

STATES OF JERSEY



DRAFT EUROPEAN UNION (REPEAL AND AMENDMENT) (JERSEY) LAW 201- (P.16/2018): COMMENTS

**Presented to the States on 5th March 2018
by the Chairmen's Committee**

STATES GREFFE

COMMENTS

Summary

1. These comments are presented by the Chairmen's Committee on behalf of the Brexit Review Panel ("the Panel"). The Panel was established by the Chairmen's Committee to review the policy of the Council of Ministers in relation to Brexit, and any legislative changes that arise as a result of Brexit.
2. [P.16/2018](#): *Draft European Union (Repeal and Amendment) (Jersey) Law 201-* ("the Repeal Law") was lodged by the Minister for External Relations on 23rd January 2018.
3. The Panel received a briefing on the Repeal Law during the process of its drafting, on 15th December 2017. This enabled the Panel to comment on the Repeal Law and recommend a minor change before the Repeal Law was formally lodged.
4. The recommendation made by the Panel (reiterated at a public hearing with the Minister on 18th December 2017¹), recommended that the Minister for External Relations would have to seek approval from the Council of Ministers to amend the definition "EU Treaties" in the Repeal Law, rather than being able to take such an action independently. This was adopted in the lodged version of P.16/2018.
5. The Panel subsequently received a second briefing on the final draft version of the Repeal Law on 23rd January 2018.²
6. The Repeal Law was lodged *au Greffe* by the Minister for External Relations on 23rd January 2018 and the debate is scheduled for 6th March 2018. This will allow the Repeal Law to be approved by the current Assembly; and the new Assembly, following the elections in May 2018, will debate the secondary (and new) legislation that will be required before Brexit in March 2019.
7. As part of producing its report, the Panel sent the Minister for External Relations a series of questions regarding the Repeal Law. The Minister's responses are included as an **Appendix** to these comments.

The United Kingdom's Repeal Bill

8. In reviewing P.16/2018, the Panel has closely followed the progress of the United Kingdom's Repeal Bill through Parliament, which at the time of writing was at the Committee stage in the House of Lords.³
9. In particular, the Panel was conscious of the concerns raised around the UK Repeal Bill containing "Henry VIII" clauses. These clauses enable the UK Government to amend a Bill after it has become an Act of Parliament, without any further parliamentary scrutiny being required to take place.⁴

¹ [Transcript](#), 18th December 2018 (p.16).

² [P.16/2018](#), Article 5(3) (p.17).

³ <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

⁴ <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/>

10. The Panel reviewed the comments made by the relevant House of Commons and House of Lords Committees, regarding such clauses. In particular the Panel was mindful of the comments made by the House of Lords Constitution Committee, which stated that –

“We accept that the Government will require some Henry VIII powers in order to amend primary legislation to facilitate the UK’s withdrawal from the European Union, but they should not be granted lightly, and they must come with commensurate safeguards and levels of scrutiny.”⁵

The Jersey Repeal Law

11. The Jersey Repeal Law takes a significantly different legislative approach to repealing EU legislation than the UK’s Withdrawal Bill. This leads to very limited requirements for a Henry VIII-style clause. As is stated in the Report accompanying P.16/2018 –

“EU law that is directly applicable in Jersey is concentrated in those areas covered by Protocol 3. There is therefore much less directly applicable legislation in Jersey than in the UK, and this means that Jersey can take a more prescriptive approach to bringing EU law into Jersey law in order to ensure that there are no gaps in our legislation after Brexit occurs. Whilst the UK is pursuing a general conversion of all directly applicable EU law into domestic UK law, the Government of Jersey is instead proposing that the States Assembly should be given the power to determine, by Regulations, the extent to which particular provisions of directly applicable EU law become part of Jersey’s domestic law after Brexit.”⁶

12. This in effect means that Jersey has fewer pieces of legislation to amend than the UK, focused primarily on the trade aspects covered under Protocol 3. This makes it possible for the States Assembly to have a more hands-on approach in deciding which pieces of legislation are to be maintained once Brexit occurs.
13. Whilst Henry VIII clauses are not present in the same manner in Jersey’s Repeal Law, the Panel notes that there are several aspects whereby the Minister for External Relations would be allowed to make retrospective amendments to the Repeal Law, if P.16/2018 is approved by the States.⁷
14. At its hearing on 18th December 2017, the Minister for External Relations stated that these powers were in order to *“achieve a balance between practicality and constitutional propriety. We do not want to be left in a position where there is a hiatus.”*⁸ The Minister continued that these powers may be needed if things started occurring more rapidly in the future negotiations between the UK and EU, and Jersey needed to react. The Minister stated that –

⁵ House of Lords Constitution Committee. *“European Union (Withdrawal) Bill: interim report”* <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/19.pdf> (p.15).

⁶ [P.16/2018](#) (p.5).

⁷ The Panel notes that if [P.1/2018 \(Machinery of Government\)](#) is approved by the States without amendment, any member of the Council of Ministers would be eligible to sign on behalf of the Minister for External Relations as part of the collective legal entity “Jersey Ministers”.

⁸ [Transcript](#), 18th December 2018 (p.15).

“I suggested earlier that things were likely to move much more quickly in the future and we do not want to be left in a position where we ought to have incorporated into Jersey law some provisions that we have not had time to do. In order to achieve a peaceful and smooth path, we need to have the legislation in place before any substantial change descends upon us as a result of the actions of others.”⁹

15. The Minister also highlighted the reasons for such powers being incorporated into the Repeal Law –

“I said earlier that the broad thrust of things was to enable the States, by regulations, to decide whether and, if so, to what extent to delegate powers to Ministers to deal with more minor matters.”¹⁰

16. The Minister further explained that the power would enable the Minister to amend the definition of “EU treaties” as set out in the Repeal Law –

“... the purpose of putting into the 2014 law a power in the Minister for External Relations, by order, to amend the treaties will be to enable him or her, by order, to add the withdrawal treaty, for one, and maybe there will be other treaties in relation to the new relationship between the European Union and the United Kingdom, which again might suddenly come upon us, and where it would be desirable to include within the definition of E.U. treaties...The power vested in the Minister for External Relations is quite narrow. It is to amend the definition of the treaties but the only practical effect of that will be to empower the States, by regulations, to give effect to the provisions of those treaties.”¹¹

17. The power conferred on the Minister can therefore be understood as enabling a flexible approach to the Repeal Law. As such, without the Minister having the ability to make minor changes to the Repeal Law in response to the UK’s negotiations with the EU, the Repeal Law would have to come back to the States for approval for any subsequent change required.

18. Whilst such a power for the Minister to make amendments by Order will need to be granted by the Assembly, and has the purpose of fixing deficiencies in the Law, the Panel acknowledges that such powers could also theoretically be used for making changes not intended under the Repeal Law or, indeed, not enacting the necessary changes in a timely manner to ensure a smooth Brexit transition.

19. Because of this concern, the Panel recommended that such a power could be limited by including a requirement for the Minister for External Relations to seek approval from the Council of Ministers before being able to make amendments to P.16/2018. The Panel is pleased to note that this recommendation has been taken account of in the Repeal Law.

⁹ [Transcript](#), 18th December 2018 (p.15).

¹⁰ [Transcript](#), 18th December 2018 (p.15).

¹¹ [Transcript](#), 18th December 2018 (p.15).

Time Constraints

20. The Panel generally supports a prescriptive process of repeal. It is, however, conscious that the same time constraints that are being faced by the UK are also being faced by Jersey. With the 2-year deadline fast approaching after the triggering of Article 50 in March 2017, the Panel retains reservations about the ability for the Island to process all EU law, including any new legislation required, such as for customs and immigration, before this date.
21. If time does become a constraining factor, the Panel would question whether a UK model, whereby all Laws are repealed at the point of Brexit and are retrospectively reviewed, might be necessary.
22. The Panel also expresses concern that the Jersey model of repeal may make comprehensive parliamentary scrutiny challenging, with potentially a large quantity of amended and new legislation requiring scrutiny before March 2019. At its hearing with the Minister for External Relations on 18th December 2017, the Panel was informed that at that time, 70 to 80 pieces of legislation relating to agriculture and fisheries alone had been identified¹², and with large numbers likely for migration-related legislation.¹³ It was confirmed to the Panel that in total there would be “hundreds” of legislative changes that would be required to be made.¹⁴
23. It was confirmed by the Panel at its hearing that for each legislative change there would be an explanatory briefing note attached, explaining the implications of the change to each Article.¹⁵ The Panel notes that such a proposal had been made of the UK Government by the House of Lords Constitution Committee, who recommended in a 2017 report –

“That 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 operate sensibly 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.”¹⁶

24. The Panel welcomes the Minister’s commitment to providing an explanatory briefing note to amended legislation. Such a measure will assist in both an effective scrutiny process for the Brexit Panel of the legislative changes, as well as benefitting the Assembly more generally in its understanding of what is occurring and why.

Conclusion

25. The Panel offers its thanks to the Minister for External Relations and all officers involved in the development of the Repeal Law, including the comprehensive briefings that were provided to the Panel.

¹² [Transcript](#), 18th December 2018 (p.12).

¹³ [Transcript](#), 18th December 2018 (p.14).

¹⁴ [Transcript](#), 18th December 2018 (p.11).

¹⁵ [Transcript](#), 18th December 2018 (p.12).

¹⁶ Constitution Committee. “*The ‘Great Repeal Bill’ and Delegated Powers*”. <https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/123.pdf> (p.32).

26. Overall, the Panel supports the prescriptive approach that the Minister has decided upon and the measures set out in P.16/2018.
27. As long as the Minister and his Ministry effectively co-ordinate the implementation of the Repeal Law and assist in allowing effective, timely scrutiny of secondary legislation that will be required to be debated during the first year of the next States Assembly, the Panel believes that such an approach will be an effective mechanism to repeal EU Laws.
28. The Panel acknowledges that there are significant time constraints due to the March 2019 2-year deadline, following the triggering of Article 50. However, this constraint is the same for both Jersey's and the UK's approach to repealing EU legislation and cannot be avoided.
29. However, the Panel still retains minor concerns surrounding the power to amend the Repeal Law by Order, which the Minister for External Relations gains from P.16/2018. The risks surrounding this are minimal, however; especially following the adoption of the Panel's recommendation that the Council of Ministers must be consulted by the Minister before he makes any changes to the defined list of EU treaties.

Statement under Standing Order 37A [Presentation of comment relating to a proposition]

These comments were submitted to the States Greffe slightly after the noon deadline as set out in Standing Order 37A due to the current high workload within Scrutiny.

**QUESTIONS FROM THE BREXIT REVIEW PANEL TO
THE MINISTER FOR EXTERNAL RELATIONS**

**(Responses to be used as written evidence as part of the Panel’s Review of the
Draft European Union (Repeal and Amendment) (Jersey) Law 201- (“EURAL”))**

	Question	Response
1.	Can you explain the rationale for the very different approach that Jersey has taken in the production of its Repeal Law, compared to that of the United Kingdom?	<p>The United Kingdom has elected to transpose all EU Law that has direct applicability into UK domestic law through a single Act of Parliament that gives the transposed EU Law a special legal status. The UK Government will then need to bring forward a wide range of secondary legislation modifying the effect of the transposed EU Law. This approach represents a complex compromise, balancing consistency in the effect of the law and the UK’s political objectives for Brexit as a whole.</p> <p>The Government of Jersey has elected to take a simpler, targeted approach, which involves actively selecting those EU laws that will be incorporated into our domestic legislation.</p> <p>The rationale for this decision is that, unlike the UK, where EU law is directly applicable in a wide range of contexts; in Jersey, EU law is directly applicable only in a limited range of circumstances, such as trade in agricultural products. This means that Jersey can take a more focussed approach to bringing EU legislation into domestic law whilst ensuring that there are no gaps in our legislation after Brexit occurs.</p> <p>This ‘front loaded’ approach provides, at an early stage, clarity on the content and volume of EU law that will need to be transposed into domestic legislation, and is regarded as the most appropriate process for the Island, as it involves incorporating into Jersey law only those measures that Jersey needs, rather than copying across entire rafts of legislation.</p>
2.	What work has been done to assess whether this method of repealing legislation is in fact feasible in the time available, for the number of legislative changes faced by Jersey?	<p>Working in partnership with other States Departments and key stakeholders, the Law Officers’ Department has conducted an extensive review of legislation on the Jersey statute book which has an EU element. This review has enabled the Government to identify the types of deficiency that will arise in our domestic law as a consequence of Brexit.</p> <p>Further work is being undertaken by individual States Departments to prioritise the changes that will need to be made to address those deficiencies and prepare instructions to the Law Draftsman’s Office.</p>

	(a) Is there a danger that, having accepted this Proposition, we find there is not enough time for a “prescriptive” approach, as you describe it in P.16/2018?	<p>The passage of the most urgent pieces of secondary legislation, identified by all Departments, will be prioritised for consideration by the States Assembly, followed by those less urgent but still important measures. The passage of these pieces of secondary legislation has been timetabled to take place before Brexit day on 29th March 2019.</p> <p>(a) We recognise that the prescriptive approach adopted by the Government of Jersey ‘front-loads’ the analysis of EU law and the passage of necessary secondary legislation, in comparison to the process adopted by the UK. However, as identified in Question 1 above, this is the most suitable process for the Island. If the draft EURAL is passed by the Assembly on 6th March 2018, there will be sufficient time to bring in all necessary secondary legislation by Brexit day.</p>
3.	P.16/2018 describes a prescriptive approach, with the Assembly being largely responsible for bringing EU law into Jersey law. What assistance will you be providing to Members to ensure that this process runs smoothly (and on time)?	<p>A States Members’ Briefing on the provisions of, and rationale behind, the draft EURAL was given by the Law Officers’ Department on 1st December 2017. As many Members were unable to attend this Briefing, officers have offered to provide small group or one-to-one briefings to Members to ensure that they have a clear understanding of the operation and structure of EURAL, as well as the processes which have been followed in reviewing both that domestic legislation with an EU element, and those processes involved in identifying which EU provisions might remain part of Jersey law after Brexit occurs.</p> <p>Informal briefings have also been given by the Law Officers’ Department to the members of the Brexit Review Panel on the legislative programme and the provisions of the draft EURAL.</p> <p>States Members will continue to receive written and oral briefings on the proposed legislative changes as part of the Brexit work co-ordinated by the Ministry of External Relations. The Ministry will also be publishing a Brexit Update Report in February 2018 to provide context to the debate of the draft EURAL, which is scheduled to take place at the States Sitting commencing 6th March 2018.</p>
4.	Does a prescriptive approach allow enough time for Scrutiny to effectively review all subsequent legislative changes before March 2019?	<p>The Government acknowledges the critical importance of the Scrutiny process in ensuring the passage of the secondary legislation that will be brought pursuant to the draft EURAL.</p> <p>As outlined in the answer to Question 2 above, careful consideration is being given to the priority of the secondary legislation to be brought before the States Assembly, and this will include appropriate</p>

		consideration by Scrutiny. Proactive co-operation between Scrutiny officers and those in the Ministry of External Relations will ensure that draft legislation is timetabled to allow for Scrutiny Panel consideration.
5.	The UK is including what are known as “Henry VIII clauses” in its Repeal Bill. What powers are being given to Jersey Ministers through enacting Jersey’s Repeal Law?	<p>The draft EURAL amends the power to implement EU Law that is already found in Article 2 to the European Union Legislation (Implementation) (Jersey) Law 2014 (“the 2014 Law”).</p> <p>Pursuant to the amended Article 2 of the 2014 Law, the States Assembly will continue to be able to implement EU Law (whether or not it is currently directly applicable) by making Regulations. In those Regulations, the Assembly will be able to confer powers on Ministers to further implement aspects of EU Law.</p> <p>The draft EURAL also adds a new power to the 2014 Law to allow the Assembly to correct deficiencies in Jersey’s domestic law that will arise from Brexit. This provision allows the Assembly to correct domestic law itself, but also to be pragmatic and give Ministers appropriate and limited powers to address particular issues by Order.</p> <p>The draft EURAL does not then confer on Ministers the type of ‘Henry VIII’ powers that have proved controversial in the UK. The Assembly will be able to confer on Ministers the ability to make Orders, but the extent of those powers will remain in the gift of the Assembly, which can decide the extent to which it is prepared, and as such does not dilute democratic oversight.</p>
6.	The Law will allow the Assembly to “confer on any Minister the ability to make further provision by Order”. How does the Law ensure that this power is not abused, or used for a purpose other than which it is intended?	Article 6 of the draft EURAL imposes express limits on the powers that may be exercised by Ministers, so that they may not be used to impose or increase taxation; make retrospective provision; create serious criminal offences; or interfere with human rights legislation.

7.	Is this Law able to accommodate the legislative complications that would arise from a UK Brexit “transition period”?	The draft EURAL has been constructed so that the Minister for External Relations will be empowered by Article 5 (which substitutes a new Article 1 into the 2014 Law), with the approval of the Council of Ministers, to amend the definition of EU treaties to add, among other things, any Withdrawal or Transition Agreement to that definition.
8.	What aspects of Jersey’s relationship with the European Union are not altered by the Repeal Law and are reliant on the UK’s final negotiations with the EU? (for example foreign affairs, for which the UK is responsible)	<p>The draft EURAL is designed to enable the States Assembly to account for any and all deficiencies that may arise in domestic legislation as a result of Brexit – caused by the ending of the effects of Protocol 3 to the UK Treaty of Accession.</p> <p>As the question identifies, other aspects of the Island’s future relationship with the European Union will be reliant upon the UK’s final negotiations with the EU; these include, for example, participation in the EU customs union and agreement on the ‘settled status’ of EU citizens.</p>
9.	Is the Repeal Law affected by the manner in which the United Kingdom leaves the European Union? i.e. would a “hard” Brexit mean that further legislative amendments would be required?	As addressed in the answer to Question 7 above, the draft EURAL, as a piece of enabling legislation, has been constructed so that it can take account of either a negotiated Brexit, with a Withdrawal Agreement and/or Transition period, or a “hard” Brexit.
10.	What processes are going to be undertaken to make sure that any changes to Jersey’s legislation arising from the Repeal Law, are (still) human rights compliant?	Whilst the 2014 Law as amended by the draft EURAL will provide the power to make provision to give effect to EU Law or remedy deficiencies arising from Brexit, these powers may not be used to amend, repeal or revoke the Human Rights (Jersey) Law 2000 . Secondary legislation prepared pursuant to the powers in the draft EURAL may be reviewed by the Law Officers’ Department, where appropriate, to ensure that it is human rights compliant. All pieces of primary legislation arising from the Brexit process will be required to contain a certification of Human Rights compliance pursuant to the provisions of Article 16 of the Human Rights (Jersey) Law 2000.

11.	<p>You state that the Repeal law is the “first stage in Jersey’s Brexit legislation project”. Can you describe in detail what other major free-standing legislation is to be introduced, and when?</p>	<p>The draft EURAL is an enabling Law, which allows secondary legislation to be brought to address deficiencies caused in the Island’s domestic legislation as a result of Brexit.</p> <p>As the question identifies, there will also be the need for additional pieces of primary legislation, the first and most important of which will be a new Sanctions Law. It is anticipated that additional primary legislation may be required in the areas of customs, trade and immigration.</p> <p>However, the content and timing of these additional pieces of legislation can only be developed once the terms of the final Withdrawal Agreement between the UK and EU have been published, and the nature of the future relationship between the two is known.</p>
12.	<p>The Report accompanying P.16/2018 states that “New sanctions legislation will certainly be needed”. Can you outline what this will look like and when it will be brought to the Assembly?</p>	<p>Work is being undertaken by officers to prepare the draft Sanctions Law, and it is anticipated that it will be presented to States Members in Autumn 2018.</p>