1. The Call for Evidence in relation to delegated powers covers a very wide range of matters and I shall limit myself to brief observations on a few points.

**Brexit**

2. Even with the “Great Repeal Bill” providing for the continuity of EU provisions post-Brexit, the sheer volume of legislative adjustment needed to enable those provisions to make sense and operate without further EU involvement will require reliance on delegated legislation. Most of this is likely to be of a technical and non-controversial nature, but there will be places where significant policy choices have to be made, e.g. in restructuring procedures where EU bodies currently play a part, including determining the future of reporting requirements and enforcement mechanisms involving EU institutions (is the EU role/stage to be abandoned or replaced, and if the latter by what?).

3. In future, it seems likely that many areas subject to EU law and currently regulated through delegated legislation will continue to be governed by secondary legislation, but it must be recognised that post-Brexit the role of such legislation will change. At present the major policy discussions and decisions on matters of EU competence take place at EU level, leaving limited room for manoeuvre when it comes to the domestic implementing regulations; these are either a purely technical matter of rendering the EU provisions operational within the UK or involve limited policy choices within a framework argued over and agreed at EU level. In the absence of the EU dimension, the delegated legislation proposed in the UK will embody the major policy choices being made and the scrutiny of such legislation is likely to be the first time when these are open to debate and scrutiny. The focus will therefore be as much on the substantive and political aspects as on the technical ones, and the consideration of the delegated legislation will become the primary forum for debate on the policy, whereas at present that occurs when the underlying EU laws are being decided. The content of more delegated legislation will therefore be politically contentious. With so many more areas of political debate to be considered, there will be considerable strain on the existing scrutiny mechanisms, which appear more effective on technical rather than policy matters (see below).

4. Two further aspects of Brexit deserve attention. The first is the devolution dimension. The devolution settlements create a wide area where legislative power is shared between Westminster/Whitehall and the devolved authorities in relation to measures implementing EU law. There has therefore been within this area no need to distinguish carefully in making legislation between devolved and reserved matters (to use Scottish terminology; the same applies for Northern Ireland and Wales). In the absence of this EU element which can override the formal allocation of powers, much more careful attention will have to be paid to this issue, segregating specific provisions according to the appropriate legislative competence and making formal arrangements where it is considered appropriate for devolved matters to be handled on a UK or GB basis.

5. The second aspect is to note how widely used the European Communities Act 1972 has been as the parent Act for legislation. In most cases there is more specific domestic legislation which also confers relevant legislative power, but the details of this will have to be checked to ensure that there are no loopholes and that there is indeed an appropriate statutory basis for all the provisions proposed. The alternative of a wide statutory provision authorising continuing legislative activity in areas covered by the 1972 Act raises the well-known fears of extensive power being conferred on governments (although hardly a shocking
innovation given the 1972 Act itself, the Regulatory Reform Act 2001, the Legislative and Regulatory Reform Act 2006, etc.).

6. The short-term difficulties can be eased by a broad power to make delegated legislation dealing with any matters arising from Brexit (regardless of devolved boundaries or other domestic authority), but at the cost of increased powers for the London government. In the longer term, though, the fact that consideration of delegated legislation will be the forum for discussion and decision on an increased range of politically controversial matters should be recognised.

The Appropriateness of Delegated Legislation

7. A difficulty in commenting on the nature of delegated legislation, and hence in determining its appropriateness and the suitable procedures for its making and scrutiny, is that what appear to be similar pieces of legislation can have dramatically different effects. For example, a rule on eligibility for legal aid or welfare benefits could be a purely technical matter reflecting consequential changes arising from other fully debated matters, or in itself be making a radical change to access to justice or financial support for the needy. Equally, an issue that at one time seems contentious may at others be non-controversial, and vice versa. The lesson from this is that it is impossible to get the choice of procedure etc. absolutely right when a parent Act is passed. Therefore there should be greater scope for reviewing (and willingness to review) the provisions in parent Acts setting the limits on the powers delegated, the conditions for their exercise and the procedures for making delegated legislation. This would be an obvious element for inclusion in any programme of post-legislative scrutiny, and perhaps an appropriate committee could routinely look back at the primary legislation considered say five years ago to examine whether experience showed that any provisions authorising delegated legislation had proved to be unduly restrictive or excessively broad and that the most appropriate procedure had been applied in each case.

Parliamentary Scrutiny

8. Especially with the greater volume of delegated legislation that embodies true political choice post Brexit (as noted above), the capacity of current parliamentary procedures to offer substantive scrutiny of delegated legislation may need to be reconsidered. Maintaining the separation between substantive and technical scrutiny is desirable, ensuring that technical claims are not used when the real objections are political or subject to being dismissed as politically motivated.

9. Scrutiny must be considered as part of the longer process from policy development to legislation. If there has been thorough and open consultation beforehand and a genuine willingness to adapt or abandon plans on the basis of responses, then the parliamentary stage is less important. If a measure appears unexpectedly or in the face of known concerns, then Parliament has a bigger role to play. But such distinction will inevitably be an ad hoc matter, not amenable to prior determination. Although final decisions properly lie with the Chambers that reflect the wider balance of Parliament, there seems scope for greater use of committees which can within specific subject areas devote the time and develop the expertise to comment on delegated legislation and invoke further procedures where there are concerns.

10. From the outside it seems unnecessary to have so many variations of the parliamentary procedure. Simplification seems desirable, ensuring that all measures are at least laid before Parliament, with one affirmative and one negative procedure and provision to cater for urgency.
11. There are good reasons for not allowing delegated legislation to be amended at the parliamentary stage, but this can result in admittedly flawed legislation being made and amending measures being required almost immediately. It might be possible to allow for some adjustment to be made after parliamentary scrutiny but before the legislation is formally made (or comes into effect), perhaps limited to adjustments certified by the appropriate parliamentary authority as being exclusively to serve the purpose of correcting flaws identified during the scrutiny stage.

“Skeleton” Bills

12. Where primary legislation confers wide power to make delegated legislation, it is tempting to say that the intended regulations etc. should be available at the time of the Bill being passed to enable approval to be given on the basis of how the broad powers will operate in practice. However, as a matter of practical business management that may not be possible (it is only after the Bill is passed that it makes sense to devote effort to the full details of the subsequent regulations). Moreover, a significant justification for the use of delegated legislation is to create an enduring primary framework which can allow for substantial adjustment over time. Nevertheless, some special attention is justified and options include providing for the first set of regulations to be made being subject to more onerous parliamentary procedure (e.g. affirmative rather than negative) than subsequent examples, or for approval of a commencement order being possible only once the (draft) regulations are available. Neither of these measures would prevent subsequent (and almost immediate) major changes to the regulations, but they would serve to mark the significance of the step being taken and increase the chance of meaningful scrutiny.

Additional points

13. In terms of improving the state of delegated legislation two features which apply as much to primary legislation are worthy of mention. The first is the need for consolidation, with the many amendments to delegated legislation resulting in a messy patchwork of laws which are awkward to use. Even for those with access to the commercial databases which offer a good service in providing the current version of the text, it is difficult to keep track of the current state of the law. But these databases are very expensive and not available to the ordinary citizen or business; sadly the official statutory database at <legislation.gov.uk> does not provide a good or user-friendly service in relation to delegated legislation.

14. The second point, which contributes to the need for consolidation, is to note the continuing attachment to the “cut-and-paste” style of amendment of earlier legislation. This makes it very hard to follow exactly what changes are being made to the law and to work out exactly what the up-to-date version of the law is. It would make the law much easier to use if amendments were achieved not be adding or omitting individual words or phrases, but by enacting new versions of complete single regulations or paragraphs (if not larger chunks of legislation). To the extent that the current practice is adopted to restrict parliamentary consideration to the elements that are being changed, as opposed to risking re-opening old battles (or starting new ones) on the text that is to remain constant, surely parliamentary rules could deal with this in another way? To the extent that minor amendments made shortly after a piece of delegated legislation has been made flow from the need to correct flaws identified during parliamentary scrutiny, the rules might be altered to allow minor adjustments (as noted above).

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