

# Briefing Paper: The Repeal Bill

## Introduction—The Legal Education Foundation’s Position

Brexit will dominate law making and policy in the UK for the next few years. The law reform associated with Brexit is extensive and unprecedented, and will mean that access to justice organisations and programmes will stand on shifting sands as the legal and policy environment changes in response to Brexit.

The goal that underpins the position of The Legal Education Foundation (TLEF) on Brexit is to ensure that the law is as clear and accessible as possible, consistent with our interest as a Foundation in helping people to understand and use the law. TLEF does not oppose or support Brexit, rather, the Foundation aims to promote clear and accessible law in the UK. By building technical legal expertise, the TLEF aims to enable civil society organisations to understand and engage in the Brexit process in order that the needs, rights and interests of their beneficiaries are reflected in the legal framework that emerges post-Brexit.

This paper sets out information on the process and content of the Repeal Bill to promote public understanding and discussion of this forthcoming constitutional statute. The process of exiting the EU will raise rule of law questions of transparency, legal certainty and proper law-making processes. Accordingly, the Foundation has produced this paper to add to the information available about the Bill and its potential constitutional significance, particularly in relation to the rule of law.

The next section outlines the process for the Bill. The paper then sets out the UK constitutional context for the Bill, proposed content of the Bill, possible rule of law questions in relation to the Bill, and the kinds of safeguards that might address such questions to preserve the UK’s constitutional principles alongside constructive suggestions by parliamentary committees. Finally, this paper sets out the Foundation’s approach to work on Brexit.

## Repeal Bill—Process

This section outlines the Government and parliamentary processes for the Repeal Bill, which will be a constitutional statute, to provide information on these processes and scrutiny mechanisms.

**White Paper**—The Government has released a [White Paper](#) on the Repeal Bill.

**Queen’s Speech**—The Repeal Bill was referred to in the Queen’s Speech on 21 June, however this added nothing significant to the White Paper.

**Bill introduced into House of Commons**—House of Commons consideration of the Bill:

- First Reading (formal, no debate)
- Usually at least two weeks later, Second Reading—*key stage for debate on the principle of the Bill*
- Usually two weeks later Committee Stage, Commons will almost certainly sit as a Committee of the whole House, not a Public Bill Committee because the Bill is a constitutional statute—*key stage for amendments*
- Report Stage *key stage for (normally) a smaller number of amendments*
- Usually followed immediately by Third Reading (no amendments possible)

- It is virtually certain that the Bill will be “programmed” (timetabled) in the Commons; an important issue will be how much time for debate the Government is prepared to give at each stage

**Bill introduced into House of Lords**—House of Lords consideration of the Bill:

- First Reading (formal, no debate)
- Second Reading—*key stage for debate on the principle of the Bill*
- Usually two weeks later Committee Stage, Lords sit as the whole House—*key stage for amendments, but with very few being pressed to a vote – most issues on which there is contention will be voted on at Report Stage*
- Usually two weeks later Report Stage—*key stage for amendments*
- Third Reading (a much narrower category of amendments possible – for example, to give effect to Ministerial undertakings at Report Stage)
- The House of Lords does not have programming, so it is likely that the Bill will be debated for longer than in the Commons

**Ping Pong** – if the Bill is amended in the House of Lords and the House of Commons does not agree, then the Bill goes back and forth between the Houses until they can agree.

**Parliamentary Committees**—In parallel with debate in the Houses of Parliament, various parliamentary Select Committees will undertake legislative scrutiny. Many Committees will accept public submissions as part of their scrutiny process. Because the Bill is likely to contain extensive powers delegated to Ministers, a key player will be the Lords Delegated Powers and Regulatory Reform Committee, which reports on whether powers proposed to be delegated to Ministers are appropriate, and whether they are subject to sufficient Parliamentary control.

For further information on Parliament’s legislative process, see [here](#).

## Constitutional Context

This section sets out some basic UK constitutional principles, including the rule of law, by way of context.

### Constitutional Context

The UK Parliament is distinct from the Government: “Parliament” refers to the House of Commons and House of Lords, whereas the “Government” is the Prime Minister, Ministers, Government departments and civil servants.

Parliament is the institution that traditionally makes laws under the UK constitution. The House of Lords Constitution Committee has [observed](#):

*The procedure for making Acts of Parliament is the proper basic standard within our parliamentary law-making system. It enables consideration of bills by both Houses consecutively, separate debates on the principles of the legislation and detailed line-by-line scrutiny of the clauses of the bill, and opportunities to move amendments...The bill procedure is valued not only because of its potential to improve legislative proposals but also because it embodies the principles of parliamentary democracy.<sup>1</sup>*

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<sup>1</sup> Constitution Committee, *Legislative and Regulatory Reform Bill* (8 June 2006), [25].

The Government traditionally implements the law as made by Parliament, but Parliament can and often does delegate some law-making power to the Government. Delegated legislation, also known as secondary or subsidiary legislation, is legislation made by the Government using power that has been delegated by Parliament in primary legislation. The Constitution Committee has [explained](#) that:

*The compromise that has been reached in the United Kingdom between effective legislative processes and parliamentary scrutiny is for Parliament to delegate some law-making powers to Ministers...for many years it has been commonplace for Acts of Parliament to delegate powers to Ministers to make legislation in the form of orders (statutory instruments) to make detailed rules governing statutory schemes... Compared to the bill procedure, parliamentary procedures for scrutinising delegated legislation are less rigorous... Most legislative powers delegated to Ministers by Parliament are for the purpose of setting out in more detail the practical means to implement the policy enacted by the enabling Act of Parliament.<sup>2</sup>*

Alongside the traditional constitutional roles of Parliament and Government is the constitutional principle of the rule of law, which provides a useful framework for considering the Repeal Bill. There are differing definitions of the Rule of Law, and for the purposes of this paper the widely recognised formulation by Lord Bingham is used. Lord Bingham identified eight key aspects of the rule of law, a number of which are relevant for present purposes.

The following explanations of relevant rule of law principles come from Lord Bingham's book *The Rule of Law* with extracts of discussion from a [paper by the Bingham Centre](#).<sup>3</sup>

The law must be accessible, intelligible, clear, and predictable

“When the law meets this requirement, people are able to understand what activity is prohibited and therefore discouraged, and what their rights are so that they are able to claim those rights. Uncertainty on the law discourages business and financial activity, as well as the good operation of UK law generally. Parliamentary processes for legislative scrutiny and law-making can help to alleviate uncertainty by providing clarity on the timetable for the establishment of new laws and on the likely content of those laws.”

The law must afford adequate protection of fundamental human rights

Lord Bingham said:

*A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.*

“It is not sufficient that laws meet the formal and procedural requirements of being duly enacted, clear and so on. In terms of content, the law must provide protection for fundamental human rights such as the prohibitions of torture and slavery, freedom of expression, freedom of religion, and right to family life.”

<sup>2</sup> Constitution Committee, *Legislative and Regulatory Reform Bill* (8 June 2006), [30], [31], [32].

<sup>3</sup> ‘Briefing Paper: Parliament and the Rule of Law in the Context of Brexit’, Bingham Centre (29 September 2016), p 11 and 12; Tom Bingham, *The Rule of Law* (2010, Penguin Books), p 67.

The Government (ministers and public officers) must exercise their powers properly  
Lord Bingham said:

*This is important. When Parliament, by statute or statutory regulations, empowers a specific officer (such as a secretary of state or the Director of Public Prosecutions or the Director of the Serious Fraud Office) or a specific body (such as a housing authority, a social services department, a county council, a health authority, a harbour board or the managers of a mental hospital) to make a particular decision, it does not empower anyone else. It expects that officer or body to follow any guidelines on policy that may have been laid down, but expects that the officer or body will exercise his or its own judgment, having regard to any relevant experience and the availability of resources. It does not expect, or intend, that the decision should be made by some judge who may think that he or she knows better. But there is a presumption that the decision made will be in accordance with the law.*

“This rule of law principle supports and reinforces parliamentary sovereignty by articulating the need for the Executive to act in accordance with the intentions of Parliament.”

## Proposed Content

The Government’s [White Paper](#) on the Repeal Bill indicates that the Bill will, among other things:

- Repeal the European Communities Act 1972
- “convert directly-applicable EU law into UK law” (at [2.4])
- “preserve the laws we have made in the UK to implement our EU obligations” (at [2.5])
- “provide that historic [Court of Justice of the EU] case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court” (at [2.12]-[2.17])
- “provide a power to correct the statute book, where necessary, to rectify problems occurring as a consequence of leaving the EU. This will be done using secondary legislation, and will help make sure we have put in place the necessary corrections before the day we exit the EU” (at [3.7])
- “ensure that, whatever the outcome of [negotiations with the EU], the statute book can continue to function, and that decisions can be taken in the national interest and reflect the contents of the Withdrawal Agreement” (at [3.12])
- “include the power to transfer to UK bodies or ministers’ powers that are contained in EU-derived law and which are currently exercised by EU bodies” (at [3.16])

The White Paper proposes the following for parliamentary scrutiny of delegated legislation under the Repeal Bill:

*The mechanistic nature of the conversion of EU law to UK law suggests that many statutory instruments will follow the negative procedure (for example, removing the requirement to send reports to the Commission on the UK’s public procurement activity). The affirmative procedure may be appropriate for the more substantive changes. (at [3.22])*

There had been some speculation that the Bill might include detailed provisions for areas of EU law that cannot easily be transposed into UK law. However, the above statements in the White Paper indicate that this is not the Government's intention.

In addition to the Repeal Bill, the Government will propose other stand-alone pieces of primary legislation for new policies or institutional arrangements after exit. The Queen's Speech included proposals for Customs Bill, Trade Bill, Immigration Bill, Fisheries Bill, Agriculture Bill, Nuclear Safeguards Bill, and International Sanctions Bill.

## Devolution

Some law-making powers in the UK are devolved to Wales, Scotland and Northern Ireland, and some are reserved to the UK. A number of the powers that will come back from the EU upon exit are presently treated as devolved under the current devolution settlements.

The Government's White Paper on the Repeal Bill states that:

*As powers are repatriated from the EU, it will be important to ensure that stability and certainty is not compromised, and that the effective functioning of the UK single market is maintained....*

*To provide the greatest level of legal and administrative certainty upon leaving the EU, and consistent with the approach adopted more generally in legislating for the point of departure, the Government intends to replicate the current frameworks provided by EU rules through UK legislation. In parallel we will begin intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary. (at [4.2] and [4.3])*

If the Repeal Bill undertakes this kind of legislating upon devolved matters to preserve EU rules, then the constitutional convention of seeking legislative consent motions by the devolved legislatures will be relevant to the Bill. The Government has indicated that it will seek legislative consent motions. Following the Supreme Court decision in [Miller](#), it is clear that this convention is not legally enforceable, despite having been included in section 28 of the Scotland Act, although the Court emphasised the importance of such conventions in the political constitution of the UK.<sup>4</sup> As such, the question of consent by the devolved legislatures is a matter of politics, not law.

Furthermore, there is an unanswered question as to whether powers that are devolved under current devolution settlements will be repatriated from the EU directly to the devolved nations, or to the UK Government. The latter seems more likely as the White Paper on the Repeal Bill states:

*the Government intends to replicate the current frameworks provided by EU rules through UK legislation. In parallel we will begin intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary. (at 4.4)*

In any case, delegated legislative power in the Repeal Bill raises a further concern in the devolved nations because the constitutional convention of seeking legislative consent motions concerns only

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<sup>4</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, (per Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Hodge) [149]-[151].

primary, not secondary, legislation.<sup>5</sup> Thus, the devolved legislatures have no control over secondary legislation made by the UK Government that affects devolved matters.

There are also particular matters in Northern Ireland with regard to the border and relationship with the Republic of Ireland, including the Good Friday/Belfast Agreement. It is not clear whether these concerns will be addressed in the Repeal Bill, or in subsequent legislation.

## Rule of Law Questions

The Government aims to provide legal certainty for the UK through the Repeal Bill, so that there is clarity and certainty as to what the law is in the UK after exit from the EU. As such, in principle, the Bill would aim to enhance the rule of law in the UK by providing legal certainty so that the law is intelligible, clear and predictable.

That said, there are a number of possible rule of law questions concerning the Repeal Bill:<sup>6</sup>

- Principle: the law must be accessible, intelligible, clear, and predictable
  - How will the functions and governance provided by EU institutions be replaced in a way that provides legal certainty? Relatedly, how quickly can these new governance arrangements be established so as to ensure there is no gap in the implementation and administration of the law?
  - How will directly applicable EU laws be transposed into UK law? For example, will it be treated as primary or secondary legislation, and who will have the power to amend it after exit?
- Principle: the law must afford adequate protection of fundamental human rights
  - Will the legal standards and protections derived from EU law continue in UK law after exit?
  - If so, what will the enforcement mechanism(s) be for these standards and protections?
- Principle: the Government must exercise their powers properly
  - Will the processes for changing the law established by the Bill be transparent and subject to proper scrutiny, or will the Government be given broad powers that lack definition to change the law through delegated legislation?

Based on the above statements from the White Paper on the Repeal Bill, the Bill will delegate broad powers to the Government to use delegated legislation to replace EU law and regulatory functions. This will involve a significant shift of law-making power from Parliament and the EU to the Executive. Parliament will not be able to pass large volumes of primary legislation to accommodate exit from the EU, so delegated legislation will be necessary given the extent of EU law.

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<sup>5</sup> Professor Alan Page, 'The implications of EU withdrawal for the devolution settlement' (October 2016), at [13], available at: [http://www.parliament.scot/General%20Documents/The\\_implications\\_of\\_EU\\_withdrawal\\_for\\_the\\_devolution\\_settlement.pdf](http://www.parliament.scot/General%20Documents/The_implications_of_EU_withdrawal_for_the_devolution_settlement.pdf)

<sup>6</sup> These questions reflect remarks made by The Right Honourable Dominic Grieve QC MP at a meeting of the All-Party Parliamentary Group on the Rule of Law on 4 July 2017.

Nonetheless, as law-making powers are transferred from the EU to the UK, rule of law and constitutional principles mean that Parliament itself should exercise law making powers to the fullest extent possible, and should have a meaningful opportunity and process to scrutinise and control law making by the Executive.

## Possible Safeguards

A number of parliamentary committees have already considered some of the rule of law and constitutional questions relating to the Bill and have suggested different ways that the Bill could resolve them, which this briefing refers to as ‘safeguards’. The following categories of safeguards have been suggested by parliamentary committees: legal, substantive, and procedural.

### Legal

The terms in which provisions delegating legislative power are drafted define those powers. The clearer and more carefully drafted those terms are, the greater the clarity and certainty of those delegated legislative powers with regard to their purpose, subject matter and scope.

By way of example, the Constitution Committee has [suggested](#) that “a general provision be placed on the face of the Bill to the effect that the delegated powers granted by the Bill should be used only:

- so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework; and
- so far as necessary to implement the result of the UK’s negotiations with the EU.”<sup>7</sup>

### Substantive

A subset of legal safeguards could be substantive safeguards, meaning provisions stipulating that secondary legislation under the Repeal Bill may not affect certain areas of law.

For example, the Women and Equalities Committee of the House of Commons has [recommended](#) that Government “include a clause in the Great Repeal Bill that explicitly commits to maintaining the current levels of equalities protection when EU law is transposed into UK law.”<sup>8</sup>

Another example is the [conclusion](#) of the Joint Committee on Human Rights that:

*the Government must resist the temptation to allow laws relating to fundamental rights to be repealed by secondary legislation for reasons of expediency. If rights are to be changed there should be an opportunity for both Houses to seek both to amend and to vote on such changes.*<sup>9</sup>

The Environmental Audit Committee [concluded](#) that in the area of environmental law:

*Transposition is likely to be complex and time consuming, and Government must ensure that protections are not weakened, either during the process of leaving the EU or afterward, and provide the opportunity for full parliamentary scrutiny of the UK’s future environmental legislation.*<sup>10</sup>

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<sup>7</sup> Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (7 March 2017), 3.

<sup>8</sup> Women and Equalities Committee, *Ensuring strong equalities legislation after the EU exit* (28 February 2017), [59].

<sup>9</sup> Joint Committee on Human Rights, *The human rights implications of Brexit* (19 December 2016), [92].

<sup>10</sup> Environmental Audit Committee, *The Future of the Natural Environment after the EU Referendum* (4 January 2017), [34]

## Procedural

Procedural safeguards could be provided through enhanced parliamentary processes for screening and scrutiny of delegated legislation under the Repeal Bill.

The Constitution Committee's March 2017 [report](#) on *The 'Great Repeal Bill' and delegated powers* considered parliamentary scrutiny of secondary legislation laid under Bill, and recommended:

- (1) "The Minister sign a declaration in the Explanatory Memorandum to each statutory instrument amending the body of EU law stating whether the instrument does no more than necessary to ensure that the relevant aspect of EU law will continue to make sense in the UK following the UK's exit from the EU, or that it does no more than necessary to implement the outcome of negotiations with the EU.
- (2) The Explanatory Memorandum to each statutory instrument sets out clearly what the EU law in question currently does (before Brexit); what effect the amendments made by the statutory instrument will have on the law (as it will apply after Brexit) or what changes were made in the process of conversion; and why those amendments or changes were necessary.
- (3) The Government makes a recommendation for each statutory instrument as to the appropriate level of parliamentary scrutiny that it should undergo. We would expect that a statutory instrument which amends EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure.
- (4) A parliamentary committee(s) consider the Government's recommendation, and decide the appropriate level of scrutiny for each statutory instrument laid under the 'Great Repeal Bill'. If the two Houses perform this function separately, then it would seem appropriate in the House of Lords for this sifting function be performed by the Secondary Legislation Scrutiny Committee. Alternatively, a Joint Committee could be established to carry out this role on a bi-cameral basis.
- (5) Where the relevant committee(s) determines that a statutory instrument laid under the 'Great Repeal Bill' amends EU law in a manner that determines matters of significant policy interest or principle, it should undergo a strengthened scrutiny procedure. We do not attempt at this stage to define exactly how this strengthened scrutiny procedure should operate, or whether one of the existing statutory models should be adopted. We recognise that existing models for enhanced scrutiny can prove resource intensive and time-consuming—in our view, the only essential element of whatever strengthened procedure is selected is that it should provide an opportunity for a statutory instrument to be revised in the light of parliamentary debate."<sup>11</sup>

The Hansard Society has [indicated](#) that they will publish a new 'sift and scrutiny' model for the House of Commons. Under their proposal, a new permanent Delegated Legislation Scrutiny Committee would be established, which would:

- "be supported by a set of permanent policy sub-committees;
- sift and scrutinise both negative and affirmative SIs; and
- turn over to the whole House for further consideration those SIs of concern, with procedures in place to ensure that any SI reported to the House would have to be debated and voted on."<sup>12</sup>

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<sup>11</sup> Constitution Committee, *The 'Great Repeal Bill' and delegated powers* (7 March 2017), 4-5.

<sup>12</sup> Hansard Society, Written Evidence to the House of Commons Procedure Committee (GRB 032) (27 April 2017) [42].

## The Legal Education Foundation's Approach

Foundation staff have spent the last eight months conducting research and scoping work including over 50 interviews and field visits to Northern Ireland and Scotland as well as participating in senior meetings and roundtables of academics and key stakeholders. This has helped to clarify the Foundation's goals in this area which are:

*To enable civil society organisations to understand and engage in the Brexit process in order that the needs, rights and interests of their beneficiaries are reflected in the legal framework that emerges post-Brexit by:*

- (i) building and contributing their technical legal expertise to parliamentarians, government officials and relevant organisations outside government involved in Brexit process, and*
- (ii) helping, via legal education, individuals affected by Brexit to manage the implications of the UK leaving the EU.*

Based on these goals, there are two tranches of activity that it is presently anticipated the Foundation will support:

1. Supporting technical legal expertise, coordination and collaboration among civil society organisations.
  - a. Legal research and analysis of the impact of Brexit on law in the UK to improve technical legal expertise; and
  - b. Coordination and Policy engagement – civil society organisations engaging constructively with Government and Parliament to contribute technical legal information.

To date, this has been the primary focus of Foundation activity relating to Brexit given the uncertainty surrounding the timing and nature of the UK's exit.

2. Projects aimed at helping individuals affected by Brexit to manage its implications. No proposals have been received that were focused on this yet, but it is anticipated that this tranche will include public legal education, and projects to train legal service providers on legal changes that result from Brexit. This will be a second phase of Foundation activity, but now that the legislative agenda is becoming clearer, the Foundation is conducting due diligence to establish need and an appropriate intervention.

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