Key Points

- We agree with the Secretary of State for Exiting the EU about the need to balance the imperative of translating EU law into UK law by the date of Brexit with the need for parliamentary scrutiny of the process – and welcome the fact that he has offered to discuss this with Parliament;
- Government needs to draw the powers provided by the Repeal Bill to amend primary legislation using secondary legislation in a restricted way to make clear they will not be used to make and implement new policy, only to replicate existing laws;
- As the Government has acknowledged, Henry VIII powers should be time limited, although they will need to run beyond the date of exit to cope with deficiencies in the law found after Brexit;
- Parliament – and in particular the Commons – needs to adapt its procedures to make sure it focuses its scrutiny efforts where they matter most. It needs a powerful committee to sift the secondary legislation proposed by government to enable Parliament confidently to distinguish technical measures from more substantive changes. The government must accompany its proposals with enough information to allow Parliament to ratify its proposal regarding the appropriate form of scrutiny.
- The Committee of Selection should ensure that members’ expertise is regarded as a qualification – not a disqualification – for service on legislative committees.
- The government should set out and keep up to date a timetable for the phasing of the secondary legislation it intends to bring forward.
- Where Parliament feels its scrutiny is being rushed (for example where measures need to be passed at short notice to implement a final agreement) – or where there is significant unaddressed public concern about the content of a measure, it needs to be able to put down a marker that the measure needs to be renewed within a period.

A partnership with Parliament

Our report, Legislating Brexit, set out the scale of the challenge facing Parliament in passing the “Great Repeal Bill”; additional primary legislation and extensive secondary legislation. We suggested that government and Parliament needed to work together effectively to ensure that the overriding need to be ready for Brexit, which puts time pressure on the passage of legislation, did not come at the expense of inadequate scrutiny. We therefore welcome the commitment by the Secretary of State for Exiting the EU to hold discussions with Parliament to this end, as promised in his statement to Parliament on his white paper.

Delegated powers are necessary but must be restricted

The scale of the task ahead means there is no option but to allow extensive use of delegated powers. But government must not abuse those powers. It needs to provide Parliament with enough information to allow it to make an informed decision on what is “technical” and “corrective” and
what involves a more substantial change. New policy must be brought forward in primary legislation with attendant levels of parliamentary scrutiny.

Parliament will obviously be concerned if the government provides itself with powers to amend existing EU law applicable in the UK for an indefinite period. However, it needs to recognise that such powers will be needed for a few years after Brexit to cope with deficiencies that may emerge in the EU law moved onto the UK statute book. These powers will be different from those the government may seek to change legislation post-Brexit for other reasons (eg ensuring conformity with evolving EU law).

Prioritisation matters – and Parliament needs to resources to do this

If Parliament is to prioritise its scrutiny efforts properly it needs a good process to sift the government’s proposed secondary legislation, to enable it to focus on the more substantive measures. A committee to do this needs to be able to draw on existing expertise of members in particular policy areas. It also needs to be able to draw on additional staff support if necessary to cope with the volume (and potential complexity) of the legislation involved.

Government can help Parliament do its job more effectively – and should do so

Government needs to help Parliament through this process. It must make available the information Parliament needs to assess individual measures and give Parliament a clear timetable for the legislation it can expect to consider. Government has so far not been particularly forthcoming with information – for example failing to respond to the request from the House of Lords Constitution Committee for draft clauses to be published alongside the Great Repeal Bill White Paper and has made clear there are no plans for pre-legislative scrutiny for the GRB. However, as we argued in Legislating Brexit – other primary legislation should be subject to pre-legislative scrutiny wherever possible.

Government needs to avoid backloading the legislative programme - not least because there will be potentially be additional delegated legislation needed down the line to cope with the outcome of the negotiations. It is almost inevitable with a hard deadline and negotiations going up to the wire that there may be a rush of measures towards the end of the process. Where Parliament is presented with legislation that needs to be passed against very compressed deadlines, it needs to have the opportunity to go back and review what it has done at more leisure after the UK has left the EU. For this reason, measures subject to accelerated scrutiny at the end of the Article 50 process should include sunset clauses as a matter of course, in order to compel the government to pass the same measures again one or two years after Brexit, once Parliament has more time to consider their merits.

A number of outside bodies are already expressing concern about the view the government is taking on what are “technical changes” and on the limited role for the public to express opinions on secondary legislation. It is not easy to see how these concerns can be addressed through conventional procedures on secondary legislation, so this may be another case for putting down a marker for early review.

10 April 2017