Further written evidence submitted by Michael Romberg of Campaign for the Real Referendum – on the Terms of Brexit (GRB 22A)

This evidence is in addition to the evidence submitted on 4 April 2017 and reflects certain of the further issues of interest identified by the Committee.

SUMMARY

- The Committee should seek a large strengthening of the political and official resources that the House of Commons devotes to scrutiny of the proposed statutory instruments.
- The Committee should take a more robust line than the House of Lords and insist on tight restrictions on the face of the Act on what statutory instruments may do.
- The reason for these recommendations is clear from what the White Paper shows that the government intends to do. In response to specific Government proposals:
  - The Committee should insist that the Charter of Fundamental Rights be incorporated as part of the existing acquis.
  - The Committee should insist that the Act should specify that where a regulatory power sits with an EU body then it should transfer to an equivalent UK body and not just be dropped.
  - The Committee should insist that where EU powers transfer to Ministers the Act should specify that the regulations provide suitable constraints on Ministers’ exercise of the transferred powers.
- The commencement of the power to make statutory instruments (but not the power to give effect to the repeal of the European Communities Act) may properly come into force on Royal Assent. However, the Act should specify that none of the statutory instruments may come into effect until Parliament has repealed the European Communities Act by means of affirmative resolutions preceded by a referendum on the terms.
- The Committee should insist that the legislative arrangements for the withdrawal agreement be handled in a separate bill. It is too early to know what safeguards would need to be built into such a bill.

FURTHER ISSUES OF INTEREST IDENTIFIED BY THE COMMITTEE
The adequacy of the statutory procedures set out in the Statutory Instruments Act 1946 to handle the anticipated scope and volume of delegated legislation

The claims made by the Government about present parliamentary scrutiny of delegated legislation, with particular reference to practice in the House of Commons

1. As a general statement, the Procedure Committee should recommend a considerable strengthening of the resources the House devotes to scrutiny of these statutory instruments. That should include both the time of MPs (and peers) and also the support by officials.

2. The House’s work would be greatly eased the more the face of the Act restricts the power to make statutory instruments. The White Paper quotes some rather unhelpful passages from the recent House of Lords report where the peers resign themselves to giving the Government wide discretion. That will be dangerous. I hope the Committee will be more robust in wanting restrictions on discretion.

3. I provide three examples below from the white paper which make clear how hawk-eyed MPs’ scrutiny will have to be if the Government’s proposals are not to lead to a large transfer of power to the executive and away from Parliament.

Charter of Fundamental Rights (paragraphs 2.21+ of the White Paper)

4. The Charter protects basic human rights in the application of EU law. That means that the Charter is part of the acquis. Nonetheless, the Government intends to convert none of the Charter into UK law.

5. We can compare the historic rulings of the European Court of Justice which the Government means should continue to apply in the interpretation of EU laws. That is to be done to preserve certainty and continuity. The same should apply to the Charter of Fundamental Rights. As it also determines the meaning of EU law, so too should it continue to determine the meaning of EU-derived law.

6. The Government claims that in many cases the Charter merely gives prominence to existing rights and that therefore non-transfer would not alter the substance of law. If that is
the case, then there would also be no difficulty in transferring the Charter in its application to EU-derived law.

7. And even on the Government’s case, some rights are to be found only in the Charter, and presumably not only those that become irrelevant after Brexit (for example, the right to stand for election to the European Parliament).

8. The government expresses a fear that future laws would be struck down because of non-compliance with the Charter. But that would be inconsistent with the Government’s understanding of the general approach where future laws supersede EU-derived laws.

9. The Government’s proposals would on its own claims reduce the prominence of human rights protections and more probably reduce the substance of human rights protections.

10. The Committee should insist that the Government converts the Charter of Fundamental Rights into UK law as part of the acquis.

*Slipping in Real Changes (case study 2 after paragraph 3.4)*

11. Some laws will not work because they refer to EU institutions. The White Paper gives the example of regulations for the protection of habitats in connexion with offshore oil operations which require an opinion to be obtained from the European Commission in certain circumstances.

12. Fair point. But the Government presents two options for the transfer of the regulation into UK law. The opinion could be sought from a UK regulatory body. Or the requirement could be dropped altogether.

13. Clearly, the first option is a change that would be necessitated by Brexit. The second option appears to be the Government trying to weaken environmental protection without being overt about it.

14. The best protection would be for the face of the Act to specify what “corrections” – to use the Government’s word – a statutory instrument may make. For example, the Act could say that where a power sits with an EU institution then the instrument must say that the power should sit with the equivalent UK institution; but the instrument should not allow the power to just disappear.
Transfers of EU powers to Ministers (paragraph 3.16)

15. The Government proposes that some powers currently exercised by EU institutions should pass to Ministers.

16. Powers exercised by EU bodies are subject to the control of EU institutions. It will be important that there are adequate safeguards built in to control those powers when they transfer across.

17. So I would encourage the Committee to require on the face of the Act that statutory instruments impose restrictions on Ministers’ ability to exercise transferred powers.

18. The Committee will wish to enter into a dialogue with Government about what such cases might be. But restrictions could include: powers to be exercisable only by order subject to an appropriate Parliamentary process; reporting requirements.

Considerations to be taken into account when determining the 'most pragmatic and effective' approach to take in balancing the need for scrutiny and speed (para 3.23)

Commencement Regulations – statutory instruments (paragraph 3.24)

19. The government proposes to bring the Act into force immediately so that it can start the process of making regulations early. Fine, up to a point.

20. First, it is only the order-making power that should come into effect early, not the power to give effect to the repeal of the European Communities Act (as already argued, that commencement regulation should require an affirmative resolution by both Houses preceded by a referendum on the terms of Brexit).

21. Second, it will be important for the Act to say that the new regulations do not come into effect until Parliament has voted to bring into effect the provision to repeal the European Communities Act.

Withdrawal agreement (paragraph 1.18)
22. The Government also intends to use the Bill to undertake some preparatory measures ready for the implementation of the withdrawal agreement.

23. I would urge the Committee to reject this idea.

24. The Committee - and later Parliament as a whole – are and will be flying partially blind on the main matter of the "great repeal bill". No-one yet know what "corrections" the Government will wish to make. But at least the basic idea is clear. And so the Procedure Committee can write some rough rules around the process and seek to refine them in discussion with the Government.

25. But no-one has any real idea what the withdrawal agreement will contain or what legislative implications it will have. It is wildly premature for the Government to seek now in effect a blank cheque from Parliament. The Procedure Committee should demand that the legislative cover for the withdrawal agreement should be in a separate bill. The Government should publish green and white papers on that when it has a better idea what it is talking about.

8 April 2017