Agenda – Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Lleoliad:
Ystafell Bwyllgora 1 – y Senedd
Dyddiad: Dydd Llun, 2 Hydref 2017
Amser: 14.30

I gael rhagor o wybodaeth cysylltwch a:
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SeneddMCD@cynulliad.cymru

1 Cyflwyniad, ymddiheuriadau, dirprwyon a datgan buddiannau

2 Papurau i'w nodi

(Tudalennau 1 – 46)

CLA(5)-22-17 – Papur 1 – Y Pwyllgor Pwerau Dirprwyedig a Diwygio Rheoleiddio
Trydydd Adroddiad

CLA(5)-22-17 – Papur 2 – Bil yr UE (Ymadael): Newidiadau a awgrymir, cynghrair Greener UK

CLA(5)-22-17 – Papur 3 – Llythyr gan y Llywydd: Senedd@Delyn

3 Cynnig o dan Reol Sefydlog 17.42 i benderfynu gwahardd y cyhoedd o'r cyfarfod ar gyfer y busnes canlynol:

4 Ymchwiliad Llais Cryfach i Gymru: Adroddiad drafft

14.30 (Tudalennau 47 – 80)

CLA(5)-22-17 – Papur 4 – adroddiad drafft

5 Bil yr Undeb Ewropeaidd (Ymadael) 2017: Dull gweithredu

15.15 (Tudalennau 81 – 246)

CLA(5)-22-17 – Papur 5 –Memorandwm Cydsyniad Deddfwriaethol

CLA(5)-22-17 – Papur 6 – Y dull o graffu ar Fil yr Undeb Ewropeaidd (Ymadael)

CLA(5)-22-17 – Papur 6 – Atodiad 1– Nodyn cyngor cyfreithiol ar y Memorandwm Cydsyniad Deddfwriaethol

CLA(5)-22-17 – Papur 6 – Atodiad 2 – Llythyr at Bwyllgor Gweithdrefn Tŷ'r Arglwyddi, Papur Gwyn Bil y Diddymu Mawr

CLA(5)-22-17 – Papur 6 – Atodiad 3 – Llythyr at y Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol, Papur Gwyn Bil y Diddymu Mawr

CLA(5)-22-17 – Papur 6 – Atodiad 4 – Llythyr at yr Ysgrifennydd Gwladol ar gyfer Ymadael â'r UE, Bil yr Undeb Ewropeaidd (Ymadael)

CLA(5)-22-17 – Papur 6 –Atodiad 5 – Digwyddiad 18 Medi

CLA(5)-22-17 – Papur 6 – Atodiad 6 – Llythyr at y Pwyllgor Busnes, 25 Medi

CLA(5)-22-17 – Papur 6 – Atodiad 7 – Dadansoddiad y Gwasanaeth Ymchwil o'r gwelliannau a gyflwynwyd yn Nhŷ'r Cyffredin

CLA(5)-22-17 – Papur 6 – Atodiad 8 – Gwelliannau Llywodraeth Cymru a Llywodraeth yr Alban

CLA(5)-22-17 – Papur 6 – Atodiad 9 – Proses ddeddfwriaethol Senedd y DU

CLA(5)-22-17 – Papur 6 – Atodiad 10 – Cynnig rhaglen ar gyfer y Cyfnod Pwyllgor

Egwyl (16.00 – 16.15)

6 Bil yr Undeb Ewropeaidd (Ymadael)

16.15

Bydd y Pwyllgor yn cwrdd yn anffurfiol â'r Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol i drafod Bil yr Undeb Ewropeaidd (Ymadael).

Dyddiad y cyfarfod nesaf

9 Hydref 2017

HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

3rd Report of Session 2017–19

European Union (Withdrawal) Bill

Ordered to be printed 25 September 2017 and published 28 September 2017

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HL Paper 22

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

Membership

The members of the Delegated Powers and Regulatory Reform Committee are:

Lord Blencathra (Chairman)
Baroness Dean of Thornton-le-Fylde
Lord Flight
Lord Jones
Lord Lisvane
Lord Moynihan
Lord Rowlands
Lord Thomas of Gresford
Lord Thurlow
Lord Tyler

Registered Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

Publications

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications.

General Information

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at http://www.parliament.uk/business/lords/.

Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hldelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

CONTENTS

SUMMARY

The European Union (Withdrawal) Bill gives excessively wide law-making powers to Ministers, allowing them to make major changes beyond what is necessary to ensure UK law works properly when the UK leaves the EU.

The Bill contains unacceptably wide Henry VIII powers, including allowing Ministers to amend or repeal the European Union (Withdrawal) Bill by statutory instrument.

The Bill contains insufficient parliamentary scrutiny of many of the law-making powers given to Ministers, including the setting of exit day.

Parliament should be given a greater say on the procedure applicable to regulations made by Ministers under the Bill.

The Government should bring forward separate Bills to confer on the devolved institutions competencies repatriated from the EU. It is inappropriate for an issue of such constitutional importance to be left to secondary legislation.

Ministers should not have power to impose taxation by statutory instrument.

Many of the time-limits and other restrictions on Ministers can be circumvented by so-called tertiary legislation, which is law made by public bodies under powers conferred on them by Ministers.

Third Report

INTRODUCTION

1. On 11 September, the House of Commons gave a second reading to one of the most important Bills in the constitutional history of the United Kingdom. The Bill gives to Ministers a range of powers, unique in peace-time, to override Acts of Parliament by statutory instrument, without in most cases the need for any prior debate in either House of Parliament.

The heart of the Bill

2. The European Union (Withdrawal) Bill essentially does three things:

- It repeals the European Communities Act 1972 Act ("the 1972 Act"), which is the legal underpinning of the UK's membership of the EU.
- It retains the large body of EU-derived law[1] that would otherwise disappear overnight once the 1972 Act is repealed.
- It gives unprecedented powers to Ministers and other public bodies to make changes to the body of EU law preserved by the Bill and to Acts of Parliament.

Our remit

3. This Committee, which has no counterpart in the House of Commons, examines Bills to see:

(a) whether they grant to Ministers (and others) inappropriate powers to make law; and

(b) whether the powers are exercisable without appropriate parliamentary scrutiny.

4. To assist us in our consideration of the European Union (Withdrawal) Bill, the Department for Exiting the European Union has provided a delegated powers memorandum.[2]

5. Ministers already make considerably more law than Parliament. From 2014 to 2016, Parliament passed 92 public general Acts. During the same period, Ministers made 6,787 laws by statutory instrument under powers delegated to them by Parliament. This Bill is expected to generate another 800 to 1,000 statutory instruments in the near future, making it a Bill of the first importance in terms of law-making powers being granted to Ministers. We make no apology for the fact that this report is longer than usual. The importance of the Bill requires it.

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1 We are talking about 60 years of EU-derived law: the 44 years since the UK joined the EEC on 1 January 1973 and the previous 16 years' law, dating from the creation of the EEC in 1957, which the UK inherited when it joined.

2 Department for Exiting the European Union, *European Union (Withdrawal) Bill: Delegated Powers Memorandum:* https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf [accessed 27 September 2017].

Earlier involvement than usual

6. Normally we report on a Bill in sufficient time to allow Members of the House of Lords to consider it before the Bill's committee stage in the House of Lords. This Bill is of exceptional constitutional significance. Central to the Bill is the balance of power between Parliament and Government, including the propriety of giving Ministers such unprecedented powers to override Acts of Parliament subject, in the great majority of cases, to no scrutiny whatsoever on the floor of either House. Accordingly we have written this report in sufficient time for Members of the House of Commons to consider it at committee stage in their House. In due course, we will also report on the Bill in the form in which it comes to this House.

Preliminary point on terminology

7. People can be forgiven for not knowing what statutory instruments are or how they are made. They are important all the same. Before turning to the heart of this Bill, we set out the types of parliamentary procedure (where there is one) that apply when Ministers make regulations, which have the force of law, under powers delegated to them under this Bill.[3] The Bill provides for two main types of procedure:

(a) The negative procedure. Regulations are made by the Minister without a need for any prior debate at all. They can subsequently be annulled following an adverse vote in either House. The great majority of regulations are made under the negative procedure and the Government have indicated that this will be the case under this Bill.

Since 1950, negative procedure instruments have been annulled only six times as a result of action taken by the House of Commons. This happened on four occasions in 1951, and not at all since 1979. Since 1950, just one negative procedure instrument has been annulled as a result of action taken by the House of Lords.

(b) The affirmative procedure. In the case of "draft affirmatives", the regulations are laid before Parliament in draft and cannot be made into law by Ministers unless they are debated and approved by both Houses. In the case of "made affirmatives" (typically used for urgent cases), the regulations are made and come into force but cannot remain in force unless debated and approved by Parliament within one month of being made.[4]

Since 1950, affirmative procedure instruments have failed to secure approval on ten occasions only, five in each House, a rejection rate of one every six or seven years.

Our expectations

8. In our 23rd and 30th Reports from the last Session,[5] we set out our expectations for the delegated powers in this Bill.

- Ministers must not have unfettered delegated powers. In particular, it would be **wholly unacceptable** for the Bill to replicate the European

3 After they are made by Ministers, the regulations are published as statutory instruments under the Statutory Instruments Act 1946.
4 Schedule 7, para. 11(4).
5 23rd Report, Session 2016–17 (HL Paper 143) and 30th Report, Session 2016–17 (HL Paper 164).

Communities Act 1972 by giving the Government a choice to adopt whichever procedure they liked for statutory instruments made under the Bill.

- Significant Henry VIII powers (the power of Ministers to override Acts of Parliament by statutory instrument) must be fully explained and justified.
- The Bill must not enable major changes to policy or establish new frameworks beyond what is **necessary** to ensure that UK law continues to work properly on exit day.
- Any time-limited delegated powers would need careful examination to see that they worked properly.

Expectations not met

9. The Bill has failed to meet our expectations on all the above points.

- The Bill subjects the law-making powers of Ministers to little parliamentary scrutiny. Apart from the small number of cases where statutory instruments must adopt the affirmative procedure, the Government have an unfettered choice as to which procedure to adopt. This is a radical departure from the norm and one that we regard as wholly unacceptable. We propose a sifting system that will give Parliament a say on the parliamentary procedure applicable to regulations made under the Bill.[6]
- The Bill confers on Ministers wider Henry VIII powers than we have ever seen.
- Ministers have powers to alter 60 years of EU law when they consider it **appropriate** to deal with deficiencies arising from the UK's withdrawal from the EU. This goes much wider than the Government's White Paper commitment not to make major changes to policy beyond those that are **necessary** to ensure UK law continues to function properly from day one.[7]
- Although time-limits apply to secondary legislation made by Ministers under clauses 7 to 9, they do not apply to secondary legislation made under other powers contained in the Bill, or to tertiary legislation (legislation made pursuant to secondary legislation). We have more to say about this later.

Our detailed comments on particular clauses

10. Bearing in mind our remit, we confine ourselves to reporting on what we regard as an inappropriate delegation of power or an inappropriate parliamentary procedure attaching to the exercise of those powers. We do not comment on general political questions relating to our withdrawal from the EU, in particular the devolution settlement. Throughout the Report, we give hypothetical examples of what the powers in the Bill *could* enable

6 See para. 107 below.

7 Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, Cm 9446, March 2017: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf [accessed 26 September 2017].

Ministers to do. That should not be construed as implying that Ministers *will* do these things. But we do judge powers on how they might be used and not just on how the Government indicate that they intend to use them.

11. **We draw attention to clauses 7, 8, 9, 11, 14, 17, and Schedules 3 to 5 and 7. For each provision on which we report, we set out (i) its effect; (ii) our concerns; and (iii) our recommendations**.

CLAUSE 7: DEALING WITH DEFICIENCIES ARISING FROM WITHDRAWAL

(i) Effect

12. Clause 7 allows Ministers by regulations to make such provision as they consider **appropriate** to prevent, remedy or mitigate:

    (a) any **failure** of retained EU law[8] to **operate effectively**, or

    (b) any other **deficiency** in retained EU law,

    arising from withdrawal of the UK from the EU.[9]

13. Deficiencies in retained EU law include (but are not limited to) cases where Ministers[10] consider that retained EU law:

    (a) is substantially redundant, for example, relating to European Parliamentary elections;

    (b) confers functions on EU entities which need transferring to a national body, for example, from the European Air Safety Authority to the Civil Aviation Authority;

    (c) makes provision for reciprocal arrangements between the UK and the EU that will no longer exist or no longer be appropriate;

    (d) contains no functions or restrictions which were in an EU directive and in force immediately before exit day and which are appropriate to retain;

    (e) contains EU references which are no longer appropriate.

14. Regulations made under clause 7 may do anything that an Act of Parliament can do.[11] This is a Henry VIII power as it allows for the repeal or amendment of primary legislation. However there are some things that cannot be done under clause 7, including taxation, retrospective legislation, criminal offences punishable by more than two years' imprisonment, changes to the Human Rights Act 1998 and certain changes to the Northern Ireland Act 1998.[12]

(ii) Concerns

15. Clause 7 is notable for its width, novelty and uncertainty.

16. Under clause 7(1)(a), Ministers can make regulations to prevent, remedy or mitigate "any failure of retained EU law to operate effectively" arising from the UK's withdrawal from the EU. By what standards is the failure to operate effectively to be judged? In relation to whom or what is the ineffective

8 The body of EU law that continues to form part of domestic law by virtue of clauses 2 to 4 of the Bill.
9 Schedule 2 confers corresponding powers on Scottish Ministers, Welsh Ministers and Northern Ireland Departments to make regulations for the same purposes within their respective areas of legislative competence. In some cases, the regulations have to be made jointly with, or with the consent of, a UK Government Minister. This point also applies to clauses 8 and 9. In the case of clause 9 (where UK Government Ministers can amend the European Union (Withdrawal) Act itself), the same power does not apply to Ministers in the devolved administrations.
10 The references to "Ministers" include (where applicable) references to Ministers in devolved administrations exercising the delegated powers conferred by Schedule 2 to the Bill.
11 Clause 7(4).
12 Clause 7(6).

operation to be judged? Need it be a major failure? What if the failure is in relation to some sectors of the economy or society but not others? There is no obvious answer to these questions.

17. The uncertainty of the meaning of clause 7(1)(a) is exacerbated by the uncertainty of "retained EU law" as defined in clause 6(7), which in turn refers to the definition of "EU-derived domestic legislation" in clause 2(2). It is by no means clear precisely what clause 2(2)(b)–(d) is referring to, adding to the uncertainty of the scope of clause 7(1)(a).

18. Clause 7 also allows Ministers to legislate to prevent, remedy or mitigate "any other deficiency" in retained EU law arising from the UK's withdrawal from the EU. This is a very wide power, given that the dictionary definition of "deficiency" includes a failure, want, lack or absence. Although clause 7(2) gives seven overlapping examples of deficiencies in retained EU law, there is no obvious rationale underlying them beyond the fact that they must arise from the UK's withdrawal from the EU. In any event the definition in clause 7(2) is expressly stated to be non-exhaustive.

19. Paragraph 1.21 of the White Paper said that the Great Repeal Bill would not:

> "aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are **necessary** to ensure the law continues to function properly from day one".

20. Likewise, paragraph 3.7 of the White Paper said that the Bill:

> "will provide a power to correct the statute book, **where necessary**, to rectify problems occurring as a consequence of leaving the EU".

The delegated powers memorandum refers to Ministers having the power by regulations to make "**necessary** corrections to the statute book".[13]

21. However, clause 7 is drafted in much wider terms. Instead of a test based on necessity, the test is based on the subjective judgment of the Minister as to what he or she **considers to be appropriate**. There is nothing to suggest that the judgment of appropriateness is confined to technical matters or purely mechanistic changes. There is scope for Ministers to make regulations arising from EU withdrawal with an extensive policy content across the whole of retained EU law.

"Necessary" versus "appropriate": some examples

22. One example concerns EU Regulation No. 883/2004 on the co-ordination of social security systems. As "direct EU legislation" under clause 3, the Regulation will become "retained EU law" under clause 6. It sets out rules designed to ensure that people receive the full benefit of the contributions they have made so that they are not disadvantaged by reason of having moved to live or work elsewhere in the EU. It also provides that some social security benefits have to be exported if the person claiming them moves to another Member State. Hence UK citizens who have retired to Spain are entitled to have their state retirement pension or invalidity benefits paid to them in Spain in full on the same basis as if they had stayed in the UK. The Regulation would appear to fall within clause 7(1)(b) and (2)(c) & (d) of the Bill — so that Ministers could legitimately form the view that there is

13 Para. 12(ii), page 11.

a deficiency in the Regulation arising from the withdrawal of the UK from the EU and it is, therefore, "appropriate" to repeal or substantially rewrite the Regulation as from exit day so as to end the obligation to export benefits, or to prevent EU citizens resident in the UK from claiming benefits here. Whether this would be "necessary" appears to be more doubtful.

23. Another example is in the new EU General Data Protection Regulation,[14] which will also become "retained EU law". Clause 7 allows Ministers to amend it if they think it "appropriate" to remedy any failure of the law to operate effectively arising from the UK's withdrawal from the EU. Under the Regulation, individuals have rights of access to personal data subject to exceptions such as national security, defence and public security. Ministers might take the view that, once we no longer have to recognise the supremacy of EU law when we have left the EU, the exceptions to data access rights do not operate effectively as regards EU citizens resident in this country and should be widened under clause 7 to prevent them, say, from having a right of access to immigration information held about them by the Home Office. Using a test of necessity, it would not be necessary for the law to be changed to give the Government the benefit of a wider derogation than they currently possess under the Regulation. But it is arguably something that Ministers could decide was "appropriate" to do as it arises from the UK's withdrawal from the EU.[15]

24. The Committee has previously drawn attention to loosely-drawn powers based on the subjective judgment of the Minister and has argued for their being restricted by an objective test of necessity.[16]

25. Drawing on Case Study 3 at page 21 of the White Paper, we take the hypothetical example of regulations under clause 7 altering a legal duty to send information to an EU body, because the EU body would no longer accept the information once the UK leaves the EU. The issue raises policy questions as to what is to become of this information requirement. Should the information go instead to an existing UK body? Should it go to a newly-created body? Should the requirement be scrapped altogether? Should more or less information be sent to some other body?

26. It might be argued that none of these solutions is strictly necessary and that, therefore, a wider test based on what Ministers regard as appropriate should be employed. We disagree. The Bill ought to be drafted so that Ministers may make remedial provision only where:

    (a) there is a deficiency in retained EU law arising from the UK leaving the EU, and

    (b) it is necessary to prevent, remedy or mitigate it.

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14 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ L 119/89, 4 May 2016).

15 By contrast, the UK Information Commissioner will, after we have left the EU, no longer be obliged to co-operate with current EU counterparts in order to contribute to the consistent application of the EU Regulation throughout the EU (precisely because we will have left the EU). This would be an example where the "necessity" test would allow the Government to remove the legal duty to co-operate found in Article 63 of the Regulation.

16 15th Report, Session 2016–17 (HL Paper 104), para. 55, in the context of the Neighbourhood Planning Bill.

Once this necessity threshold is met, Ministers may choose whichever solution most commends itself even if it is one of several possible solutions. In the information example, a requirement to collect and send information that will no longer be accepted by the EU institution is a deficiency that it is necessary to remove from the statute book on the ground that it cannot be right to retain a redundant legal duty that amounts to a waste of time, effort and public money. Having passed this hurdle, Ministers would not be stopped from acting merely because the proposed solution was one of several that might have been devised. In other words, the operative test in clause 7 would be whether it is necessary to deal with the problem, not whether only one solution follows inexorably.

27. The things that Ministers cannot do in regulations made under clause 7 bear some resemblance to the restrictions currently found in the European Communities Act 1972. However, there is something that regulations under clause 7 can do that regulations under the 1972 Act cannot. Regulations under clause 7 allow for "legislative sub-delegation". That is to say, regulations under clause 7 may allow people or bodies, including Ministers themselves, to make further subordinate legislation (tertiary legislation) without there necessarily being any parliamentary procedure or even any requirement for the tertiary legislation to be made by statutory instrument. Paragraph 12 of Schedule 7 says that regulations made by Ministers must be made by statutory instrument. This would not catch other forms of subordinate legislation apart from regulations. It would not cover tertiary legislation made by non-Ministers. Arguably it does not catch tertiary regulations at all (on the basis that they are not made under the Act but are made under secondary legislation which is itself made under the Act). Where tertiary legislation is not made by statutory instrument, it evades the publication and laying requirements of the Statutory Instruments Act 1946. Despite its greater inaccessibility, tertiary legislation is still the law.

28. The delegated powers memorandum suggests that the power to make tertiary legislation is intended to be used sparingly, where it is appropriate for powers to be conferred independently of political control, for example, conferring powers on a regulator to set standards. However, there is nothing in the Bill that limits the power in this way. It could be used for any purpose for which regulations may be made under clause 7. It could, for example, be used to create new bodies with wide powers to legislate in one of the many areas currently governed by EU law, including aviation, banking, investment services, chemicals and medicines. The regulations might also contain only skeleton provisions in relation to a particular activity, leaving the detailed regime to be set out in tertiary legislation made not by Parliament, or even by Ministers, but by one of the new bodies so created.

29. Although regulations made under clause 7 cannot be made after the period of two years following "exit day",[17] the ability to provide for sub-delegated powers in regulations under this clause (and under clauses 8 and 9) allows the Government to circumvent the two-year period. Paragraph 28 of Schedule 8 to the Bill states that the two-year restriction does not apply to such tertiary legislation, meaning that those powers could be exercised after the two-year period elapses.

17 "Exit day" is a day or days specified by regulations under clause 14, discussed later in this Report at page 19.

30. We also note that the prohibition in clause 7(6)(c) against certain criminal offences being created by regulations does not prevent the levying of substantial civil penalties. Indeed, the power for Ministers to create criminal offences attracting a sentence of up to two years' imprisonment is a significant one.

(iii) Recommendations

31. **Clause 7 involves an inappropriately wide delegation of power.**

    (a) **The "appropriateness" test in clause 7 should be circumscribed in favour of a test based on necessity. Currently, the Bill allows regulations to make substantial policy changes that ought to be made only in primary legislation.**

    (b) **Tertiary legislation should be subject to the same parliamentary control and time-limits applicable to secondary legislation.**

CLAUSE 8: COMPLYING WITH INTERNATIONAL OBLIGATIONS

(i) Effect

32. Clause 8 allows Ministers to make such regulations as they consider appropriate to prevent or remedy any breach of the UK's international obligations arising from the UK's withdrawal from the EU.

33. Clause 8 contains a Henry VIII power allowing the regulations to do anything that an Act of Parliament can do, including amending or repealing any Act of Parliament ever passed. This power is subject to several of the exceptions found in clause 7. However more can be done in regulations made under clause 8 than under clause 7. Under clause 8, the regulations can impose or increase taxation. Similarly the restriction on amending the Northern Ireland Act 1998 in clause 7 does not apply to clause 8.

34. Regulations made under clause 8 cannot be made after the period of two years following exit day.

(ii) Concerns

35. The appropriateness test in clause 8 gives Ministers greater scope to act than if the test were one based on necessity.

36. The Government have not been explicit about the sorts of international obligation they have in mind under clause 8, save for the example about trans-frontier television given at paragraph 52 of the delegated powers memorandum. It would be helpful if the Government would give more examples.

37. The Government have not explained why regulations under clause 8 (unlike regulations made under clauses 7 and 9) may impose or increase taxation, thus allowing the supremacy of the House of Commons in financial matters to give way to taxation by statutory instrument.

38. Unlike the corresponding test in clause 7, the power to make regulations in clause 8 relates to preventing or remedying breaches but does not extend to mitigating such breaches.

39. Tertiary legislation made under clause 8 escapes both parliamentary control and the two-year time limit applicable to secondary legislation. Nothing is said in the delegated powers memorandum to explain why a power to make tertiary legislation is needed in the context of clause 8. This is surprising given the unusual nature of the power.

(iii) Recommendations

40. **Clause 8 involves an inappropriately wide delegation of power.**

    (a) **The "appropriateness" test in clause 8 should be circumscribed in favour of a test based on necessity.**

    (b) **The Government should demonstrate a convincing case before the supremacy of the House of Commons in financial matters gives way to taxation by statutory instrument.**

(c) **The Government should demonstrate a convincing case for requiring the power to make tertiary legislation under clause 8. Even if the power is needed, it is unsatisfactory that tertiary legislation made under clause 8 escapes both parliamentary control and the two-year time limit applicable to secondary legislation.**

41. **The Government should explain further how they propose to use this law-making power, including why the power to make regulations in clause 8 relates to preventing or remedying breaches but does not extend to mitigating such breaches.**

CLAUSE 9: IMPLEMENTING THE WITHDRAWAL AGREEMENT

(i) Effect

42. Clause 9 allows Ministers to make such regulations as they consider appropriate for the purposes of implementing the withdrawal agreement. There are limits to what regulations under clause 9 can do, broadly similar to those in clause 7. No regulations may be made under clause 9 after exit day.

43. Importantly, regulations under clause 9 can do anything that an Act of Parliament can do, including amending or repealing the European Union (Withdrawal) Act itself. Clause 9(2) reads:

> "Regulations under this section may make any provision that could be made by an Act of Parliament (including modifying this Act)."

Although clause 9(2) is expressed as a power to "modify" the Act, suggesting less substantial change, "modify" is defined in clause 14(1) to include amendment and repeal. The inclusion of this power to amend and repeal the Act itself does not appear in clauses 7 and 8 and is therefore implicitly excluded from those clauses.

(ii) Concerns

44. Clause 9 allows for important matters in the withdrawal agreement (for example, the rights of EU citizens resident in the UK) to be implemented in domestic law by negative procedure regulations, even if this requires extensive changes to primary legislation (for example, the Immigration Acts).

45. Although clauses 7 and 8 contain wide Henry VIII powers, clause 9 contains the widest Henry VIII power. Regulations under clause 9 may, in addition to amending or repealing any Act of Parliament whenever passed, also repeal the European Union (Withdrawal) Act itself. Such an instrument must adopt the affirmative procedure.[18] Notwithstanding, this power is wholly unacceptable. By way of example, to implement the withdrawal agreement Ministers could by statutory instrument:

(a) repeal the restrictions in clauses 7 to 9 that time-limit the making of regulations;

(b) amend clauses 3 and 4 to alter the scope of "retained EU law" so that in certain areas it includes EU legislation passed after exit day;

(c) amend clause 5 so that the supremacy of EU law is retained for certain purposes or for certain areas of law;

(d) amend clause 6 so that in certain areas the courts have to follow decisions of the Court of Justice of the EU made after exit day;

(e) widen the scope of clause 7 to allow regulations to make major policy changes, to the extent that they cannot already.

46. It is no answer for the Government to say that they would never use a statutory instrument for these purposes. Clause 9 is wide enough for Ministers to do so. We judge powers not on how the Government say that they will use them but on how any Government might use them.

18 Schedule 7, para. 6(1) and (2)(g).

47. The delegated powers memorandum justifies the extraordinary width of this Henry VIII power because the "exact use of the power will of course depend on the contents of the withdrawal agreement"[19] and the "nature and scale of the legislative changes required are as yet unknown".[20] The answer to this is as follows. The Government propose to take very wide-ranging secondary and tertiary legislative powers in the Bill, which would appear to cover every possible need to deal with failures and deficiencies in retained EU law as we leave the EU. Given the sheer width of these powers, it is difficult to conceive of areas where the proposed powers are not sufficient. However if the final withdrawal agreement includes something that is not capable of being legislated for under the regulation-making powers of the European Union (Withdrawal) Act, then Parliament should legislate rather than Ministers. Parliament is capable of passing urgent Bills with extraordinary expedition.

(iii) Recommendations

48. **Clause 9 involves an inappropriate delegation of power in allowing statutory instruments to amend or repeal the European Union (Withdrawal) Act.**

49. **If, before exit, amendments are needed to the European Union (Withdrawal) Act, it is for Parliament to make the changes through primary legislation rather than for Ministers to do so by statutory instrument, particularly where significant and contentious policy issues are at stake.**

19 Para. 62.
20 Para. 60.

CLAUSE 11 AND SCHEDULE 3: RETAINING EU RESTRICTIONS IN DEVOLUTION LEGISLATION ETC.

(i) Effect

50. The existing law prevents the Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales and Scottish Ministers, Welsh Ministers and Northern Ireland Departments from making legislation that is incompatible with EU law.[21]

51. Clause 11 and Schedule 3 amend that law so that none of the devolved institutions can modify retained EU law unless the modification would have been within their legislative competence immediately before exit day. This means that EU withdrawal will not result in any new competencies being conferred on the devolved institutions, even in subject areas that are already devolved (for example, food, plant health, the environment). It will therefore, at least initially, be for the UK Government and Parliament to legislate on matters that fall within those areas but could not be changed by devolved institutions due to their incapacity to legislate incompatibly with EU law. This provision, which the Scottish and Welsh Governments have declared unacceptable,[22] concerns the devolution settlements rather than delegated powers and is therefore outside this Committee's remit.

52. However clause 11 and Schedule 3 also contain delegated powers that do fall within our remit. These allow for an Order in Council (a type of secondary legislation) to confer on the devolved institutions the power to alter retained EU law. The affirmative procedure would apply in both Houses of Parliament and the relevant devolved legislature.

(ii) Concerns

53. The Government's delegated powers memorandum describes clause 11 as "a transitional arrangement to provide certainty after exit day and allow intensive discussion and consultation with devolved authorities on where lasting common frameworks are needed".[23] As regards the power to prescribe exceptions by Order in Council the memorandum asserts that:

    (a) its purpose is "to provide an appropriate mechanism to broaden the parameters of devolved competence in respect of retained EU law";

    (b) "it adopts a similar approach to established procedure within the devolution legislation for devolving new powers (for example section 30 orders in the Scotland Act 1998)";

    (c) "without the power it would be necessary for the UK Parliament to pass primary legislation (having sought Legislative Consent Motions from the relevant devolved legislatures) in order to release areas from the new competence limit".[24]

21 Scotland Act 1998, sections 29 and 57; Northern Ireland Act 1998, sections 6 and 24, and the Government of Wales Act 2006, sections 80 and 108A (as amended by the Wales Act 2017).

22 See their Legislative Consent Memoranda: http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf and http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf

23 Para. 68.

24 Para. 69.

54. We doubt whether the powers in clause 11 and Schedule 3 are analogous to existing procedures in the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006 (as amended in 2017). In the case of the Scotland Act, Schedule 5 sets out which matters Parliament considers should be reserved to Westminster (for example, defence, foreign affairs and company law).[25] This is supplemented by a power in section 30 to allow existing reservations, by Order in Council, to be removed from the list or new ones to be added.[26] In contrast, the effect of clause 11 and Schedule 3 is to reserve to Westminster all competences returning from the EU unless the position is changed by Order in Council.

55. Moreover the lists of reserved matters in the devolution enactments are, for the most part, relatively straightforward. This is not the case with the concept of "retained EU law" which is defined in clause 6 to mean:

> "anything which, on or after exit day, continues to be, or forms part of, domestic law, by virtue of section 2, 3 or 4 or subsection (3) or (6) [of clause 6] (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time)".

56. This is complex and obscure, and something of a moving target in view of the words in brackets at the end of the definition. There may be significant potential for disputes after exit day between the UK Government and the devolved administrations about what does or does not constitute "retained EU law", which might ultimately require resolution by the Supreme Court.

57. We are also puzzled by the memorandum's description of clause 11 as "a transitional provision". It is not drafted in those terms and could remain indefinitely.

58. The Government appear to envisage that the Order in Council procedure will distribute competences returned from the EU to the devolved institutions, following negotiations with them. The memorandum gives no convincing explanation as to why it is considered appropriate to implement any agreement following those negotiations by delegated legislation, rather than by a Bill. Revisions to the three devolution settlements in light of EU withdrawal will be of considerable constitutional significance. We anticipate that both Houses of Parliament would wish closely to scrutinise proposed legislation amending the settlements, and to have the opportunity to amend it—as has happened with all major changes to devolution since 1998: see most recently the Scotland Act 2016 and the Wales Act 2017.

59. On an issue as important as this, we regard it as unacceptable for Parliament to be presented with a draft Order in Council and given a simple choice of "take it or leave it". The Government should instead bring forward a separate Bill. It is, of course, not for us to express a view as to which competencies returned from the EU should be devolved to Belfast, Cardiff or Edinburgh. We are concerned only with the issue of whether it appropriate for this to be done by delegated powers. In our view, it is not.

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25 See also Northern Ireland Act 1998, Schedules 2 and 3 and the Government of Wales Act 2006, Schedule 7A (inserted by the Wales Act 2017).

26 The power in section 30 of the Scotland Act was used in 2013 so as to confer competence on the Scottish Parliament to legislate for the Scottish independence referendum.

(iii) Recommendation

60. **The Order in Council powers in clause 11 and Schedule 3 are inappropriate and should be removed. Separate Bills should be introduced in Parliament to provide for the conferral on devolved institutions of competencies repatriated from the EU.**

CLAUSE 14: INTERPRETATION OF EXIT DAY

(i) Effect

61. Clause 1 of the Bill repeals the European Communities Act 1972 on exit day. Exit day is defined in clause 14(1) to mean any day appointed by Ministers in regulations. The regulations are subject to **no** parliamentary procedure. That is to say, Ministers can decide on exit day and set it out in law without recourse to Parliament. This becomes the day on which the 1972 Act is repealed and the supremacy of EU law ceases to apply in the UK.

62. Exit day may be one date for some purposes and a different date for other purposes.[27] Accordingly, some sectors might be governed by unchanged EU law for a longer period than others. One can therefore talk about exit **days**, given that there can be more than one.

(ii) Concerns

63. We are concerned that no parliamentary procedure attaches to the setting of exit day(s). There are good reasons why the setting of exit days should require the affirmative procedure, meaning that both Houses are able to debate the regulations before they are made. These reasons include:

- Political significance and public interest will attach to the setting of exit days.
- Some sectors might be governed by unchanged EU law for longer than others.
- The time-limits applying to the making of regulations under clauses 7 to 9 are dependent on exit day. If exit day is later rather than sooner, the period during which regulations under clauses 7 to 9 can be made will be longer.
- Regulations setting exit days can also make transitional and consequential provision, which too may be of significance.

64. Paragraph 73 of the delegated powers memorandum justifies the lack of a parliamentary procedure because "the power is limited to only specifying a date and time which will itself be subject to negotiations between the UK and the EU". However, considerable significance attaches to these dates.

(iii) Recommendation

65. **Regulations stipulating exit day(s) should be subject to the affirmative procedure.**

27 Para. 13(a)(ii) of Schedule 7 to the Bill.

CLAUSE 17(1): POWER TO MAKE CONSEQUENTIAL PROVISION

(i) Effect

66. Clause 17(1) allows Ministers to make regulations containing such provision as they consider appropriate in consequence of the Bill.

67. The powers include a Henry VIII power to repeal or amend any Act of Parliament passed from earliest times until the end of the current Session.

68. We have already noted that, although the power is expressed as a power to modify primary legislation, and therefore may tend to suggest less substantial changes, "modify" is defined by clause 14(1) of the Bill to include amendment and repeal.

69. There is no time-limit on the making of regulations under clause 17, unlike the regulation-making powers in clauses 7 to 9.

70. Regulations under clause 17(1) are subject to the negative procedure, including where those regulations amend or repeal primary legislation.

(ii) Concerns

Scope of powers

71. In our 15th Report of the last Session on the Neighbourhood Planning Bill,[28] we considered a similar regulation-making power which allowed the Minister to make such provision as the Minister considered "appropriate". In that case we expressed concern about such widely-drawn powers and recommended a restriction based on an objective test of necessity rather than leaving this to the subjective judgment of the Minister. We have similar concerns here. The delegated powers memorandum does not explain the need for such widely-drawn powers. It states that regulations under clause 17(1) are limited to making amendments consequential to the contents of the Bill and not to consequences of withdrawal from the EU that are addressed by other powers (for example, under clauses 7 to 9). We are not convinced, given that the substantive effect of the Bill is to provide for the repeal of the European Communities Act 1972, with all that this entails.

72. Paragraph 15(2) of Schedule 7 makes it clear that regulations under clause 17(1) can amend or repeal retained EU law where doing so is consequential on the repeal by the Bill of any enactment contained in the 1972 Act. One consequence of the repeal of the 1972 Act is to remove the requirement to comply with, and implement, EU law. A Minister might at some point in the future rely on this to make substantive policy changes to retained EU law, going beyond remedying a defect. For example, the powers could be used to amend the Working Time Regulations on the basis that the changes are "appropriate" in consequence of the repeal of the 1972 Act and the UK no longer being under a duty to implement the Working Time Directive.

Parliamentary scrutiny

73. Established practice in other legislation has been to require the affirmative procedure for consequential amendments to primary legislation. The

28 15th Report, Session 2016–17 (HL Paper 104), para. 55.

precedents given in paragraph 75 of the delegated powers memorandum are all ones which follow this practice. For Henry VIII powers to be routinely exercised by negative procedure instruments represents a significant departure from what Government and Parliament have hitherto regarded as acceptable. Paragraph 78 of the delegated powers memorandum justifies this on the ground that a large number of "fairly straightforward" changes, including to primary legislation, will be needed in consequence of this Bill. But that does not explain why it is appropriate for the negative procedure to apply in all cases including those which are not "fairly straightforward".

(iii) Recommendations

Scope of powers

74. **The powers to make consequential provision conferred by clause 17(1) should be restricted by an objective test of necessity rather than being left to the subjective judgment of the Minister.**

75. **The Government should be asked to explain why it is necessary to have powers that go beyond those conferred by clauses 7 to 9.**

76. **In the absence of a convincing explanation, clause 17(1) should not be capable of being used to amend retained EU law.**

Parliamentary scrutiny

77. **Where regulations under clause 17(1) amend or repeal primary legislation, the affirmative procedure should — in the absence of a convincing explanation to the contrary — apply in accordance with established practice.**

78. **Where a decision is to be made on the appropriate level of parliamentary scrutiny applying to the making of regulations by Ministers under this Bill, Parliament and not Ministers should decide. When we come to Schedule 7, we recommend a sifting mechanism. Ministers may propose the level of scrutiny which is to apply, but Parliament should have the opportunity to require a higher level of scrutiny. The details are set out at paragraph 107 below. Regulations under clause 17(1), other than those which amend or repeal primary legislation and which should be affirmative, should be subject to this sifting mechanism.**

CLAUSE 17(5): POWER TO MAKE TRANSITIONAL PROVISION

(i) Effect

79. Ministers may, by regulations under clause 17(5), make transitional, transitory or saving provision in connection with the coming into force of provisions of the Bill or the appointment of exit day.

80. The effect of paragraph 10 of Schedule 7 is that the Minister decides for each set of regulations made under clause 17(5) whether it is to be made without any parliamentary procedure (including without any requirement for laying before Parliament), or whether it should be subject to parliamentary scrutiny and, if so, whether the negative or affirmative procedure applies.

(ii) Concerns

81. The delegated powers memorandum explains that, while powers to make transitional provision in connection with commencement are commonly not subject to any parliamentary procedure, the unique circumstances of the Bill warrant a different approach which allows for a higher level of scrutiny. But the memorandum does not explain why Ministers rather than Parliament should decide the appropriate level of parliamentary scrutiny in each case.

(iii) Recommendation

82. **Regulations under clause 17(5) should be subject to the sifting mechanism set out at paragraph 107 below.**

SCHEDULE 4: FEES AND OTHER CHARGES

(i) Effect

83. Schedule 4 confers a power on UK Ministers or (within their areas of competence) Ministers in the devolved administrations to make regulations providing for a public authority to impose "fees or other charges" in respect of functions it is given by regulations under clauses 7 to 9.[29] For example, regulations under clause 7 may establish a new public body to assume the functions of the European Medicines Agency as regards the UK. Schedule 4 would then allow Ministers to make further regulations allowing the body to levy charges on UK pharmaceutical companies, or even on the general public, in connection with the cost of the new UK regulatory regime for medicines.

84. The delegated powers memorandum indicates that Schedule 4 is designed to allow "flexibility" in how new Government functions are funded and that "it enables the creation and modification of fees or other charges so the costs of Government services do not always fall on the taxpayer".[30]

85. Schedule 4 also contains a power for Ministers to confer on public authorities the same powers to make fee regulations as Ministers have, save that where the public authorities make the subordinate legislation it does not have to be subject to parliamentary scrutiny or be made by statutory instrument.[31]

(ii) Concerns

86. The powers in Schedule 4 are very wide. The delegated powers memorandum notes that they would enable:

> "the creation of **tax-like charges** [our emphasis], which go beyond recovering the direct cost of the provision of a service to a specific firm or individual, including to allow for potential cross-subsidisation or to cover the wider functions and running costs of a public body".[32]

87. Ensuring that the general taxpayer does not pay the cost of specialist services is a legitimate aim, although permitting organisations full cost recovery of their services without parliamentary scrutiny allows them to gold plate the services they offer. Parliamentary scrutiny is accordingly important, even where the fees do not overtly involve a tax or a tax-like charge.

88. A "tax-like charge" means a tax. Taxes and tax-like charges should not be allowed in subordinate legislation. They are matters for Parliament, a principle central to the Bill of Rights 1688. Regulations under clauses 7 and 9 cannot impose or increase taxation.[33] But regulations under Schedule 4 may. Not only can Ministers tax, Ministers can confer powers on public authorities to tax and they can do so in tertiary legislation that has no parliamentary scrutiny whatsoever.

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29 The consent of the Treasury is needed where the power is to be exercised by a UK Government Minister. Treasury consent is not needed for exercise of the power by a devolved administration although, in certain limited circumstances, the administration will need to seek the consent of a UK Minister.

30 Para. 91.

31 Para. 1(3)(c) of Schedule 4 and para. 7 of Schedule 7.

32 Para. 89.

33 Clauses 7(6)(a) & 9(3)(a).

89. The affirmative procedure applies to secondary legislation under Schedule 4, made by UK Ministers or Ministers in devolved administrations, which imposes a new fee or charge. But only the negative procedure applies to subsequent regulations modifying those fees.[34] This is open to abuse, allowing an initially very small fee to be set by affirmative regulations, with a subsequent increase accomplished by negative regulations.

90. The delegated powers memorandum recognises that the decision to charge is a policy issue warranting affirmative scrutiny, but suggests that the negative procedure suffices where a department amends the amount.[35] In our view such an amendment equally involves a policy issue. Indeed the initial decision to charge (say) a £10 fee arguably involves less policy than trebling or quadrupling the fee, or increasing a fee by 13,000% — which the Government recently proposed for probate fees.[36]

(iii) Recommendations

91. **Schedule 4 is unacceptably wide.**

(a) **Taxation, including "tax-like charges", should not be permissible at all in regulations made under Schedule 4. Fees and charges for services or functions should operate on a cost-recovery basis, leaving taxation for a Finance Bill — a principle enshrined in Article 4 of the Bill of Rights 1688.**

(b) **Schedule 4 should in no circumstances permit fees or charges to be levied by tertiary legislation.**

(c) **All regulations imposing a fee or charge under Schedule 4 should be made by statutory instrument either by UK Government Ministers or by Ministers in a devolved administration.**

(d) **The affirmative procedure should apply to all regulations made under Schedule 4 which introduce or increase fees, either in both Houses of Parliament or in the relevant devolved legislature.**

34 Para. 7 of Schedule 7 to the Bill.
35 Para. 96.
36 The draft Non-Contentious Probate Fees Order 2017 and the 26th Report of the Joint Committee on Statutory Instruments, Session 2016–17.

SCHEDULE 5: PUBLICATION AND RULES OF EVIDENCE

(i) Effect

92. Paragraph 1 of Schedule 5 sets out the statutory duty of the Queen's Printer in relation to the publication of retained EU law. Paragraph 2 of Schedule 5 allows a Minister of the Crown to amend the scope of this duty, not by a statutory instrument but by a direction.

(ii) Concern

93. Amending the law by direction — with no statutory instrument and no parliamentary procedure — is highly unusual. The delegated powers memorandum justifies this on the ground that it is a "limited administrative power". Even so, to allow Ministers to amend the law by a mere direction, with no associated parliamentary procedure, sets an ominous precedent. Such a direction is what Henry VIII might have called a proclamation. The Statute of Proclamations 1539, which gave proclamations the force of statute law and later gave rise to the term "Henry VIII power", was repealed in 1547 (after the King's death earlier that year).

(iii) Recommendation

94. **The direction-making power should be replaced by a requirement that any changes to the scope of the statutory duty of the Queen's Printer in Schedule 5 be made by statutory instrument.**

SCHEDULE 7: PARLIAMENTARY PROCEDURE FOR REGULATIONS UNDER CLAUSES 7–9 AND 17

(i) Effect

95. Schedule 7 sets out the parliamentary scrutiny procedures for regulations made under the Bill:

    (a) "draft affirmative" (the regulations are laid in draft and cannot be made unless the draft is approved following debates in both Houses);

    (b) "negative" (the regulations are made without a need for any debates, but can subsequently be annulled following an adverse vote in either House);

    (c) "made affirmative" (the regulations are made and come into force but cannot *remain* in force unless approved by both Houses within one month of being made).

96. The "made affirmatives" are for urgent cases.

97. The "draft affirmatives" under clauses 7 to 9 cover a variety of matters:

- establishing a new public authority;
- transferring an EU function to a newly created public authority;
- transferring an EU legislative function to a UK body;
- imposing fees;
- creating or widening the scope of certain criminal offences;
- creating or amending a power to legislate; and
- (in the case of clause 9) amending the European Union (Withdrawal) Act.

98. If an exercise of powers does not fall within one of these matters, Ministers have an unfettered discretion to decide whether the affirmative or negative procedure should apply.

(ii) Concerns

Extending the matters to which the affirmative procedure applies

99. There is no obvious rationale for the narrow range of matters which must be contained in affirmative regulations under clauses 7 to 9. In the context of regulations under clause 7, the delegated powers memorandum talks of the negative procedure being used for those areas that are "principally mechanistic". This is vague, as was the same language in the White Paper,[37] and in our view raises the question whether the list of matters which automatically require the affirmative procedure has been appropriately drawn, or whether there are further matters which should be added to the list.

37 Para. 3.22.

100. Under Schedule 7, the affirmative procedure is required where the regulations provide for any function of an EU body to be exercisable by a newly-established body under clauses 7 to 9. However, where regulations transfer such functions to an existing body the negative procedure can apply. We are not convinced that there are sound reasons for this difference in approach. The issues of how transferred functions should be configured in a UK context, and which body is most appropriate to exercise particular functions, are of equal importance in both cases, and arguably justify the affirmative procedure in both cases.

101. It is suggested in paragraph 47(a) and (b) of the delegated powers memorandum that a higher level of scrutiny is appropriate where functions are transferred to a newly-established body because of the cost implications of setting up the new body. There will be cost implications arising from the transfer of functions (and how those functions are configured) whether it is a new or old body that is given the functions. And in any case that seems to us to be an unduly narrow basis for determining whether the affirmative procedure should apply.

102. The powers in clauses 7(4), 8(2) and 9(2) for regulations to do anything that an Act of Parliament can do involve a significant Henry VIII power. Except in the narrow cases where regulations must be affirmative, the Government are free to exercise these Henry VIII powers under the negative procedure. This is a significant departure from long-established practice whereby the Government have accepted the Committee's position that powers to amend primary legislation should be made in affirmative instruments save in exceptional cases for which a full justification must be provided.

103. To say that some of the changes will be "mechanistic and minor"[38] does not provide an adequate justification for applying the negative procedure in all cases particularly as these are exceptionally wide-ranging Henry VIII powers.

Deciding whether the affirmative or negative procedure applies

104. The delegated powers memorandum does not explain why it is Ministers rather than Parliament who should have the final say on the appropriate level of parliamentary scrutiny in those cases where either the affirmative or negative procedure is capable of applying. There are examples in existing legislation where the final decision on the level of scrutiny is given to Parliament: for example, the Legislative and Regulatory Reform Act 2006, the Public Bodies Act 2011 and the Localism Act 2011. A similar mechanism could be included in this Bill, albeit with shorter time-periods in view of the large amount of legislation that has to be in place before exit from the EU.

(iii) Recommendations

Extending the matters to which the affirmative procedure applies

105. **The affirmative procedure should apply to regulations which transfer EU functions to a UK body under clauses 7 to 9, irrespective of whether or not the body is newly established.**

38 See para. 47 of the delegated powers memorandum.

106. **In the absence of a convincing explanation to the contrary, the affirmative procedure should apply to regulations under clauses 7 to 9 and 17 that amend or repeal primary legislation.**

Deciding whether the affirmative or negative procedure applies

107. **Where the Bill currently allows Ministers a choice as to whether the affirmative or negative procedure applies to regulations under clauses 7 to 9 and 17(5), we recommend the following sifting mechanism instead.[39] We also consider that this mechanism should apply to all regulations made under clause 17(1).**

(a) **Each statutory instrument is laid in draft. The Minister proposes either the affirmative or the negative procedure. Where the Minister proposes the negative procedure, he or she must justify it in writing to Parliament.**

(b) **Where the Minister proposes the affirmative procedure, that procedure will apply.**

(c) **Where the Minister proposes the negative procedure, a committee of each House — or a joint committee of both Houses — has 10 sitting days in which to accept the Minister's proposal or recommend the affirmative procedure. If no recommendation is made in the 10-day period, the statutory instrument will be subject to the negative procedure.**

(d) **If the responsible committee of either House (or a joint committee) recommends the affirmative procedure, that level of scrutiny applies unless the relevant House resolves to reject the committee's recommendation within a further period of five sitting days.[40]**

(e) **Once the relevant periods have expired:**

- **Where the negative procedure applies, the Minister may make the statutory instrument although it could still be annulled if prayed against in either House within the usual 40-day period.**
- **Where the affirmative procedure applies, the Minister may make the statutory instrument once the draft has been approved by both Houses.**

(f) **In urgent cases where the Minister considers it necessary for a proposed negative instrument to come into force immediately, the Minister makes the instrument before laying it. The relevant Committee(s) would still have 10 days in which to recommend that the affirmative procedure should apply instead. If it**

39 Others have also considered how the two Houses can play a role in determining the scrutiny procedures to be applied to instruments made under the Bill. See, for example, Hansard Society, *Taking Back Control for Brexit and Beyond* (September 2017).

40 As under the Legislative and Regulatory Reform Act 2006, there is no need for both Houses to agree on the necessary level of scrutiny. A recommendation or resolution from either House is sufficient to increase the level of parliamentary scrutiny. The position is analogous to that under the Statutory Instruments Act 1946, where a successful prayer in either House against a negative procedure statutory instrument is sufficient to lead to its annulment.

made such a recommendation, which was not rejected by the relevant House, the instrument would cease to remain in force unless approved by both Houses within 40 days of laying. If no recommendation is made, the instrument continues to have effect like any other negative instrument, subject to the usual 40-day praying period.

108. This sifting mechanism strikes a balance between the scrutiny requirements of Parliament and the business needs of Government. So far as the level of applicable scrutiny is concerned, our proposal would allow for every instrument to be judged rapidly on its merits. In our view, it incorporates realistic timeframes that will allow the Government to have a functioning statute book when the UK leaves the EU. Since many of the regulations to be made under the Bill may end up being laid before Parliament towards the end of the negotiation process, it is all the more important that Members of both Houses have an opportunity to sift the purely mechanistic ones from those which they consider deserve fuller scrutiny. The sifting process permits Parliament to make rapid decisions on those regulations which it wants to scrutinise more closely.

SUMMARY OF OUR MAIN RECOMMENDATIONS

1. **Powers given to Ministers to "correct" retained EU law are too wide.**

   - **The test in clauses 7 to 9 and 17 should be whether remedial action is objectively necessary rather than whether the Minister thinks it is appropriate.**
   - **Tertiary legislation should be subject to the same parliamentary control and time-limits applicable to secondary legislation.**
   - **Ministers should not be able to amend or repeal the European Union (Withdrawal) Act by statutory instrument.**

2. **The Order in Council powers in clause 11 (devolution) are inappropriate. Separate Bills should provide for the conferral on devolved institutions of competencies repatriated from the EU.**

3. **Regulations under clause 14 stipulating exit day(s) should be subject to the affirmative procedure.**

4. **Schedule 4 (fees and charges) is unacceptably wide. Taxation and "tax-like charges" are matters for Parliament, not for Ministers under secondary legislation or other bodies under tertiary legislation. All regulations made under Schedule 4 which introduce or increase fees should be subject to the affirmative procedure.**

5. **In the absence of a convincing explanation to the contrary, the affirmative procedure should apply to Henry VIII powers under clauses 7 to 9 and 17 that allow Acts of Parliament to be amended or repealed.**

6. **Ministers should not have an unfettered choice to apply the negative or the affirmative procedure for statutory instruments under those clauses. We propose instead a sifting mechanism:**[41]

   - **Ministers lay all instruments in draft before Parliament, proposing either the affirmative or the negative procedure.**
   - **Where the Minister proposes the affirmative procedure, it applies.**
   - **Where the Minister proposes the negative procedure, a parliamentary committee has 10 sitting days in which to recommend the affirmative procedure instead. If no such recommendation is made, the negative procedure applies.**
   - **Where the committee recommends the affirmative procedure, it applies unless the relevant House rejects the committee's recommendation within a further period of five sitting days.**

41 In urgent cases, the procedure in paragraph 107(f) applies.

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

The membership of the Committee is set out on the inside front cover of this Report.

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office.

Dear Gareth,

Please find attached a set of amendments to the EU (Withdrawal) Bill which the RSPB has worked on pulling together as part of the Greener UK coalition – a group of 13 major environmental organisations who are working together to maintain and strengthen the UK's environmental protections and climate leadership as we leave the EU.

Greener UK believes that, no matter what the outcome of the Brexit negotiations, the people of Wales, England, Scotland, and Northern Ireland deserve a world class environment with clean air and water, a stable climate, healthy seas, beautiful landscapes, and thriving wildlife in the places we love. However, as currently drafted, the bill contains flaws that will leave our natural environment less well protected than it is now.

In particular, the bill needs to:

1. Convert the entire body of European environmental law into domestic law, including fundamental principles of international and EU environmental law.

2. Provide for new governance arrangements, so that there is effective implementation of environmental standards, whatever the UK's future relationship with EU institutions.

3. Restrict the use of secondary legislation, before and after Brexit, and create processes for robust parliamentary scrutiny of any changes made through secondary legislation during the conversion of EU law

We are asking for the Welsh Government's help to support these amendments - which are in line with and support implementation of the Well-being of Future Generations (Wales) Act 2015 - and promote them to Westminster Government during discussions on the Bill.

I would be grateful if you could pass these amendments onto the Constitutional and Legislative Affairs Committee and ask them to push Welsh Government to raise them with the UK Government in order to highlight the importance of getting the Bill right for the benefit of the environment across the UK. We would be happy to provide more information if required.

If you have any queries please don't hesitate to contact me.

Kind Regards

Jess

Jess Chappell

	Proposed amendment	Justification
1	To move the following Clause— **Scope of delegated powers** Subject to clauses 8 and 9 and paragraphs 13 and 21 of Schedule 2, any power to make, confirm or approve subordinate legislation conferred or modified under this Act and its Schedules must be used, and may only be used, insofar as is necessary to ensure that retained EU law continues to operate with equivalent scope, purpose and effect following the United Kingdom's exit from the EU	The stated purpose of the EU (Withdrawal) Bill is to transfer existing EU law into the UK statute book as seamlessly as possible on exit day. The purpose of this amendment is to ensure that the very broad powers to create secondary legislation given to ministers by the Bill (for example in clause 7 to "prevent, remedy or mitigate… deficiencies in retained EU law arising from withdrawal") can only be used in pursuit of the overall statutory purpose, namely to allow retained EU law to continue to operate effectively after exit day. This clause thus gives effect to commitments already made by ministers. The EU (Withdrawal) Bill contains very broad powers for ministers to amend retained EU law by secondary legislation. The scope of the powers must be clearly limited and the use of such powers restricted to only "functional" amendments that ensure retained EU law continues to operate with the same scope, purpose and effect following Brexit. The Bill also provides for secondary legislation to be used to implement the terms of any withdrawal agreement with the EU. However, this framing is too broad and it is arguable that ministers could use secondary legislation to reverse certain environmental protections existing as a result of the UK's membership of the EU if they were not required by such withdrawal agreement. Such powers should only be used to implement obligations on the UK arising from the withdrawal agreement, and not used to remove pre-existing standards, protections and rights resulting from EU membership.
2	Clause 4, page 2, line 45, leave out— *"(b) are enforced, allowed and followed accordingly,"*	This amendment simply deletes clause 4(1)(b) of the Bill. Clause 4(1)(b) adds an unnecessary extra criterion that must be satisfied before citizens can rely on existing rights. The test set out at clause 4(1)(a) - that such rights are available in domestic law immediately before exit day - is sufficient for those rights to continue to be available following the UK's exit from the EU. This is consistent with the overall purpose of the Bill – the seamless transfer of existing EU law (including existing case law) into UK law. The additional requirement in clause 4(1)(b) that such rights are

		currently "enforced, allowed and followed" is unnecessary and raises potential arguments that rights available but not currently enforced in domestic law, will be lost on the UK leaving the EU. Such a position would be unacceptable and amendment 2 deals with this by removing 4(1)(b).
3	Clause 4, page 3, leave out subclause (2)(b) and after subclause (3) insert— (…) Where, following the United Kingdom's exit from the EU, no specific provision has been made in respect of an aspect of EU law applying to the United Kingdom or any part of the United Kingdom immediately prior to the United Kingdom's exit from the EU, that aspect of EU law shall continue to be effective and enforceable in the United Kingdom with equivalent scope, purpose and effect as immediately before exit day. (…) Where, following the United Kingdom's exit from the EU, retained EU law is found to incorrectly or incompletely transpose the requirements of EU legislation in force on exit day, a Minister of the Crown shall make regulations made subject to an enhanced scrutiny procedure so as to ensure full transposition of the EU legislation.	Clause 4, subsection 1 provides that, amongst other things, people's rights available in the UK as a result of the UK's membership of the EU will continue after the UK leaves the EU. However clause 4(2)(b) excludes rights arising under EU directives which are not recognised by the courts. Clause 4(2)(b) should be removed so that rights arising under EU directives (but not yet adjudicated on by the courts) are protected and continue to be available in UK courts. New sub –clause (3) deals with a situation where the UK has incorrectly implemented a directive as there is no guarantee that all EU directives will have been correctly implemented in domestic law prior to exit day. In cases of incorrect implementation, reliance on the EU directive may still be necessary. New sub clause (4) ensures that where the UK has not correctly or completely implemented EU law, such as a directive, prior to exit day, there will be a statutory obligation on Ministers to modify UK law to ensure that the relevant EU legislation is correctly and fully implemented. This power is particularly important because some requirements of EU directives currently (and correctly) exist only within the text of the directive and have not been transposed into domestic law. Many reporting and reviewing requirements fall into this category.
4	Clause 7, page 6, line 18, at end insert— (g) limit the scope or weaken standards of environmental protection.	Clauses 7, 8, 9 and 17 of the EU (Withdrawal) Bill grants ministers very wide powers to legislate (and amend existing legislation) by way of regulations (which have the effect of primary legislation). . Amendments 4 to 7 will ensure that these regulation-making powers may not be
5	Clause 8, page 6, line 38, at end insert— (e) limit the scope or weaken standards of environmental protection.	

6	Clause 9, page 7, line 8, at end insert— (e) limit the scope or weaken standards of environmental protection.	
7	Clause 17, page 14, line 13, at end insert— (8) Regulations under this section may not limit the scope or weaken standards of environmental protection. (9) No regulations may be made under this section after the end of the period of two years beginning with exit day.	New sub clause (9) supplements the more limited restriction on exercise of the consequential amendment power in sub clause (3) of the Bill, so as to ensure consistency with the other main regulation making powers in the Bill.
Tudalen y pecyn 37	Schedule 1, page 15, line 17, delete paragraph 2 and insert— 2. (1) Any general principle of EU law will remain part of domestic law on or after exit day if: (a) it was recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case); (b) it was recognised as a general principle of EU law in the EU Treaties immediately before exit day; (c) it was recognised as a general principle of EU law by any direct EU legislation (as defined in section 3(2) of this Act) operative immediately before exit day; or (d) it was recognised as a general principle of EU law by an EU directive that was in force immediately before exit day. (2) Without prejudice to the generality of sub-paragraph (1), the principles set out in Article 191 of the Treaty on the Functioning of the European Union shall be considered to be general principles for the purposes of that sub-paragraph.	Paragraph 2 of Schedule 1 currently limits the retention of "general principles" of existing EU law after exit day to principles which have been recognised by the European Court in case law. This is an odd criterion given that it risks excluding, for example, principles included in the EU treaties that have not been the subject of litigation in the European Court. Amendment 8 therefore clarifies that all the existing principles of EU law will be retained within domestic law whether they originate in the case law of the European Court, the EU treaties, direct EU legislation or EU directives. This is consistent with the overall purpose of the Bill – the seamless transfer of existing EU law into the UK statute book on exit day. It also makes clear that the key environmental law principles in Article 191 of the Treaty are retained, since the use of the term "general" in Schedule 1(2) has created uncertainty as to whether principles of this kind are "general" and would be retained after exit day.

9	Schedule 1, page 15, line 28, leave out paragraph 4	The rule in Francovich that individuals can claim damages against a state for failure to implement EU legislation correctly should be maintained to the extent that EU legislation continues to apply to the UK. There is no reason why the UK courts should not be able to award damages against the Government for failure to implement correctly EU legislation that was in force immediately prior to exit day. This is consistent with the overall purpose of the Bill – the seamless transfer of existing EU law – including existing rights arising under EU law - into the UK statute book on exit day. It is an important (financial) incentive to ensure government complies with the law (by way of implementation).
10	To move the following Clause— **Treatment of retained law** (1) Following the commencement of this Act, no modification may be made to retained EU law save by primary legislation, or by subordinate legislation made under this Act. (2) By regulation, the Minister may establish a Schedule listing technical provisions of retained EU law that may be amended by subordinate legislation. (3) Regulations made under subsection (2) will be subject to an enhanced scrutiny procedure including consultation with the public and relevant stakeholders. (4) Regulations may only be made under subsection (2) to the extent that they will have no detrimental impact on the UK environment. (5) Delegated powers may only be used to modify provisions of retained EU law listed in any Schedule made under subsection (2) to the extent that such modification will not limit the scope or weaken standards of environmental protection.	Most EU Regulations and Directives have undergone a full democratic process via the European Parliament and Council before becoming law. It is therefore appropriate that substantive changes to these important laws can only be made through the full democratic process provided by the UK's parliaments. Otherwise, a democratic deficit will open up and important environmental safeguards will be vulnerable to modification without the proper scrutiny. We accept that there may be elements of retained EU law that it would be more appropriate to be amended by subordinate legislation even after the 2 year sunset clause for secondary legislation under the EU (Withdrawal) Bill expires. Amendment 10 provides a mechanism for ministers to establish a list of technical provisions of retained EU law that may be amended by subordinate legislation outside of the time restrictions of the EU (Withdrawal) Bill.
11	Schedule 8, page 50, leave out paragraphs (3) and (5)	This amendment deletes paragraphs 3 and 5 of Schedule 8 in their entirety. Paragraph 3 provides that a power to modify retained direct EU legislation will be "read in" to *any* existing power to make subordinate

		legislate conferred prior to exit day. This power is unnecessary given the breadth of the powers conferred by the main part of the Bill. Paragraph 5 purports to "read in" the power to modify retained direct EU legislation into any powers to make subordinate legislation made after exit day. Neither of these paragraphs is necessary and, in the case of paragraph 5, the effect would appear to be unconstitutional (Parliament should not in this Bill seek to pre-empt any decision Parliament may take in the future about the appropriate scope of a proposed power to make subordinate legislation). In any event clause 7 of the Bill gives ministers ample powers to correct deficiencies in retained EU law by regulation. Importantly clause 7 is subject to a sunset provision that could be circumvented if paragraphs 3 and 5 of Schedule 8 were enacted.
Tudalen y pecyn 39	12 To move the following Clause— **Scrutiny of statutory instruments** (1) A Parliamentary Committee shall determine the form and duration of parliamentary and public scrutiny for every statutory instrument proposed to be made under this Act. (2) Where the relevant Committee decides that the statutory instrument will be subject to enhanced parliamentary scrutiny the Committee shall have the power— (a) to require a draft of the proposed statutory instrument be laid before Parliament; (b) to require the relevant Minister to provide further evidence or explanation as to the purpose and necessity of the proposed instrument; (c) to make recommendations to the relevant Minister in relation to the text of the draft statutory instrument; (d) to recommend to the House that "no further proceedings be taken" in relation to the draft statutory instrument.	The Bill as currently drafted provides that all regulations made under the Act will be subject to the existing standard scrutiny procedures (either negative or affirmative – see, for example, Schedule 7, paragraphs 1, 5 and 6). This amendment recognises that the Government is likely to have to bring forward a very large number of regulations in a relatively short period of time in order to ensure that the statute book operates effectively from exit day onwards and accepts that the negative or affirmative scrutiny procedures may well be appropriate for many of those regulations (especially for those making purely technical changes rather than establishing matters of policy or principle). This amendment sets up a Parliamentary Committee to assess the level of scrutiny necessary for statutory instruments proposed under the Bill. In this way, uncontroversial statutory instruments can be processed quickly, but the Committee can require some statutory instruments be subjected to enhanced scrutiny

	(3) Where an instrument is subject to enhanced scrutiny, the relevant Minister must have regard to any recommendations made by the Parliamentary Committee pursuant to subparagraph (c) above before laying a revised draft instrument before each House of Parliament. (4) Where an instrument is subject to public consultation, the relevant Minister must have regard to the results of the consultation before laying a revised draft instrument before each House of Parliament or making a Written Statement explaining why no revision is necessary.	As such, this amendment seeks to ensure: 1) that a Parliamentary Committee rather than ministers should decide what is the appropriate level of scrutiny for regulations made under the Act; 2) that the Parliamentary Committee has the power to require enhanced scrutiny in relation to regulations that it considers to be particularly significant or contentious. This amendment is intended to achieve a sensible balance between the need for Parliament to scrutinise effectively particularly significant and contentious regulations while allowing ministers to make regulations dealing with largely technical or non-contentious matters without undue delays.

14	To move the following Clause— **Institutional arrangements** (1) Before exit day a Minister of the Crown must make provision that all powers and functions relating to the environment or environmental protection that were exercisable by EU entities or other public authorities anywhere in the United Kingdom before exit day which do not cease to have effect as a result of the withdrawal agreement ("relevant powers and functions") will— (a) continue to be carried out by an EU entity or public authority; (b) be carried out by an appropriate existing or newly established entity or public authority in the United Kingdom; or (c) be carried out by an appropriate international entity or public authority. (2) For the purposes of this section, relevant powers and functions relating to the UK exercisable by an EU entity or public authority include, but are not limited to— (a) monitoring and measuring compliance with legal requirements, (b) reviewing and reporting on compliance with legal requirements, (c) enforcement of legal requirements, (d) setting standards or targets, (e) co-ordinating action, (f) publicising information including regarding compliance with environmental standards. (3) Within 12 months of exit day, the Government shall consult on and bring forward proposals for the creation by primary legislation of— (a) a new independent body or bodies with powers and functions at least equivalent to those of EU entities and	As noted by the House of Lords EU committee last year: "the importance of the role of the EU institutions in ensuring effective enforcement of environmental protection and standards… cannot be over-stated". EU institutions perform vital governance functions for the UK that must either be maintained or replicated after Brexit. They have brought the letter of the law to life through monitoring, oversight, implementation and enforcement. For example, the European Commission carries out an important watchdog function in ensuring member states comply with common environmental standards and requirements. Our current domestic arrangements and institutions are not able to fulfil all of these functions in a comparable way to the existing system. The government has said that the UK's judicial review and parliamentary processes would be enough to enforce environmental law, but (leaving aside the argument in favour of a specialist environmental tribunal to deal with environmental claims and the shortcomings of current judicial review rules) this response does not answer concerns about the non-judicial functions currently carried out at EU level – for example, monitoring and reporting on compliance and the setting of standards and targets. . While the precise role of EU or other bodies in overseeing future relationships between the UK and EU will depend on the outcome of the negotiations, we already know that the UK will have to replace some key oversight functions with new domestic arrangements. Post-Brexit, UK governance institutions must have (i) adequate resources (ii) full independence (iii) relevant expertise and (iv) sufficient legal powers to uphold and enforce environmental protections. Amendment 14 places an obligation on the Government to consult on and bring forward new domestic governance proposals within 12 months of exit day to ensure there is no "governance gap" following the UK's exit from the EU and that the Government's long-term proposals for

	public authorities in Member States in relation to the environment; and (b) a new domestic framework for environmental protection and improvement. (4) Responsibility for any functions or obligations arising from retained EU law for which no specific provision has been made immediately after commencement of this Act will belong to the relevant Minister until such a time as specific provision for those functions or obligations has been made. Clause 7, page 6, line 6, at end insert— (c) A public authority established under this Section will be abolished after 2 years.	environmental protection and improvement are placed on a sound legislative footing and subjected to rigorous parliamentary scrutiny. The amendment also ensures that any new public authorities established by secondary legislation under the Bill to exercise functions currently exercised by EU institutions are placed on a sound footing of primary legislation within two years of their establishment. Whilst we appreciate that temporary measures in relation to governance and enforcement may need to be put in place on the UK leaving the EU, public authorities set up by ministers should only be a temporary measure and a full proper process should eventually be gone through, with proper consultation, to establish lasting public authorities. As such, public authorities set up by ministers using delegated powers under the EU (Withdrawal) Bill, should have a limited life span and be required to be replaced after 2 years. If the Government fails to replace these authorities then those public authorities will be abolished, but that is not the desired outcome of this amendment. The intention is to provide a positive incentive for the Government to bring forward primary legislation within 12 months of exit day.
15	Schedule 1, page 15, line 21, leave out paragraph 3	This amendment deletes paragraph 3 of Schedule 1. This paragraph states *"There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law."* Once the general principles have been retained and converted into domestic law they should, as with the majority of other UK laws, be enforceable by UK courts. The law has little strength if it cannot be enforced by those who rely on it. The amendment is consistent with the overall purpose of the Bill – the seamless transfer of existing EU law into the UK statute book on exit day. If paragraph 3 remains in the Bill it would be likely to deprive UK citizens of rights they currently enjoy under EU law. That is plainly inconsistent with the stated purpose of the Bill.

16	To move the following Clause— **General Environmental Principles** (1) In carrying out their duties and functions, public authorities must have regard to and apply the principles set out in this section. (2) Any duty or function conferred on a public authority must be construed and have effect in a way that is compatible with the principles in this Section and the aim of achieving a high level of environmental protection and improvement of the quality of the environment. (3) The principles in this section are— (a) the need to promote sustainable development in the UK and overseas; (b) the need to contribute to preserving, protecting and improving the environment; (c) the need to contribute to prudent and rational utilisation of natural resources; (d) the need to promote measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change; (e) the precautionary principle as it relates to the environment; (f) the principle that preventive action should be taken to avert environmental damage; (g) the principle that environmental damage should as a priority be rectified at source; (h) the polluter pays principle; (i) the principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities, in particular with a view to promoting sustainable development;	This amendment address the failure of the Bill to adequately define "general principles of EU law" to include the environmental principles and ensures that all public authorities must, in carrying out their duties and functions, have regard to certain key principles of environmental protection currently enshrined in EU law. This is consistent both with the stated purpose of the Bill and with the Government's declared intention that exit from the EU should not lead to any weakening of environmental protection. The amendment seeks to ensure that the core principles on which EU environmental law is based are firmly entrenched within UK public law after exit day.

Tudalen y pecyn 44	(j) the need to guarantee participatory rights including access to information, public participation in decision making and access to justice in relation to environmental matters. (together the "environmental principles"). (4) In carrying out their duties and functions, public authorities shall take account of— (a) available scientific and technical data; (b) environmental benefits and costs of action or lack of action; and (c) economic and social development. (5) Public authorities, shall when making proposals concerning health, safety, environmental protection and consumer protection policy, take as a base a high level of protection, taking account in particular of any new development based on scientific facts. (6) Subsection (7) applies in any proceedings in which a court or tribunal determines whether a provision of primary or subordinate legislation is compatible with the environmental principles. (7) If the court is satisfied that the provision is incompatible with the environmental principles, it may make a declaration of that incompatibility. (8) In formulating and implementing agriculture, fisheries, transport, research and technological development and space policies, public authorities shall pay full regard to the welfare requirements of animals as sentient beings, while respecting the administrative provisions and customs relating in particular to religious rites, cultural traditions and regional heritage.	

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28 Medi 2017

Annwyl Gadeirydd

Dros y ddwy flynedd ddiwethaf, rydym wedi mynd â gwaith y Cynulliad i bobl Cymru drwy fenter Senedd@. Hyd yn hyn, rydym wedi mynd â'r fenter ar daith i Wrecsam, Abertawe a Chasnewydd. Gwnaethom ddewis y lleoliadau hyn am fod nifer y rhai a bleidleisiodd yno yn etholiadau'r Cynulliad yn 2011 a 2016 yn arbennig o isel.

Cyflwynwyd rhaglen gynhwysfawr o ddigwyddiadau, ymweliadau a gweithdai fel rhan o Senedd@Wrecsam, Senedd @Abertawe a Senedd@Casnewydd, a gwnaethom gynnwys miloedd o bobl yn uniongyrchol yng ngwaith y Cynulliad. Gwnaethom hefyd feithrin perthnasau gwaith â sefydliadau lleol pwysig a'r cyfryngau lleol. Er mwyn cynnal y momentwm a grëwyd drwy ein hymweliadau â'r trefi hyn, a chan adeiladu ar y gwersi a ddysgwyd, rwy'n awyddus i gynnal digwyddiad arall fel rhan o fenter Senedd@ yn ystod yr wythnos sy'n dechrau ar 13 Tachwedd 2017. Etholaeth Delyn yw'r lleoliad a ddewiswyd ar gyfer menter nesaf Senedd@.

Un o brif ganfyddiadau'r gwerthusiad o fentrau blaenorol Senedd@ oedd bod angen galluogi pwyllgorau i ystyried eu cyfranogiad posibl yn llawer cynharach yn y broses gynllunio. Felly, rwy'n gwahodd unrhyw awgrymiadau sydd gan eich pwyllgor ynghylch sut y gallai gymryd rhan yn Senedd@Delyn.

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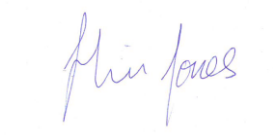
Yn y gorffennol, mae pwyllgorau wedi cynnal cyfarfodydd ffurfiol mewn lleoliadau cymunedol fel rhan o fentrau Senedd@, gan achub ar y cyfle i annog pobl i gymryd rhan yn eu gwaith. Bydd Senedd@Delyn yn gyfle gwych i'ch pwyllgor godi ei broffil ac ymgysylltu â'r cyfryngau a llawer o sefydliadau lleol.

Os bydd angen rhagor o wybodaeth arnoch, cysylltwch â Geraint Huxtable drwy ffonio 0300 200 6277 neu drwy anfon neges e-bost: Geraint.Huxtable@Cynulliad.Cymru

Diolch ymlaen llaw am eich cymorth.

Yn gywir



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Llywydd

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