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Concerns about broad “delegated powers”

1. In the White Paper, the Government emphasised that the Bill was not intended to be “a vehicle for policy changes” but that the powers were required to “give the Government the necessary power to correct or remove the laws that would otherwise not function properly once we have left the EU.”¹ The White Paper further recognised the importance of limiting the powers, stating that the Government will “ensure 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.”² In introducing the White Paper to Parliament, the Secretary of State said that it “almost goes without saying” that “no change should be made to rights through delegated legislation”.³

2. However, the Bill in its present form gives Ministers extensive powers to amend primary and secondary legislation with little Parliamentary oversight,⁴ including in such a way as to remove or change existing rights or obligations. This is contrary to the assurance given by the Secretary of State.

3. The breadth and potency of these powers is unprecedented. The Bill gives Ministers the power to amend:
 - a. EU legislation, including EU Regulations which have effect equivalent to an Act of Parliament;
 - b. “EU-derived domestic legislation”. These are EU laws, particularly Directives that have been implemented by way of secondary legislation under the European Communities Act 1972 (ECA).⁵ These include provisions which would likely have been made by an Act of Parliament

¹ See forward to the White Paper by Rt Hon David Davis MP, Secretary of State for Exiting the European Union; see also paragraphs 3.10 and 3.17 of the White Paper and paragraph 14 of the Explanatory Notes.

² Paragraph 3.17.

³ HC Hansard 30 March 2017 Col 431.

⁴ Clauses 7 and 8.

⁵ Clause 2.



Public Law Project

but for the ECA as they contain key environmental and workers' rights protections;⁶

- c. Acts of Parliament, including the Bill itself;
 - d. Potentially all legislation, if Ministers interpret their powers expansively.⁷
4. Despite the statements of intent in the White Paper, the present draft of the Bill provides **few restrictions on Ministers using these powers to implement wide-ranging policy changes.**
 5. The Bill gives Ministers the power to “make any provision that could be made by an Act of Parliament” to “prevent, remedy or mitigate” any failure of retained EU law to operate “effectively”, or any other “deficiency” in retained EU law, arising from the withdrawal of the United Kingdom from the EU. **Nowhere in the Bill are the terms “prevent, remedy or mitigate” defined.** The power is given to the Minister to use whenever s/he considers it “appropriate”⁸ or to make amendments to provisions that are “no longer appropriate”.⁹ This language appears to give a broad discretion to Ministers.
 6. Similarly, **the terms “effectively” and “deficiency” could be interpreted broadly and are not defined.** The Explanatory Notes to the Bill clarify that the “law is not deficient merely because a Minister considers that EU law was flawed prior to exit” (paragraph 110). This could be an important restriction on the scope of the powers but it is not contained in the text of the draft Bill.
 7. Parliament needs to clarify what constitutes a permissible technical change as opposed to an impermissible policy change and ensure that the provisions in the Bill are drafted sufficiently narrowly to limit the power being conferred in the manner which the Government has said is intended.

⁶ Examples include Working Time Regulations 1998 and Air Quality Standards Regulations 2010

⁷ See Explanatory Notes at paragraph 115, which provide that the powers “could be used to amend law which is not retained EU law where that is an appropriate way of dealing with a deficiency in retained EU law.”

⁸ Clause 7(1)

⁹ E.g. Clause 7(2)(c) and (d).



Public Law Project

8. The examples given in the Explanatory Notes¹⁰ give real cause for concern as to the nature of the changes which Government envisages being able to make under these powers. Some examples are uncontroversial, such as removing or amending references to “EU law” or “member states other than the United Kingdom”.
9. However, the Government fails to recognise that there are policy choices inherent in other examples which it gives, some of which would involve significant policy choices. For example, the Explanatory Notes state that when previously the UK would have been required to seek an opinion from the European Commission, Ministers would be able to “either replace the reference to the Commission with a UK body or remove this requirement completely”. This is **not merely a technical change: it is a policy decision as to the extent of oversight** to which decision makers will be subject after Brexit.
10. Strikingly, the Explanatory Notes suggest that issues arising out of “reciprocal arrangements” could be a basis for finding retained EU law deficient and that the powers could therefore be used to **remove the rights of EU citizens** in the UK.¹¹ The explanation advanced is that because other EU states will no longer have any obligations to UK citizens, an obligation on the UK to respect EU citizens’ rights would be a “deficiency” in retained EU law. This is an extraordinarily broad interpretation of the concept of “deficiency”. If correct, it signifies that the powers in the Bill would allow Ministers through delegated legislation to make very significant changes to retained EU law not only in connection with the rights of EU citizens but more generally. Many other EU law obligations could be described as “reciprocal” in this sense and therefore changed through delegated legislation if the powers in the Bill are not circumscribed.
11. Ministers are also given powers to introduce laws to prevent or remedy any breach of the UK’s international obligations arising from withdrawal from the

¹⁰ See text box between paragraphs 25 and 26.

¹¹ A [blog piece by Paul Daly](#), University Senior Lecturer in Public Law at the University of Cambridge, highlights some of the concerns raised by this passage in the Explanatory Notes.



Public Law Project

EU.¹² This would give broad powers to Ministers to give effect to international law acts in domestic law. Importantly, this power could be used to make new international trade agreements binding in domestic law without Parliamentary oversight. The agreements could include important provisions regarding workers' rights or even privatisation of the NHS.

This is an extract from PLP's Parliamentary briefing on the EU (Withdrawal) Bill. The full briefing can be found: <http://www.publiclawproject.org.uk/news/83/plps-briefing-on-european-union-withdrawal-bill>

¹² Clause 8