments or providing the democratic debate and discussion of them that is required will be hampered if the poor supporting material that was a hallmark of the Brexit and Covid-19 delegated legislation processes continues for SIs made under any new powers. **We recommend that some sort of sanction is imposed on Departments which fail to publish explanatory and supporting material at the same time that the instrument is published. We also recommend that any instruments are reviewed in subject matter specific committees rather than general Delegated Legislation Committees, where the reviewing MPs and Parliamentarians will have more subject matter expertise.**

29. There is no formalised process of consultation for Statutory Instruments. A lack of consultation for Brexit and Covid-19 SIs resulted in some of those instruments being later withdrawn or replaced after feedback from the sector and even one successful judicial review challenge for lack of consultation**.[20] It is recommended that significant instruments made under any proposed power are published in**

[15] Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing 2018)
[16] Hansard Society,'Westminster Lens: Parliament and delegated legislation in the 2015–16 session' (2017) 5.
[17] Secondary Legislation Scrutiny Committee *31st Report of Session 2019–21* (HL, 2019-21, 153)
[18] Secondary Legislation Scrutiny Committee *60th Report of Session 2017-19* (HL, 2017-2019, 420) at [11].
[19] Katie Lines *18 Months of COVID-19 Legislation in England: A Rule of Law Analysis* (16 October 2021, Bingham Centre for the Rule of Law) and J Tomlinson and A Sinclair *Plus ca change? Brexit and the Flaws of the Delegated Legislation System* (Public Law Project, 2020) 25.
[20] *R (on the Application of Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577

draft and allow for an extended period of consultation prior to their being laid in parliament.

30. It is unlikely that parliamentary time will allow for sufficient scrutiny. By way of example, during the process of EU Exit the Aviation Safety (Amendment etc) (EU Exit) Regulations 2019 were 146 pages long and were debated for 21 minutes in the House of Commons. The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019, SI 2019/710 were 26 pages long and made 36 different amendments to existing laws which Lord Tunnicliffe described as having "no themes or interrelationship" and were debated for 11 minutes in the House of Commons.[21]

31. **Where SIs are appropriate, it will be important to set clear guidelines for which are subject to the negative procedure, which the affirmative, and which have additional measures**. **We also recommend that sifting committees in the Commons and Lords are instituted for negative procedure SIs.** This helps to ensure that only more limited and technical instruments are laid using the negative procedure and those deserving of upgrade to the affirmative resolution procedure are identified.

[21] HL Deb 21 March 2019, vol 796, col 1576.