

Briefing by the Brexit Civil Society Alliance

Legislating for Brexit: Parliament is being written out of the process

About the Brexit Civil Society Alliance


The Brexit Civil Society Alliance is made up of over 80 organisations from across the UK and includes voices from health, human rights, the environment, consumer and workers' rights, equality, food, farming and trade. We want to make sure that civil society organisations understand the process and what is entailed as we leave the EU and are able to best advocate and articulate their interests in the Brexit process.

The Brexit Civil Society Alliance is guided by a broad set of principles, which are:

- Open and accountable lawmaking
- A high standards UK, with rights, standards and funding to underpin them maintained
- Leaving the EU should not create a governance gap

Executive Summary

The sovereignty of Parliament was a central theme in the EU referendum and a promise was made that Parliament would 'take back control of our own laws'. Yet, several pieces of Brexit legislation show that control of lawmaking will not rest with Parliament after we leave the EU. Instead, the executive and ministers have been given unprecedented powers to change laws, without proper parliamentary



scrutiny. This undermines both parliamentary sovereignty and accountable law making.

It is therefore essential that the use of delegated powers is subject to the highest level of parliamentary scrutiny.

The delegated powers in Brexit legislation

The government has so far announced a total of 12 Brexit bills. Some cover areas where significant policy changes are expected (agriculture and fisheries) or areas that were previously governed by the EU (customs or trade). The bills that have either received Royal Assent or are currently being debated in Parliament **all contain delegated powers, many of which are Henry VIII powers** (see Annex 1).

It's alarming that the government has handed such exceptionally broad powers to ministers in every piece of Brexit legislation introduced to Parliament. It is setting a dangerous precedent and risk undermining the principle of parliamentary sovereignty. Fundamental rights and standards are under threat as a result of the wide scope of many of the delegated powers in Brexit bills.

The government justifies the widespread use of delegated powers in Brexit bills because the outcome of negotiations are not yet known and flexibility is needed to make new laws and enable new regimes to be created at short notice¹. However the need for flexibility and speed does not justify cutting corners of parliamentary scrutiny, nor does it justify handing ministers extraordinary lawmaking powers that can be


¹ Please see:

[Delegated Powers Memorandum for the EU \(Withdrawal\) Bill](#)

[Delegated Powers Memorandum for the Agriculture Bill](#)

[Delegated Powers Memorandum for the Trade Bill](#)

[Delegated Powers Memorandum for the Taxation \(Cross-border Trade\) Bill](#)



used remove existing rights or obligations. There have been opportunities for the government to combine the necessary speed with improved scrutiny. They have chosen not to take them.

A clear need for Parliamentary scrutiny of delegated legislation

These extraordinary exercises of executive power must be subject to the highest level of parliamentary scrutiny. However, the current scrutiny system of delegated powers is not fit for purpose and does not provide for proper parliamentary control of delegated legislation.


Henry VIII powers: ceding more powers to the executive

Henry VIII powers, one type of delegated power, allow ministers to amend or repeal primary legislation without going through the process of creating a new Act of Parliament that can be scrutinised by parliamentarians. This leaves open the possibility that Henry VIII powers handed to ministers may be used to amend acts such as the Equality Act 2010, the Data Protection Act 2018 and the Modern Slavery Act 2015, without MPs having a proper say in the matter.

Delegated powers are meant to make technical or administrative changes. However, increasingly such powers have seeped into policy areas as seen when delegated powers were used to [abolish maintenance grants](#), [change voter registration](#) and allow [fracking in national parks](#).

Statutory instruments- a 'take it or leave it' option

The most common form of delegated legislation is known as statutory instruments (SIs). MPs have very little role in scrutinising SIs. They can't be amended and are only very rarely rejected even when there is significant opposition.



A negative statutory instrument (the most common form) will become law unless it is 'prayed' against and it is up to the government to allocate time for debating objections to negative SIs. An SI upgraded to the affirmative procedure will be subject to a debate in a Delegated Legislation Committee. Historically the quality of these debates has been affected by the fact that MPs are often appointed at a relatively short notice; lack briefing material and time to engage in detailed analysis². In addition, MPs are not able to amend an SI but are instead faced with a 'take-it-leave-it' choice when debating an SI. As the Constitution Committee noted in its report on the delegation of powers: 'without genuine risk of defeat, and no amendment possible, Parliament is doing little more than rubber-stamping the Government's secondary legislation'³.

Although a new sifting committee has been created for some Brexit SIs this does not solve the problem as the scrutiny procedure has not been changed. So once an SI has been sifted it goes through exactly the same flawed system.

Transparent lawmaking: Parliament must be in control

It must be up to Parliament, not the government to decide what level of scrutiny delegated legislation is subject to. We call on MPs to vote in favour of amendments to Brexit bills that:

a) Put clear limits and safeguards on what delegated powers can be used for. The Government should set out the specific purpose of delegated powers and how it will be used- broad powers in Brexit bills cannot be justified solely on the ground of the need for flexibility and speed.

² Unlock Democracy (2017) [Democratic Brexit: avoiding constitutional crisis in Brexit Britain.](#)

³ House of Lords Constitution Committee (2018) [The Legislative Process: The delegation of powers](#)

b) Offer proper parliamentary scrutiny of delegated powers- parliamentary control of delegated legislation should ultimately be decided by Parliament.

The European Statutory Instrument Committee (ESIC) has been established to sift through proposed negative statutory instruments made under the EU Withdrawal Act. While it is a considerable flaw that recommendations from the Committee is not binding upon the government, it is nevertheless necessary that ESIC or a committee of similar kind sift and scrutinise changes made via delegated powers under the Brexit bills. The Hansard Society's proposed 'sift and scrutiny' system of statutory instruments include a strengthened scrutiny procedure whereby "the government is obliged to accept the recommendation of a designated committee in each House of upgrade the scrutiny of an SI"⁴.


Conclusion

The House of Lords Delegated Powers and Regulatory Reform Committee expressed 'dismay at the government's approach to delegated powers in the delegated powers in the Agriculture Bill'⁵ and described the Henry VIII powers in the EU Withdrawal Act as 'wider than we have ever seen'⁶. We echo these concerns and find it astonishing that the government time and time again confers wide-ranging powers

⁴ Blackwell, J. (2018) Scrutiny of SIs: further amendments are needed to the EU (Withdrawal) Bill. Hansard Society blog. 15 January. Available at: <https://www.hansardsociety.org.uk/blog/scrutiny-of-sis-further-amendments-are-needed-to-eu-withdrawal-bill>

⁵ HoL Delegated Powers and Regulatory Reform Committee (2018) Agriculture Bill, p. 1, paragraph 4. HL Paper 194. Available at <https://publications.parliament.uk/pa/ld201719/ldselect/lldelreg/194/194.pdf>

⁶ HoL Delegated Powers and Regulatory Reform Committee (2018) European Union (Withdrawal) Bill, p.1, paragraph 9. HL Paper 22. Available at: <https://publications.parliament.uk/pa/ld201719/ldselect/lldelreg/22/22.pdf>



on ministers, often without sunset clauses. Legislating for Brexit must respect the democratic processes. There must be clear limits and safeguards on executive power with robust parliamentary scrutiny with appropriate level of transparency and debate.

We are calling on MPs to challenge the use of delegated powers in Brexit legislation and ensure that there is proper levels of parliamentary scrutiny in place.

If you would like to meet with the Alliance to discuss the issue of delegated powers further, please get in touch with policy and project assistant Malene Bratlie on malene.bratlie@brexitcivilsocietyalliance.org.

Annex 1:

Agriculture Bill: proposes 25 delegated powers of which five would allow ministers to modify primary legislation (so-called ‘Henry VIII powers’)⁷. These powers are exercisable indefinitely and without sunset clauses.

Trade Bill: proposes seven delegated powers of which two are Henry VIII powers⁸

Taxation (Cross-border Trade) Bill: proposes over 150 delegated legislative powers for ministers⁹

⁷ House of Commons Library (2018) The Agriculture Bill. 25 October. Available at: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8405>

⁸ Department for International Trade (2018) Delegated Powers Memorandum. 19 July. Available at: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0127/18127-DPM.pdf>

⁹ HoL Delegated Powers and Regulatory Reform Committee (2018) Taxation (Cross-Border Trade) Bill. 17 January. Available at: <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/65/65.pdf>

The EU Withdrawal Bill (now Act)¹⁰: which give ministers significant delegated powers including to:

- Correct any deficiencies in retained EU law as the Minister considers appropriate, including make any provision that could be made by an Act of Parliament
- A Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of the EU Withdrawal Act

Sanctions and Anti-Money Laundering Bill (now Act): give ministers significant delegated powers¹¹ including to:

- to make sanctions regulations for the purpose of implementing UN and other international obligations, as well as for other purposes concerned with the prevention of terrorism, national security and furthering the UK's foreign policy objectives.
- to make regulations concerned with the detection, investigation and prevention of money laundering and terrorist financing, and implementing Standards published by the Financial Action Task Force relating to combating threats to the integrity of the international financial system

Haulage Permits and Trailer Registration Bill (now Act): contains 16 delegated powers¹², all of which are subject to the negative procedure

Fisheries Bill: confers 16 delegated powers to ministers¹³

¹⁰ European Union Withdrawal Act 2018. Available at:

<http://www.legislation.gov.uk/ukpga/2018/16/introduction/enacted>

¹¹ HoL Delegated Powers and Regulatory Reform Committee (2017) European Union (Approvals) Bill, Finance Bill, Northern Ireland Budget Bill, Sanctions and Anti-Money, Laundering Bill. 17 November Available at:

<https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/38/38.pdf>

¹² HoL Delegated Powers and Regulatory Reform Committee (2018) Haulage Permits and Trailer Registration Bill. 28 February. Available at:

<https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/84/84.pdf>

¹³ HoL Delegated Powers and Regulatory Reform Committee (2018) Fisheries Bill Healthcare (International Arrangements) Bill Divorce (Financial Provision) Bill [HL] Prisons (Interference with Wireless Telegraphy) Bill. 14 November. Available at:

<https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/226/226.pdf>