Evidence to the Delegated Powers and Law Reform Committee
European Union (Withdrawal) Bill

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This submission is in response to the Committee’s call for evidence. It seeks to address some of the questions raised by the Committee with regard to delegated powers in the European Union (Withdrawal) Bill. The submission is confined to comments on points of law.

A. Preliminary point: retained EU law in the UK legal order

1. The European Union (Withdrawal) Bill will introduce a new category of law into the law of the UK: ‘retained EU law.’ According to the definition in clause 6(7) of the Bill, retained EU law ‘means anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of clause 2, 3 or 4 or sub-clause (3) or (6) above (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).’

2. It follows that retained EU law comprises three sub-categories: EU-derived domestic legislation (as per clause 2); direct EU legislation (as per clause 3); and rights under clause 2 (1) of the European Communities Act 1972 (as per clause 4).

3. **EU-derived domestic legislation** are domestic enactments (i.e. both primary and secondary legislation), which were either made under section 2 (2) of the European Communities Act 1972 (ECA) – these are statutory instruments typically adopted to transpose EU Directives – or for the same purpose or otherwise relating to the EU or the EEA.

4. This category is very broadly defined. The catch-all formulation in clause 2 (2) (d) ‘relating otherwise to the EU or EEA’ demonstrates this. This result is that apart from statutory instruments adopted under the ECA, this includes numerous Acts of Parliament adopted (partly or wholly) giving effect to EU Directives, such as the Equality Act 2010 or the Consumer Rights Act 2015. The definition also catches provisions of domestic law that pre-date an EU obligation, which mirrors them. An example would be the prohibition of disability discrimination (now) contained in the Equality Act, which is required by Directive 2000/78/EC, but has existed in UK law since 1995.

5. **Direct EU legislation** is EU legislation that has effect in EU law, i.e. which by virtue of EU law is directly applicable in the UK. The main examples are EU Regulations, which – in contrast to EU Directives - under the EU Treaties normally need no implementation in domestic law. Naturally there are myriad examples. A well-

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known EU Regulation is Regulation 261/2004 on flight cancellation (and delay) compensation.

6. **Rights under section 2 (1) ECA** are mainly rights under the EU Treaties, in particular the right to equal pay for women and men (Article 157 TFEU) and the rights of the single market, in particular those pertaining to free movement of goods; freedom to provide services; free movement of people; and free movement of capital. **Not included** are the rights flowing from the **EU Charter of Fundamental Rights** even though most of these rights also exist as general principles of EU law and they are retained, albeit in a modified form as they cannot be the basis for a right of action and their function is thus relegated to that of an interpretational aid.\(^1\) Furthermore, the right to claim state liability for failure of the UK (or any other public body attributable to the UK) to comply with EU law is not included.\(^2\)

**B. Appropriateness of delegated powers**

7. The European Union (Withdrawal) Bill confers far-reaching powers of amendment on Ministers to make changes to retained EU law in three situations. First, in order to prevent, remedy or mitigate ‘deficiencies’ in retained EU law; second in order to comply with the UK’s international obligations (in particular any agreement on the future relationship between the EU and the UK); and third in order to implement the withdrawal agreement (which will presumably also deal with a transition from EU membership to the final future relationship).

8. These are very wide powers as they expressly allow ministers ‘to make any provision that could be made by Act of Parliament’ (so-called Henry VIII clause). The powers are particularly far-reaching because the category of law – retained EU law – which they affect is very broadly defined. As shown above, includes numerous Acts of Parliament and legislation that was adopted independently of the UK’s EU law obligations and was only later made mandatory under EU law (see paragraphs 4 and 5). Moreover, when it comes to the implementation of the withdrawal agreement, clause 9 even allows ministers to make changes to the European Union (Withdrawal) Act itself.

9. It is questionable whether these powers are entirely appropriate. There is admittedly a need for powers to correct retained EU law where it would otherwise not work. For instance, references to EU law in these instruments will need to be corrected. Equally, EU law may provide for a reporting duty to the European Commission, which after Brexit becomes redundant and must either be replaced or removed. However, the breadth of these powers – based on a definition of ‘retained EU law’ that goes beyond what is technically necessary in order to salvage existing provisions and keep the legal system functioning – would seem to be both unprecedented and ill-defined. The respective sunset clauses in clauses 7-9 –

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1 See clause 5(4 and 5) and Schedule 1 para 2 and 3.
2 See schedule 1 para 4.
limiting the exercise of these powers to two years or to Brexit day depending - do only little to mitigate this.

10. The powers in clauses 7-9 of the Bill are so-called Henry VIII powers, which allow Ministers to make any provision that could be made by Act of Parliament. Clause 9 even allows for changes to the European Union (Withdrawal) Act itself to be made by way of statutory instrument. The limits of this power are not clearly defined. The lack of clarity of these powers is considered in more detail below at C.

11. Schedule 2 of the European Union (Withdrawal) Bill confers similar powers to those contained in clauses 7 to 9 of the Bill on Scottish Ministers as far as they concern devolved competences.

12. However, Schedule 2 stipulates two important limitations in para 3: by contrast to a Westminster minister a Scottish minister will not be in a position to modify retained direct EU legislation (i.e. in particular EU Regulations carried over into UK law) even if the subject matter they deal with would ordinarily be devolved; and Scottish ministers may not modify anything which is retained by virtue of section 4 of the Bill, i.e. primarily Treaty rights. A further restriction can be found in para 7 (1) of Schedule 2. If a Scottish minister wanted to modify retained EU law pertaining to those areas, they would need to act jointly with a UK minister.¹⁴ Hence the corresponding powers of the Scottish ministers are asymmetrical to those of UK ministers.

13. It is not entirely clear why Scottish ministers should be categorically excluded from powers to modify direct EU legislation so far as it falls within the devolved competence. For instance, a number of private international law instruments (e.g. the Brussels Regulations) may need specifically Scottish adaptations given the separateness of Scots law and the Scottish judiciary. Hence at least for these cases a case could be made that powers to modify them should be exercised by Scottish ministers.

14. The only explanation for the restriction would be the overall aim of the Bill to retain existing EU frameworks at the Westminster level, at least temporarily. The consequence is that the powers of Scottish Ministers remain broadly the same as they are now, while the powers of Westminster ministers are augmented considerably. It is not the purpose of this submission to express a political preference as to how the distribution of powers between London and Scotland should be managed in the future, but it can be pointed out that by removing the EU level of law-making and replacing it with domestic frameworks, the balance in the power between Scotland and London is being tilted towards London.

³ Para 1 (2) of Schedule 2.
C. Clarity of the powers

15. The limits on the powers conferred on Ministers are not fully clear. The formulation chosen in clause 7 in particular is vague and would appear to have a catch-all effect by allowing for ‘any deficiency in retained EU law’ to be prevented, remedied or mitigated. The Minister is given relatively broad discretion – whether he considers it ‘appropriate’ – when deciding to cure a deficiency in this way. Furthermore, there is no apparent restriction of Ministers’ powers that would prevent them from effecting policy changes. The UK Government’s White Paper on the Great Repeal Bill had envisaged that ‘the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU’. Yet such a limit is not apparent in the European Union (Withdrawal) Bill.

16. There is of course the possibility that a court asked to judicially review a statutory instrument based on clause 7 would consider a policy change not to be covered by the power to ‘prevent, remedy or mitigate’ a ‘deficiency in retained EU law’, but there is no guarantee this will be the case. Hence a clearer formulation of the limits to Ministers’ powers would be appropriate.

D. Adequate opportunity for

17. One of the main concerns with regard to delegated powers is parliamentary scrutiny both at Westminster and in Scotland. The main challenge in this regard will be time-pressure: even if appropriate mechanisms for effective scrutiny are found, the sheer time-pressure for effecting changes may render them ineffective. Time-pressure is likely to arise for two main reasons: first, because certain bits of retained EU law will need to be amended before exit day in order to function properly. And second, because the powers of amendment will expire after a certain time period: in case of clauses 7 and 8 within two years; and in case of clause 9 on exit day. This means that there is likely to be a minute rush to get statutory instruments through towards the end of these periods. This is likely to overburden any scrutiny mechanism, in particular if the negative procedure is used.

E. Role for the Scottish parliament when UK ministers are using their powers

18. There are good reasons to support and argument that the European Union (Withdrawal) Bill requires the consent of the Scottish Parliament under the so-called Sewel Convention. According to section 28 (8) of the Scotland Act ‘it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament’. Furthermore devolution guidance note 10 says that changes to the legislative competence of the Scottish Parliament also require its consent. Given that the Bill makes provision to retain numerous pieces of EU law that – under the current devolution settlement –

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would fall within the competence of the Scottish Parliament and given that it modifies the powers of the Scottish Parliament, the convention applies.

19. It should further be noted that the Sewel Convention continues to be politically – albeit not legally – binding despite the Supreme Court’s judgment in *Miller*. In that case the Supreme Court merely held that the Convention was not justiciable, i.e. judges ‘cannot give legal rulings on its operation or scope, because those matters are determined within the political world.’

20. However, the vast majority of substantive changes will be brought about by way of delegated legislation. The Sewel Convention does not apply to it, i.e. if a UK minister uses powers under clauses 7-9 of the Bill concerning a devolved matter, the Scottish Parliament need not be consulted.

21. This would seem to be inappropriate – at least as far as the European Union (Withdrawal) Bill is concerned – for the following reasons. First, where Henry VIII powers are concerned, UK ministers in effect pass primary legislation, which – if it concerns devolved matters – normally requires legislative consent. Given the vast Henry VIII powers contained in the Bill, it would be appropriate to extend the requirement to secondary legislation adopted under the European Union (Withdrawal) Bill in these cases. Second, while under normal circumstances UK ministers will not often exercise their powers with regard to devolved matters, the European Union (Withdrawal) Bill will require them to do so in a great number of circumstances. This is because it constrains the powers of the Scottish Ministers and allows them to exercise parallel powers only with regard to Scottish EU-derived domestic legislation, but not with regard to the vast number of pieces of direct EU legislation and EU law saved by clause 4 (in practice probably of little relevance to devolution). There is much direct EU legislation in the broad fields of agriculture and fisheries – both of which are (at least to a large extent) devolved. Furthermore, many justice cooperation measures fall in this sub-category of retained EU law as well.

22. There is thus a weakness in the current devolution arrangement, which the Bill could aim to close by requiring scrutiny also by the Scottish Parliament where a UK minister proposes secondary legislation which concerns devolved matters.

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5 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.