



Bar Council response to the Constitution Committee inquiry: The Legislative Process Call for evidence on the delegation of powers consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the third stage of the Constitution Committee's Inquiry into the Legislative Process; Call for evidence on the delegation of powers.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. It is appropriate to delegate powers where changes to the law are likely to be required frequently or quickly, for matters which cannot be known when a Bill is passed, where there is little practical scope for amendment, for laws which are relatively unimportant in their impact and where local choice is desirable.
5. Delegated powers should always be constrained by a purpose and by a description of what they may and cannot do and, if they are made, what they must do. Too often, the

¹ <http://www.parliament.uk/documents/lords-committees/constitution/Legislative-process-2016/Call-for-Evidence-stage-3-delegation-of-powers.pdf>

Government seeks broad delegated powers for the wrong reasons, i.e. because they do not know what they intend to do. Skeleton Bills and provisions should be approached sceptically, and should be subject to appropriate scrutiny and sunset provisions. “Speed” is never an appropriate justification for a skeleton provision.

6. Parliamentary scrutiny of delegated powers is effective in the House of Lords (although too limited in scope), but not in the House of Commons. The Delegated Powers and Regulatory Reform Committee could perform even more effectively, particularly if it carried out scrutiny on all Bills on their Introduction and liaised with Public Bill Committees.

7. The Bar Council has serious concerns about the use of guidance instead of secondary legislation. There are egregious examples in the immigration regime.

8. Parliamentary scrutiny of delegated legislation is effective in ensuring that the Government acts within its powers, follows Statutory Instruments (SI) practice and procedures and is of adequate quality. It is less effective in scrutinising the policy merits. There is little justification for making secondary legislation amendable (except, perhaps, for Brexit legislation) but immense care should be taken to ensure that power is only delegated appropriately. Parliament should be more willing to reject secondary legislation using its existing powers.

9. The Bar Council does not take a principled position against Henry VIII powers. Granting a small number of Henry VIII powers will in most cases be preferable to granting a single broad power.

10. Explanatory Notes do not contain sufficient information on proposed secondary legislation. In many cases that information will not be available. Parliament should not seek comfort by asking for draft legislation; it might change, and it may require consultation. Parliament should focus on considering and limiting the full scope of delegated powers.

11. It is likely that the Government will need to prepare high volumes of secondary legislation to convert the *acquis*. The Bar Council is concerned that the “Great Repeal Bill” might give the Government a large amount of power in areas where that power has to date been constrained by stringent European consultation and scrutiny requirements. Parliament should consider whether it should adopt a special scrutiny procedure for Brexit legislation. The House of Lords could adopt a Select Committee procedure, and it may be appropriate to provide for amendment of secondary legislation in some areas.

Consistency of approach

Q1. For what purposes is it appropriate to delegate powers to make law to Government? Is there a clear boundary between subject-matters which are appropriate for primary legislation on the one hand and for secondary legislation on the other?

12. The Bar Council suggests that it may be appropriate for legislative power to be delegated in the following respects:

- where it is known or likely that there will be a need for frequent changes to ensure that the purpose of the legislation continues to be fulfilled in changing circumstances (e.g. where a figure may need to be changed in order to reflect changes in economic conditions);
- where it is desirable to allow for the possibility of some future change;
- where the law might need to be changed quickly;
- aspects of the law that (for good and justifiable reasons) cannot be known at the time when the Bill is passed;
- laws made at a point where there is little practical scope for amendment (e.g. international commitments are being implemented);
- laws which are relatively unimportant in their impact (assuming that such laws are truly necessary); and
- situations where local choice is desirable, within defined limits, and the delegation is to local authorities as local legislative bodies with democratic accountability.

13. There is general agreement that laws which describe procedures and forms are often suitable for delegated legislation – in those cases the reasons for delegation cover several of the grounds above – but beyond that, the Bar Council’s perception is that too often the reason for seeking delegated powers is not concerned with their justification on any of those grounds, but more with trying to give the executive flexibility in situations in which legislation is being brought forward without sufficient clarity (or even internal agreement) about what the final policy aims and methodology will be; in other words, simply because the executive is not yet ready or able (or willing) to set out in primary legislation what ought to be in the primary legislation. In those types of situation, the risk of excessive and inappropriate delegation is

much greater, not least because it will be more difficult for Parliament to set clear aims for the power and clear limits on its exercise.

14. It is rare for power simply to be delegated, and simple delegation would ordinarily be constitutionally inappropriate. In almost every case, the delegated power is rightly constrained – by a purpose for which it must be used, by procedural requirements, by matters that must be taken into account, and by other limits. These constraints are constitutionally essential, because they provide the Government with clear direction on how it should exercise the power, and provide Parliament and the Courts with the tools they need to scrutinise and constrain abusive exercises of power. The Bar Council considers that Parliament could reasonably require that all delegated powers should be constrained through clear words on both—

- a. the purpose for which the power may be used;
- b. the scope of the power, including what sort of provision must be included in delegated legislation, what sort of provision may be included in delegated legislation and what sort of provision cannot be included in delegated legislation.

15. Many current delegated powers are unconstrained by a purpose restriction, and many others contain only minimal restrictions on how the power can be used (indeed they often only include words which are intended to put beyond doubt how very wide a delegated power is intended to be). There are occasions when constraints are set at a level which leaves an unfortunate and unhelpful degree of uncertainty as to the scope of the power.

16. This question might also be answered by considering matters that are *inappropriate* for delegated powers, but having considered this, we have found it difficult to set out a list of inappropriate matters in generalised terms. A dividing line simply between matters of policy and matters of implementation is a difficult one to draw in a general way, and a similar point will often apply in other areas (e.g. whether law have a significant effect on fundamental rights and freedoms). We might suggest that delegated legislation should not exclude or limit access to courts or tribunals, or laws affecting fundamental rights and freedoms, but that may not be a sensible or useful test in relation, for example, to delegated legislation under a statute relating to the administration of justice (e.g. court procedural rules).

Q2. Does the Government have a consistent approach to the delegation of powers and, if so, on what basis has that approach been adopted? Has the outcome of this approach been satisfactory?

17. The Bar Council has not observed any consistency of approach by the Government, although in many instances power to legislate has been delegated in the type of circumstances outlined above. There are numerous examples, though, of where substantial amounts of legislative power have been delegated with significant consequences for the sectors of the economy affected. For instance the Housing and Planning Act 2016 contained broad powers to enable the Government to introduce a requirement for developers to build Starter Homes, with enormous implications for the housing supply sector. The constraints on the use of the power are minimal. The Bar Council considers it an inappropriate use of delegated powers.

18. Indeed, the oral evidence given to this Committee by Daniel Greenberg and Sir Stephen Laws suggests that there is no consistent approach, other than what the department promoting the legislation believes Parliament might accept (through persuasion or lack of attention). Bar Council suggests that that the approach is also likely to depend on the attitudes of the key civil servants (and, to a degree, Ministers) to this issue.

19. In areas of the law dominated by EU law, the origin of most legislation (where UK legislation has been needed) has been through the exercise of delegated powers; and in many cases, this has involved the amendment of primary legislation by delegated legislation. The Bar Council does not consider that these areas of legislation are materially “worse” as a body of law than areas of domestic law set out in primary legislation. Either approach may lead to good or bad law.

Q3. How effective is parliamentary scrutiny of provisions in primary legislation that delegate power to the Government?

20. In the House of Commons there is little or no scrutiny of provisions which delegate power. Occasionally the scope of a delegated power is raised by a member at Committee stage, but there is no consistent approach.

21. In the House of Lords, the Delegated Powers and Regulatory Reform Committee (DPRRC) provides far more effective scrutiny. Without its reports, the Bar Council would fear that the Government would seek considerably larger numbers of, and considerably broader, delegated powers. The most important element of the DPRRC’s scrutiny is in questioning

whether power should be delegated at all and seeking a justification for it. By forcing the Government to explain, it requires the Government to consider the options available to it, and the Bar Council is aware that this means that civil servants – particularly at the instigation of their lawyers – often adopt alternative approaches while legislation is being prepared.

22. The Bar Council does, though, consider that the DPRRC could improve its scrutiny still further. The DPRRC often scrutinises power-by-power and does not always consider the overall balance between matters on the face of the Bill and matters which are being delegated. The DPRRC could require the Government to explain how it has struck an overall balance for each area of law in a Bill (e.g. for each Part). The DPRRC could also produce its reports earlier for Bills which are introduced in the House of Commons, perhaps finding a way to work effectively with the Public Bill Committee for those bills presented in the Commons.

Q4. Are there circumstances in which ‘skeleton’ Bills and clauses are appropriate? Are ‘skeleton’ Bills and clauses becoming more frequent, and if so, why?

23. The Bar Council suggests that skeleton Bills and clauses should be assessed on their merits, but with a sceptical approach.

24. Some regard skeleton provisions as appropriate where instead of regulating immediately, it is proportionate to provide an incentive for voluntary action. This approach may take the form of “backstop” skeleton powers such as section 77 of the Climate Change Act 2008, which had an immediate impact on retailers’ approach to issuing single use carrier bags, and delayed and eased the introduction of the effective (and relatively uncontroversial) carrier bag charges across the UK, individually timed and tailored for Scotland, Wales and England. Others, however, question whether this is truly an appropriate purpose of legislation. We do not seek to promote one view over the other.

25. There might also be appropriate in highly complex areas of policy where different elements of the drafting need specialist input, and the elements must then be drawn together effectively (e.g. in areas such as energy law, where it may be necessary for new law to dovetail with new conditions in energy licences and codes – see, for instance, the powers in Chapter 6 of the Energy Act 2013). Where these factors are present, and the Government provides an adequate explanation, Parliament might still be open to delegating power at a skeleton level. Appropriate scrutiny or sunset provisions may then be the right tools to ensure that such powers are used in the right way, so long as they are built into the legislation in a tailored and cautious way.

26. The Bar Council does not consider that 'speed' is ever an appropriate justification for skeleton Bills and clauses. In most cases, this is simply shorthand for "we have not thought through what we intend to do": see, again, the Housing and Planning Act 2016, where the Government has already announced that some of the broad powers it hastily sought will not be used. Moreover, the Bar Council does not think that speedier results are usually achieved; the time which could have been spent preparing better primary legislation is spent preparing secondary legislation (where time is also wasted when the powers taken a year earlier do not match the final policy and work-arounds are required).

Q5. How far are matters previously dealt with in secondary legislation moving into guidance, codes of practice and directions; and what are the implications of any such movement for Parliamentary scrutiny?

27. The Bar Council has a serious concern that the use of policy guidance, without any clear or express statutory basis, has in some areas of law created a complex body of provisions that govern the way individuals and businesses can behave but which is not subject to parliamentary control of any sort. A clear example is the Guidance issued by the Home Office in connection with the sponsorship of foreign students or employees in the points based immigration system. The scope and detail of the Guidance can be seen by examining, for example, the "Tier 4 of the Points Based System: guidance for Sponsors" documents 2 and 3, concerned with the sponsorship activities of educational establishments. Document 2 is a 93 page document which creates a substantive scheme; document 3 is a 21 page document concerned with compliance decisions, which can include the revocation of a sponsorship licence. Decisions applying these policies have very considerable implications for the colleges concerned. There are other equally complex policy documents covering aspects of the points based system as they affect both employers and educational establishments.

28. The Immigration Rules properly so called are subject to a modified form of negative resolution procedure (see R(Alvi) v Home Secretary (JCWI intervening) [2012] 1 WLR 2208). However, in New London College v Home Secretary [2013] 1 WLR 2358 the Supreme Court held that the details of the licensing system for educational establishments did not need to be laid out. Whilst this decision confirmed that the Guidance was lawful, Lord Sumption commented in paragraph 1 that: "*The Immigration Act 1971 is now more than 40 years old, and it has not aged well. It is widely acknowledged to be ill-adapted to the mounting scale and complexity of the problems associated with immigration control. The present appeals are a striking illustration of the problem.*"

29. The result is a complex system of regulation not subject to any parliamentary scrutiny.

30. The Bar Council consider that this Guidance is a very clear example of regulation outside any framework of parliamentary control; but does not consider that the problem is confined to immigration. There has always been an extensive use of policy for e.g. planning purposes but the present position involves extensive use of documents such as the National Planning Policy Framework.

31. The advent of the use of the internet as the medium for the promulgation of policy creates another dimension to the problem, since the detail of the policies can be readily adjusted with the minimum of notice and formality. Furthermore, when changes are made, previous iterations of such guidance can become difficult to identify, even though they may still be relevant to pre-existing situations.

32. The issues created by the combination of a greater use of policy; and the migration of policy onto the internet, deserve careful consideration.

Scrutiny of secondary legislation

Q6. The extent to which it is appropriate for Parliament to devolve power to the Government inevitably depends on the appropriateness of Parliament's future scrutiny of the exercise of those powers. To what extent are current procedures for scrutinising secondary legislation effective?

33. The Bar Council considers that the current procedures for scrutinising are adequate for ensuring that secondary legislation is made within its powers, follows proper SI practice, is of adequate quality and that procedural checks have been made (especially in relation to consultation). However, the Bar Council believes that the procedures are less effective in identifying whether the policies described in secondary legislation are the right policies and should be added to the statute book. It is very rare for negative resolution instruments to be debated in either House, regardless of their significance and content. It is even rarer for any instrument (under either the affirmative or negative resolution procedure) to be blocked by either House. This suggests that once legislative power has been transferred to the Government there is no effective check in place on the use of that power to make laws which implement flawed or disproportionate policies.

34. We shall say more about this in answer to question 8 below.

Q7. Is there a case for making secondary legislation amendable in certain circumstances (and if so, in which circumstances), or for greater use of an enhanced scrutiny process that allows Parliament to scrutinise draft instruments before a final version is introduced for approval (such as the existing super-affirmative procedure)? What problems arise from the 'take it or leave it' process currently used for agreeing secondary legislation?

35. The Bar Council thinks it would be very difficult to identify a class of secondary legislation above any other which would be appropriate for amendment. The exercise of any delegated power involves choice, and most instruments contain a mixture of more important and less important elements. The advantages of distinguishing between amendable and unamendable legislation would be lost entirely if all secondary legislation was amendable.

36. The main difficulty with the 'take it or leave it' approach may well be the resulting unwillingness on the part of Parliament to reject delegated legislation. We address this in further answer to question 8 below.

37. This would not be such a problem with the 'take it or leave it' approach, however, if the initial delegation of powers was always done in only appropriate circumstances (as we have already explained), as there ought then to be far fewer situations in which Parliament might have cause to reject draft delegated legislation.

38. The Bar Council suggests that the most practical way to ensure that particularly sensitive instruments are made subject to greater scrutiny is to apply the super-affirmative resolution procedure, which provides a greater opportunity for Parliament to influence the content of secondary legislation than the affirmative and negative resolution procedures. Greater scrutiny of delegated powers in the first place ought to enable Parliament to identify when this may be required; and there could perhaps be a possibility for the Government to follow this procedure voluntarily (in the same way that departments may carry out consultation, whether or not that is a statutory requirement).

39. Greater consideration might also be given to imposing statutory consultation requirements, where delegated legislation is appropriate but may involve changes and/or uncertainties, although this should not be an excuse for taking delegated powers which are not otherwise appropriate and Parliament needs to be aware of the heavy consultation burden already imposed on regular consultees (such as the Bar Council). There is a fairly strong view that the firmer consultation policy of earlier (but still fairly recent) times, requiring consultation wherever possible and always for three months (compared with the current, more 'flexible' procedure), led to better laws. That may have been by accident, perhaps:

slowing down the timetable for the preparation of legislation, giving more time for consideration and mature reflection, and sometimes taking some of the political or media ‘heat’ out of an issue by the time legislation was finally introduced.

40. If those were linked to our suggestions in answer to question 8 below, then there would be firm encouragement to the Government both to ensure that the primary legislation deals with all policy questions of significance and to ensure that it does not misuse delegated powers. If Parliament rejects delegated legislation on policy grounds, then the Government has only itself to blame.

41. See also our answer to question 13. The volume and nature of Brexit legislation may justify a procedure that allows for amendment in some cases.

Q8. Is there a case for allowing either or both Houses of Parliament additional powers to delay or reject secondary legislation?

42. It is not clear to us whether this is a question of powers or of attitude. At the moment, Parliament just does not vote against SIs – the Commons are whipped to vote in favour (where necessary), and the Lords vote against only in rare and exceptional situations. Without a willingness on the part of Parliament to exercise its existing powers, or at least to change its attitude to delegated legislation, we would be concerned that new powers would make no significant difference.

43. Subject to that, delegated legislation ought as a matter of course to be given dedicated consideration beyond the limits of current consideration (described in answer to question 6 above, which largely excludes the merits of the delegated legislation). Parliament should be willing to reject delegated legislation outright as being inappropriate for a delegated legislative procedure where the draft delegated legislation raises questions of policy that are not resolved by the primary legislation, and so have not been subject to the level of scrutiny that should have been applied.

44. The more effective the manner in which the delegation of powers has been dealt with in the primary legislation, the less onerous this task will be, and the less likely it will be that Parliament will have proper cause to reject the delegated legislation; but with the inconsistency that exists at the moment in the granting of delegated powers, together with the inevitability (recognised in our first answer above) that powers will be granted in some circumstances which allow for changes which ought to be scrutinised on their merits,

Parliament (and, in particular, this House) ought to go further than it does at the moment in the scope of the scrutiny that it applies to draft delegated legislation.

45. In tandem with this, as well as identifying statutory consultees in appropriate circumstances, Parliament might also consider instituting processes under which:

- a. A neutral summary of the results of any consultation on delegated legislation must be laid before Parliament with the draft delegated legislation; and
- b. Parliament may reject the draft legislation if it considers, in view of the nature or contents of the legislation, either (1) that consultation should have taken place but has not, or (2) the consultation that has taken place has been inadequate.

Henry VIII powers

Q9. Bills often include ‘Henry VIII powers’, which allow the Government to amend or repeal primary legislation by secondary legislation. For what reasons might such powers be appropriate, and with what level of scrutiny? Are there any subject-matters or purposes for which Henry VIII powers should never be used? Should Henry VIII powers ever be exercisable by a person who is not a Minister?

46. The Bar Council does not take a principled position against the conferral of Henry VIII powers in all circumstances, but it begins by pointing out that if Henry VIII powers are taken, then this presupposes that primary legislation exists (or may yet be enacted) in which it was appropriate to include particular provisions that, under the primary legislation being considered, Parliament is being asked to allow the Government to amend by delegated legislation.

47. There will be cases in which it is convenient and appropriate to grant a number of tightly-circumscribed Henry VIII powers, focused on the aspects of a legal regime that may need to be amended in future, but this is likely to be appropriate only if a power to make delegated legislation is itself appropriate (such as in circumstances such as those set out in answer to question 1 above, in which minor amendments to primary legislation may be needed in order for the primary legislation to be fully effective). In other words, the type of situation in which this is most likely to be appropriate is one in which the legal framework and the legal details of key relationships (e.g. the identity of decision-makers, the factors they

should take into account, routes of appeal, and so on) are so important that they should be set out in primary legislation, but there are individual details (such as an address for service, a figure to be agreed at international level) which can legitimately be delegated.

48. Indeed, in some situations, the granting of Henry VIII powers might increase the chance of creating “good law” (which the Bar Council would encourage), particularly where the Henry VIII power is limited to a power to make consequential or incidental provision.

49. In addition, if Parliament were to exercise greater scrutiny over the merits of delegated legislation implementing Henry VIII powers, then there would be less objection to their existence in these limited circumstances.

50. It is possible that Parliament’s (rightly) cautious attitude towards Henry VIII powers has the unintended consequence that it incentivises Government departments to seek wide or skeleton powers instead. In many cases it would be preferable for the Government to set out the details of a legislative scheme in a Bill (as described above), but the Bar Council is aware that wide powers are sometimes now considered the easier route both for internal clearance and when taking a Bill through Parliament. In our view, wide delegated powers are worse than narrow Henry VIII powers, so there may be room for greater balance in Parliament’s approach.

51. To the extent that there is concern about the granting of Henry VIII powers, the Bar Council considers that a workable approach might be that Henry VIII clauses should always be drafted as narrowly as possible. The Bar Council does not consider that Parliament needs to be dogmatic about the choice of scrutiny procedure for Henry VIII powers.

52. The Bar Council considers that it should be exceptional, at the very least, for a Henry VIII power to be exercisable by a person who is not a Minister; but the constitutional importance of legislation would justify such powers being granted to no-one other than Ministers who are directly responsible to Parliament.

Information provision

Q10. Do the Explanatory Notes that accompany a Bill contain sufficient information about what the proposed secondary legislation will do?

53. In short, no. This is probably inevitable, although it may be compounded by what the House Authorities will allow the Government to include.

54. Often, the point of taking a delegated power is that there is a lack of certainty about what the department wishes to do – otherwise, more detail could be included in the Bill itself. In these circumstances, the information will not be available.

55. In both these and other situations, the need for more information in order to be able properly to understand the scope or application of a proposed power may be a warning sign that the balance between primary and secondary legislation is wrong, or that the primary legislation needs to contain additional safeguards. Similarly, if there may be a devil in the detail, then that may again be a warning that the balance is wrong.

56. A requirement for more information in the Explanatory Notes might assist in identifying such problems, but these difficulties will not necessarily be identified by Parliament itself without expert input on the way in which policy is being implemented in the drafting of the legislation. Current procedures do not readily allow for this such input

57. A requirement for more information in the Explanatory Notes might also assist in ensuring that subsequent delegated legislation is kept within the bounds of what was explained to Parliament at the time, but this is no proper substitute for those bounds being set out in the primary legislation itself.

Q11. How far is the intended content of secondary legislation made clear when the Bill is going through Parliament? Should draft secondary legislation be routinely made available when Bills are scrutinised by Parliament? Are there any examples of secondary legislation that brought forward provisions which were unexpected in the light of information provided by Government when the primary legislation was being enacted?

58. In many cases it will not be practical for the Government to make draft secondary legislation available when Bills are scrutinised by Parliament. It is understandable that the Government will not have prepared draft legislation at a point when it is not sure what the

final scope of its enabling power will be. In addition, the need for hasty preparation is likely to undermine other desirable aims, such as proper consultation on the content of the secondary legislation. Finally, there is a danger that Parliament might take undue comfort from the draft secondary legislation and be distracted from considering the full scope of the power and the use that might be made of it in the future.

59. Looking at this from the opposite perspective, Government should also not be able to use such a procedure to escape an obligation to set out clearly the aims of, and limitations on, delegated powers in the primary legislation itself. It may also be more difficult for parliamentarians to assess the impact of detailed draft delegated legislation when compared with clear aims and limitations set out on the face of the primary legislation itself.

60. To the extent that Parliament wishes to know how the Government intends to exercise a power, it is entitled to demand a statement to that effect from the Minister responsible for the Bill. In the Bar Council's view a policy statement would be of equal value to draft regulations, which might change. This process could be formalised and statements could become a mandatory element of the Memorandum required by the DPRRC.

61. We would reiterate, however, that neither draft regulations nor policy statements are a proper substitute for proper clarity of purpose and effective limitations in the primary legislation itself.

62. Moreover, both draft regulations and policy statements are likely to be much less accessible to affected persons than the primary legislation, so the use of either approach may hinder the effectiveness of the rights of affected persons to challenge the lawfulness of delegated legislation. This is a yet further reason for ensuring that the bounds of the delegated power are set out clearly in the legislation itself.

Brexit

Q12. To what extent, in Brexit-related primary legislation, might the use of secondary legislation be necessary or justified to convert the 'acquis' (the body of existing EU law) into British law?

63. The terms of Article 50 mean that the Government would be wise to prepare for the possibility that the UK will leave the EU two years after Article 50 is triggered. At that point, the Treaties will cease to apply to the UK; and the agreement of saving or transitional

provisions would be a matter for negotiation, as to which no safe assumptions can presently be made. In the Bar Council's view, the task of converting into UK law the EU *acquis* that is presently binding within the UK as a result of the Treaties is a very substantial one. The fact that the Government have described the proposed legislation to replace the European Communities Act 1972 ("ECA") as a "Great Repeal Bill" suggests that its intention is not simply to replicate the existing body of EU law but to remove or modify the effect of particular elements of the *acquis*.

64. The Bar Council cannot see how the volume of legislation required could possibly be passed through Parliament as primary legislation, so secondary legislation will be necessary. In many cases that will also be justified, because many aspects of the conversion of the *acquis* will be uncontroversial, at least at that initial stage; for example, where the object is simply to incorporate into the UK legal order provisions of the Treaties themselves, or EU regulations, which currently have direct effect without the need for domestic implementing legislation.

65. However, the Bar Council believes that there will be aspects of the *acquis* that cannot be converted without resulting in breaches of international law or other significant problems with the resulting law. Where that situation arises, primary legislation will be required in order to put new domestic laws in place. That is likely to have the effect of increasing the use of secondary legislation for other aspects of the conversion, including in more controversial areas. The use of secondary legislation for this purpose raises a number of concerns arising out of the contrast between the pre- and post- Brexit context. We take the liberty here of substantially reproducing the observations we made in response to the Committee's Stage 1 Call for Evidence (Preparing Legislation for Introduction), which are particularly pertinent to the present topics.

66. As the Committee will of course appreciate, EU Directives are not generally directly effective until implemented in each Member State's domestic law. At present, in the UK very few Directives are implemented by means of primary legislation enacted following the usual full Parliamentary procedure. Most are implemented by means of secondary legislation made under section 2(2) of the ECA. The ECA provides a generous "Henry VIII" power enabling regulations made under s. 2(2) to amend or repeal primary legislation. The broad scope of that power was affirmed by the Divisional Court in the "metric martyrs" case, Thoburn v. Sunderland City Council [2002] QB 151, <http://www.bailii.org/ew/cases/EWHC/Admin/2002/195.html>.

67. Even where the affirmative resolution procedure is adopted for an ECA instrument, the opportunity for meaningful public and Parliamentary debate on the terms of each instrument is extremely restricted, as we have commented above. However, the abbreviated nature of that derives legitimacy from the fact that each Directive will itself have been the subject of the

elaborate legislative process at EU level. That process invariably involves two or more rounds of public consultation by the Commission before a proposal is formally put to the bipartite EU legislature (the Council and Parliament); detailed scrutiny and amendment by the Parliament (acting through its appropriate Committee and in plenary session); and, more often than not, a degree of scrutiny by national legislatures. In the latter respect, the work of the Lords EU Select Committee and its Sub-Committees set a high standard among the Member States. At each stage, stakeholder and public involvement helps shape the legislation as it makes its journey towards adoption.

68. It would be a matter of great constitutional concern if the “Great Repeal Bill” were to contemplate the possibility that repeal, or other significant change to the substantive content, of law currently deriving from EU Directives could be effected by a process similar to the making of ECA s. 2(2) instruments. Such a process would bring about a significant democratic deficit which would undermine the legitimacy of resulting legislation. It is one thing to use a secondary instrument to implement legislation that has been the subject of an extensive legislative process at European level. It is another thing entirely to use that process to implement policy which simply emerges from ministerial decision-making within the confines of Whitehall departments or Cabinet committees. Indeed the UK Supreme Court has already affirmed that the ECA 1972 power is confined to transposing into the content of EU legislation into domestic law. Government may not lawfully use it to “piggy back” different or additional content of its own (sometimes known as “gold plating”) onto the implementation exercise: see United States of America v. Nolan [2015] UKSC 63, [2016] AC 463, <http://www.bailii.org/uk/cases/UKSC/2015/63.html>.

69. We would invite the Committee to draw to the attention of the Government the importance, following Brexit, of a legislative process involving sufficient public and Parliamentary scrutiny of any future proposal to alter the content of law deriving from an EU instrument otherwise than through full primary legislation.

Q13. Do you envisage that any changes will be required to procedures related to the delegation of powers or secondary legislation, to cope with the legislation likely to be required as a result of Brexit?

70. In view of our response to Question 12, the Bar Council considers that this unprecedented legislative exercise will require Parliament to adopt a special approach to scrutiny. The affirmative and negative resolution procedures will not operate effectively, and will overwhelm Parliamentarians while providing for inadequate public involvement in the legislative process.

71. The Bar Council considers that the House of Lords could consider, among other things, adopting a Committee-based approach to scrutinising EU Exit legislation. It could, in particular, establish specialist Select Committees to scrutinise legislation on particular aspects of the *acquis*, where members could become specialists and be supported by expert staff. This would reduce the risk that important issues would be missed, and bring consistency within sectors.

72. However, enhanced scrutiny within Parliament would need to be matched by adequate procedural provisions contained in the Brexit legislation itself, in particular provisions aimed at ensuring public involvement while ministerial proposals are still at a formative stage; adequate opportunities for Parliament and the public to comment on draft legislation; and, where appropriate, adequate Parliamentary power of amendment of instruments.

73. We do not presume to make exhaustive suggestions as to the features of a secondary instrument that ought to attract a power of Parliamentary amendment to the text of the instrument. But our present view is that cases appropriate for such a power would at least include provisions that—

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

Bar Council

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