

## The EU (Withdrawal) Bill and the Rule of Law Expert Working Group

Third Briefing for Members of Parliament for  
Days 6 and 7 of Committee Stage (Tuesday 12<sup>th</sup>  
and Wednesday 13<sup>th</sup> December):

Clauses 7-9, 17(1) and related Schedules

### What this Note is for:

A group of experts, convened by the Bingham Centre for the Rule of Law and the Constitution Unit, and chaired by The Rt Hon Dominic Grieve QC MP, is meeting regularly to consider how the EU (Withdrawal) Bill can be improved to make it more compatible with the UK's constitutional commitment to the Rule of Law (for full list of members see back page). This third briefing for parliamentarians outlines the most significant Rule of Law issues considered by the Expert Working Group to be raised by the Bill's delegated powers in Clauses 7-9, 17(1) and related schedules. **This Briefing Note seeks to:**

- **Inform Members of Parliament** about the most significant Rule of Law issues raised by Clauses 7-9, 17(1) and related Schedules of the Bill
- **Identify a number of questions** that should be asked of the Government in relation to Clauses 7-9, 17(1) and related Schedules during the course of debate in Parliament to seek clarification.

**Please note:** This Briefing does not address parliamentary scrutiny mechanisms. However, the Hansard Society have published a Briefing on that subject, which is available [here](#).

## Introduction – Delegated Powers and the Rule of Law

The Bill's provisions on delegated powers raise a number of Rule of Law concerns, particularly regarding three components of the rule of law.<sup>1</sup> First, **legality** requires the objectives, content and scope of delegated powers to be defined explicitly in a legislative act.<sup>2</sup> Second, **legal certainty** requires all legislation (including delegated legislation) to be accessible, its effects foreseeable and its content stable so that any changes are preceded by a 'fair warning'.<sup>3</sup> Third, the rule of law seeks to **prevent the abuse of power** by ensuring that there are clear restrictions on discretionary powers in law and mechanisms to 'prevent, correct and sanction the abuse of discretionary powers'.<sup>4</sup>

From the start, it has been generally recognised that Brexit would require the granting of relatively wide delegated powers, as the **House of Lords Constitution Committee acknowledged** in its March 2017 report.<sup>5</sup> Therefore, the focus of this Briefing Note is on the scope of the delegated powers in the Bill rather than their existence. From a Rule of Law perspective, the scope of the delegated powers is important for several reasons. For example, the scope will determine how much law-making is done in this way, and the nature of the legal uncertainty or problems of legality or abuse of powers that could arise. From the perspective of

**parliamentarians**, the scope of powers will determine how much law-making power can be exercised by the Executive as opposed to Parliament. The Briefing focuses on powers within the Bill that give rise to the most serious rule of law concerns: Clauses 7-9, 17(1) and related schedules.

## 1. Scope of Delegated Powers: Clauses 7-9 and 17(1)

The powers in **Clause 7(1)** are triggered when a Minister considers it “appropriate” to “prevent, remedy or mitigate” a “failure of retained EU law to operate effectively” or “any other deficiency in retained EU law” and the failure or deficiency is “arising from the withdrawal of the United Kingdom from the EU”. A non-exhaustive list of types of situation in which there could be said to be a ‘deficiency’ is provided in **Clause 7(2)**. The reach of Clause 7 is extensive. It gives Ministers the power to make “any provision that could be made by an Act of Parliament”. The broad and subjective nature of the terms used to frame this trigger have attracted considerable attention.

The meaning of “failure to operate effectively” and “deficiency” are not defined by the Bill. To prevent the Clause 7 power from being overly broad, and to safeguard against abuse of powers, clear definitions of these terms are important. Alternatively, turning the list of deficiencies in Clause 7(2) into a closed list could achieve that Rule of Law goal, as well as enhancing legal certainty. The **House of Lords Constitution Committee** has expressed a concern that the Bill does not guard against the use of Clause 7 to make legal changes ‘in significant policy areas’.<sup>6</sup> The **House of Lords Delegated Powers and Regulatory Reform Committee** shares this concern.<sup>7</sup>

There has also been disagreement about whether replacing ‘appropriate’ in Clause 7(1) with ‘necessary’ would provide more objectivity and certainty. This is the recommendation of both the **House of Lords Constitution Committee**<sup>8</sup> and the **House of Lords Delegated Powers and Regulatory Reform Committee**.<sup>9</sup> In addition, the Expert Working Group discussed the possibility of subjecting the Minister’s choice of remedy to a proportionality test that would ensure, e.g., that any remedy chosen is proportionate to the policy objective at issue.

Similar powers to make ‘appropriate’ legal changes are given in **Clause 8** to remedy or prevent a breach of the UK’s international obligations, **Clause 9** to implement a withdrawal agreement, and **Clause 17(1)**, to make legal changes ‘in consequence of this Act’. The same issues apply. In addition, some specific concerns have been raised in relation to individual powers. For example, **Clause 9** has a sweeping reach that would allow Ministers to amend any Act of Parliament passed before the session in which the Withdrawal Act is passed, including the Withdrawal Act itself. The **House of Lords Delegated Powers and Regulatory Reform Committee** has described this as an “inappropriate delegation of power”<sup>10</sup> because, for example, it gives Ministers the power to remove or modify the safeguards that currently apply to delegated powers under the Bill. Finally, the **House of Lords Delegated Powers and Regulatory Reform Committee** has argued that the power to make consequential provision under **Clause 17(1)** should not apply to modifying retained EU law. To allow it to do so would duplicate the power in Clause 7, without being subject to the safeguard of the two-year limitation period in that clause.<sup>11</sup>

### Questions the Government needs to answer:

- Q1.1 Can the Minister explain how the term 'appropriate' should be interpreted by Ministers in Clauses 7, 8 and 9?
- Q1.2 Can the Minister define the terms 'failure...to operate effectively' and 'deficiency', and explain why these are not clearly defined in the Bill?
- Q1.3 Does the Minister agree that the open list of possible types of 'deficiency' in Clause 7(2) risks causing legal uncertainty, and that a closed list would be preferable?
- Q1.4 Can the Minister indicate what guidance will be provided to Ministers regarding how to exercise their discretion in choosing a remedy for failures or deficiencies have been identified? On this key matter, should the Bill not provide a proportionality test?
- Q1.5 Can the Minister explain under what circumstances it might be desirable for the power in Clause 9 to be used to amend the Withdrawal Act itself? Should this power not be restricted, requiring the Withdrawal Act to be amended by primary legislation?
- Q1.6 Can the Minister explain why a two-year restriction period does not also apply to the power in Clause 17(1) to make consequential provision?

## 2. Sub-delegation of Powers and Tertiary Legislation

The main delegated powers in the Bill would allow Ministers to confer legislative power on public authorities (existing or newly created).<sup>12</sup> This is known as sub-delegation. Sub-delegated powers enable the recipient to make what is known as 'tertiary legislation' (in contrast to secondary legislation made by the person or body to whom power is delegated by an Act of Parliament). The **House of Lords Delegated Powers and Regulatory Reform Committee** has expressed concern over the sub-delegation in the Bill, noting that even the wide powers in the European Communities Act 1972 do not permit such delegation.<sup>13</sup> Because tertiary legislation need not be by statutory instrument, these delegated powers under the Bill can escape the publication and laying requirements of the Statutory Instruments Act 1946, but still become law. This makes it more difficult for parliamentarians and others to undertake timely scrutiny of tertiary legislation, and the absence of any guarantee of timely publication may present a Rule of Law problem in terms of accessibility of the law – and is another issue that the Lords Committee expressed concern about.<sup>14</sup> Moreover, some query whether it is appropriate to sub-delegate legislative power, suggesting that sub-delegation should only be possible with respect to the exercise of executive discretion.

In addition, the scope of these sub-delegated powers raises concern for the Rule of Law requirements of legality and legal certainty. Under the Bill, Ministers are able to sub-delegate as much power as they are given themselves, but the recipients of sub-delegated powers might include public authorities which are not accountable to Parliament in the same way as Ministers. The Government has indicated that it does plan to sub-delegate powers to independent bodies such as regulators, but only "where existing constitutional arrangements mean that it is more appropriate for the power to be exercised independent of political control".<sup>15</sup> However, the Bill does not reflect this, and future governments could take a different approach.

There are no time limits on the sub-delegated powers under the Bill because **Schedule 8, paragraph 28** provides that the expiry of time limitations that apply to delegated powers does not affect “any power conferred by regulations made at or before that time”. This raises an obvious risk that the time limits applicable to particular Clauses may be circumvented or effectively invalidated.

#### **Suggested Questions for Discussion**

- Q2.1 Can the Minister explain why it is necessary to sub-delegate legislative powers in the bill? Should any sub-delegation not be restricted to non-legislative powers?
- Q2.2 Can the Minister explain why the Bill does not include any requirements regarding the publication and parliamentary scrutiny of resultant tertiary legislation? Why are these sub-delegated powers not subject to the same scrutiny procedure as will apply to the exercise of delegated powers?
- Q2.3 Can the Minister explain why legislative powers that may be granted by sub-delegation under the Bill are not subject to a two-year time limit like the powers of delegated legislation the Bill grants directly to Ministers?

## Expert Working Group on the EU (Withdrawal) Bill and the Rule of Law

The Expert Working Group exists to identify the most pressing rule of law problems with the Bill and inform debate on the Bill from that perspective. The Group is coordinated by the [Bingham Centre for the Rule of Law](#), with additional support from the [UCL Constitution Unit](#).

**Chair:** The Rt Hon Dominic Grieve QC MP (former Conservative Attorney General)

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Throughout the passage of the Bill we will be publishing briefings and other papers on our website:  
<https://binghamcentre.biicl.org/withdrawalbillworkinggroup>.

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- <sup>1</sup> This note uses the analytical framework of the Venice Commission Rule of Law Checklist, which was recently endorsed by the Parliamentary Assembly of the Council of Europe, and develops the rule of law principles identified by Lord Bingham. Council of Europe, European Commission on Democracy through Law, 'The Rule of Law Checklist' (March 2016), available at: [http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule\\_of\\_Law\\_Check\\_List.pdf](http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf). The Checklist was officially adopted by the Parliamentary Assembly of the Council of Europe in Resolution 2187 (2017) on 11 October 2017 and is available at: <http://bit.ly/2z68orN> (shortened link).
- <sup>2</sup> *ibid*, para 49.
- <sup>3</sup> *ibid*, paras 57-59.
- <sup>4</sup> *ibid*, para 64.
- <sup>5</sup> Constitution Committee, Third Report of Session 2017-19 HL Paper 19: European Union (Withdrawal) Bill: Interim Report (7 September 2017), para 46, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/19.pdf>.
- <sup>6</sup> Constitution Committee (n 5), para 39.
- <sup>7</sup> DPRRC (n 9), para 31.
- <sup>8</sup> *ibid*, para 40.
- <sup>9</sup> DPRRC, Third Report of Session 2017-19 HL Paper 22: European Union (Withdrawal) Bill (28 September 2017), para 31, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/22.pdf>.
- <sup>10</sup> *ibid*, para 48, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/22.pdf>.
- <sup>11</sup> *ibid*, para 76, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/22.pdf>.
- <sup>12</sup> Clauses 7, 8 and 9 allow sub-delegation because they are Henry VIII powers and sub-delegation is not among the exclusions listed in these clauses. Schedule 7 makes provision for the scrutiny of regulations made under these clauses that create or amend legislative powers. Similar provisions apply to the Schedule 2 powers in devolved settings that correspond to the UK-wide powers in Clauses 7, 8 and 9. The power to make consequential regulations in Clause 17(1) is also a Henry VIII clause, but it is unclear whether sub-delegation is envisaged. The House of Lords Delegated Powers and Regulatory Reform Committee report (para 83-91) also expresses concern about Schedule 4, which indicates that Ministers may sub-delegate a power to levy fees to public authorities exercising functions conferred upon them by regulations made under Clause 7, 8 or 9 or the equivalent provisions in devolved settings.
- <sup>13</sup> DPRRC, (n 9), paras 27-29.
- <sup>14</sup> *ibid*, para 27.
- <sup>15</sup> Delegated Powers Memorandum, para 32.

This Briefing Note was based on a Discussion Paper written by Dr Jan van Zyl Smit, Associate Senior Research Fellow in the Rule of Law, Bingham Centre for the Rule of Law, and was prepared by Justine Stefanelli, Senior Research Fellow in European Law, Bingham Centre for the Rule of Law, with input from Professor Meg Russell, Director, UCL Constitution Unit.