



Law Society
of Scotland

Written evidence submitted by The Law Society of Scotland (REULB02)

Retained EU Law (Revocation and Reform) Bill

November 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to provide written evidence to the Public Bill Committee on the Retained EU Law (Revocation and Reform) Bill¹ (the Bill).

General comments

In the foreword to *Legislating for the United Kingdom's withdrawal from the European Union* (CM 9446, 2017) the then Prime Minister, Teresa May MP, stated “Our decision to convert the ‘acquis’ – the body of European legislation – into UK law at the moment we repeal the European Communities Act is an essential part of this plan. This approach will provide maximum certainty as we leave the EU. The same rules and laws will apply on the day after exit as on the day before. It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate”.

If we accept the premise that retaining EU law in UK law provided “the maximum certainty” as the UK left the EU, then subject to any particular amendments which are necessary to keep the body of law up to date and functioning, there is no reason why retained EU law (REUL) cannot be considered a sustainable concept. On the other hand, it would be equally possible following a thorough review and relevant amendments that incorporation into domestic law in the four UK jurisdictions could be completed.

The review of REUL has been begun in terms of that announced by Lord Frost: [UK Government - Retained EU Law Dashboard | Tableau Public](#) as paragraph 13 of the Explanatory Notes (“EN”) states that:

“now the Government is in a position to ensure that REUL can be revoked, replaced, restated, updated and removed or amended to remove burdens.”

The Bill intends to further facilitate the review and provides that it should be carried out by the end of 2023. However, given the fact that there are 2,400 pieces of REUL (see EN paragraph 16), we are concerned that this does not appear to allow sufficient time to enable the review to be completed properly after due

¹ <https://bills.parliament.uk/bills/3340>

consultation with the devolved authorities and relevant stakeholders including UK Parliamentary and Devolved Legislature Committees².

We are also concerned that the process of moving from the “maximum certainty” of REUL to domestic provisions in such a short time could result in less certainty and more confusion with consequent adverse impact on individuals and businesses affected.

This is particularly so in the case of Scotland in view of the current policy of the Scottish Government and Parliament under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 to keep pace with EU law so far as possible. This is likely to result in considerable divergence between what domestic provisions replace REUL in Scotland and the rest of the UK which may result in difficulties in connection with the United Kingdom Internal Market Act 2020. This is despite what is stated in paragraph 60 EN that:

“The Government remains committed to respecting the devolution settlements and the Sewel convention and has ensured that the Bill will not alter the devolution settlements and will not create greater intra-UK divergence.”

If the Bill is to proceed, it will require considerable amendment to ensure that there is adequate consultation with relevant stakeholders before moving from the current arrangements of REUL to domestic provisions.

Furthermore, a number of provisions of the Bill set out restrictions on the powers of the devolved authorities. Legislation which affects the legislative competence of the Scottish Parliament or executive competence of the Scottish Ministers engages the legislative consent convention. The Government should ensure that where the convention applies in relation to the Bill, it should be complied with.

Specific comments on the Bill

Clause 1 Sunset of EU-derived subordinate legislation and retained direct EU legislation

Subsection (1) provides for the revocation of all (a) EU-derived subordinate legislation and (b) retained direct EU legislation (RDEUL) at the end of 2023.

The reference to the “end of 2023” in subsection (1) is vague. It is suggested that this reference should be defined in clause 21(1) as “11.59 p.m. on 31 December 2023” following the precedent of the European Union (Withdrawal Agreement) Act 2020. This comment applies throughout the Bill and is not repeated.

² See comments on parliamentary consultation contained in the European Scrutiny Committee report: [Retained EU Law: Where next? - European Scrutiny Committee \(parliament.uk\)](https://www.parliament.uk/european-scrutiny-committee/reports/retained-eu-law-where-next/).

Subsection (2) enables regulations made by a relevant national authority (i.e. Minister of the Crown or a devolved authority) to exempt from the revocation under subsection (1) of specified provisions of EU-derived subordinate legislation or RUEUL. This will provide a safety net to enable such specified provisions to be preserved after the end of 2023. These preserved provisions will in terms of section 6 become assimilated law.

Subsection (4) defines EU-derived subordinate legislation as any domestic subordinate legislation so far as — (a) it was made under section 2(2) of, or paragraph 1A of Schedule 2 to the European Communities Act 1972, or (b) it was made, or operated immediately before IP completion day, for a purpose mentioned in section 2(2)(a) of that Act (implementation of EU obligations etc.), and as modified by any enactment.

This definition, and particularly the use of the words “so far as”, means that it could be very difficult to identify the relevant parts of the subordinate legislation which fall within the definition. It will be difficult to do this thoroughly and evaluate it in the time available before the end of 2023.

Clause 2 Extension of sunset under section 1

Clause 2 provides that a Minister of the Crown may by regulations provide that the reference in section 1(1) to the end of 2023 should specify a “later time”.

Clause 2(3) provides that the “later time” cannot be later than the end of 23 June 2026. This is the tenth anniversary of the date in June 2016 on which the referendum on UK membership of the European Union was held. Government policy in relation to the applicability of Retained EU law should not be made on the basis of symbolism which reflects political doctrine. The choice of date should be made on the application of a more rational thought process including consultation with those who will be affected by the changes in the regulations. Both the references to “the end of” in section 3 should be amended to be more specific and less vague. This comment applies throughout the Bill and is not repeated.

Clause 3 Sunset of retained EU rights, powers, liabilities etc.

Clause 3(1) provides that Section 4 of the European Union (Withdrawal) Act 2018 (EUWA) is repealed at the end of 2023. The comments made above in relation to the vagueness of the phrase “end of 2023” apply.

Clause 4 Abolition of supremacy of EU law

This clause amends EUWA by repealing as from the end of 2023 the principle of the supremacy of EU law in relation to any domestic legislation whenever made.

That principle is currently applied to domestic legislation made on or before 31 December 2020 by section 5 EUWA. Clause 4 replaces subsections (1) to (3) of section 5 with new subsections (A1), (A2) and (A3).

Subsection (A1) provides that the principle of the supremacy of EU law is not part of domestic law and disapplies it in relation to any legislation or rule of law whenever made from the “end of 2023”.

Subsection (A2) which provides that RDEUL must, so far as possible, be read and given effect in a way which is compatible with all domestic enactments, and is subject to all such enactments, so far as it is incompatible, or in conflict, with them. In other words, it establishes a new priority rule by in effect reversing the principle of the supremacy of EU law.

Subsection (A3) provides that subsection (A2) is subject to sections 183 and 186 of the Data Protection Act 2018 which makes its own provision as to the priority between various provisions of data protection legislation in RDEUL and domestic legislation; and (b) any provision to the contrary made in regulations under clause 8 (Compatibility) of the Bill.

The principle of the supremacy of EU law was developed by the CJEU and provides that where there is a conflict between national law and EU law, EU law will prevail. It is key to the EU legal order and ensures consistent application across the EU. Duh and Rao in *Retained EU Law - A Practical Guide*, comment on the application of the principle. They note the comment by the House of Lords Constitution Committee that it is impossible “to see in what sense “the principle of the supremacy of EU law” could meaningfully apply in the UK once it has left the EU” and then explain that the reason it is retained is because one of the stated aims of the EUWA is to incorporate EU law into domestic law. To incorporate EU law into the domestic statute book while retaining the principle would imbalance the statute book. It is logically consistent therefore that when retained EU is being abolished the principle should be disapplied also.

However, we question whether the abolition of this principle will not affect the interpretation of EU law when it becomes assimilated and is this not a factor to be taken into account in considering how to assimilate that law?

Clause 5 Abolition of general principles of EU law

This clause amends EUWA so that the general principles of EU law are not part of domestic law as from the end of 2023.

Will not the abolition of these general principles affect the interpretation of EU law when it becomes assimilated and is this not a factor to be taken into account in considering how to assimilate that law?

Clause 5 amends various sections of the EUWA, so that retained general principles of EU law are no longer part of UK law from the end of 2023. This clause will achieve the Government’s policy of removing retained general principles of EU law.

Clause 6 “Assimilated law”

Clause 6(1) provides that, after the end of 2023, any REUL which remains in force is to be known as “assimilated law”. This introduces the concept of assimilated law as a new body of law.

Clause 6(2) provides that, in consequence of subsection (1), provision may be made by regulations under clause 19 (power to make consequential provision) of the Bill to amend EUWA so that references to “retained EU law” and similar terms may be changed to references to assimilated law.

We have no comments to make upon this clause.

Clause 7 Role of courts

Clause 7 amends section 6 of the EUWA which dealt with the interpretation of REUL and the application of retained case law by domestic courts.

As the amendments made by clause 7 are quite complicated and convoluted, it is difficult to understand the effect of the amended provisions. We therefore suggest that it would be clearer if clause 7 simply substituted a new section 6 of EUWA.

New Section 6B which clause 7(8) proposes to insert into the EUWA provides that UK or devolved Law Officers can make a reference to the Supreme Court, the High Court of Justiciary or to the appropriate relevant appeal court (as defined by section 6A):

- (a) where proceedings before a court or tribunal (other than a higher court) have concluded,
- (b) no reference was made under section 6A in relation to the proceedings, and
- (c) either— (i) there has been no appeal, or (ii) any appeal has been finally dealt with otherwise than by a higher court.

Even although section 6B(7) provides that “[any decision by the court to which reference is made] does not affect the outcome of the proceedings...”, we consider it contrary to the interests of justice that the Law Officers can be empowered to make a reference in a civil case which has been concluded and where there has been either no appeal or the appeal itself has been concluded. This contravention of the principle of finality and interference by the State in civil litigation needs to be explained and justified by the Government.

Moreover, this innovation would apply only on a point of law “on retained case law”, thus diluting the unity of the civil law. Further, any such power of reference would not be comparable, for instance, to the role of the Attorney General or the Lord Advocate in criminal proceedings. There, such Law Officers have a direct interest and an integral role to play in all such proceedings, including instituting appeals or references on points of law. Law Officers do not currently have that role in civil proceedings, and it remains to be seen why they should have it in respect of one particular category of civil case law.

In relation to new section 6B(2) we have some observations. This new subsection identifies the Law Officers who can make a reference.

The Lord Advocate’s power to make a reference is limited to where the point of law relates to the meaning or effect of relevant Scotland legislation. There is no corresponding restraint on the powers of any UK Law Officer to either the law of England and Wales or a matter of law on reserved matters. We question whether it is appropriate that any UK Law Officer (other than the Advocate General for Scotland) should be able to make a reference to the High Court of Justiciary or a relevant appeal court which is a Scottish court

on a matter of Scottish legislation see *Taylor Clark Leisure PLC v The Commissioners for Her Majesty's Revenue* [2015] CSIH 32.

New Section 6C provides that each UK Law Officer and devolved Law Officer is entitled to notice of proceedings. The Lord Advocate's power to intervene is limited to where the argument relates to the meaning or effect of relevant Scotland legislation. There is no corresponding restraint on the powers of any UK Law Officer to either the law of England and Wales or to the law on reserved matters.

We question whether it is appropriate that any UK Law Officer (other than the Advocate General for Scotland) should be able to intervene on a matter of Scottish legislation before the High Court of Justiciary or a relevant appeal court which is a Scottish court.

Clause 8 Compatibility, Clause 9 Incompatibility orders, Clause 10 Scope of powers and Clause 11 Procedural requirements

Clause 8 enables regulations to be made which preserve the equivalent to the principle of supremacy in relation to RDEUL or to specified provisions of RDEUL over specified domestic legislation or provisions of it.

Clause 9 makes provisions as to the remedies which a court may grant following the abolition of the principle of supremacy.

Clause 10 amends the provisions in EUWA which modify the powers in other statutes with regard to their use to amend RDEUL or section 4 EUWA rights.

Clause 11 repeals the parliamentary scrutiny requirements which apply to the amendment or revocation of subordinate legislation made under section 2(2) of ECA.

We have no comments to make on these clauses.

Clause 12 Power to restate retained EU law

This clause provides that a relevant national authority may by regulations restate any secondary retained EU law. The restatement is not retained EU law. Will the restatement be capable of further amendment in the future?

Clause 13 Power to restate assimilated law or reproduce sunsetted retained EU rights, powers, liabilities etc.

This clause provides that a relevant national authority may by regulations restate any secondary assimilated law. This operates in a similar way to clause 12 but to operate after the end of 2023. Will the restatement be capable of further amendment in the future?

Clause 14 Powers to restate or reproduce: general

Clause 14 provides further detail on what on what a national authority can do when exercising its powers to make regulations under clauses 12 and 13.

Subsection (2) provides that a national authority can use different words or concepts from those used in the secondary retained EU law which is being reinstated.

The Government should explain what is meant by “restatement” if the restated law is different in concept from the original law. To what extent can “different words” be used before the restatement changes into a new and distinct law?

However, subsection (3) appears to set out limitations on what changes can be made. It provides that a national authority may make changes which it considers appropriate for the purpose of:

- (a) resolving ambiguities;
- (b) removing doubts or anomalies; or
- (c) facilitating improvement in the clarity or accessibility of the law (including by omitting anything which is legally unnecessary).

These are laudable objectives for creating better legislation, but we take the view that it would be important for the national authority to consult broadly on the nature of the changes contemplated before proceeding to legislate.

It is also suggested that subsection (3) should make it clear that these are the only changes which can be made by using different words or concepts.

Subsection (5) provides that the provision that may be made by regulations under section 12 or 13 may be made by modifying any enactment. This is a very wide Henry VIII power the necessity for which the Government should explain.

Clause 15 Powers to revoke or replace

Clause 15(1) is a declaratory principle that a national authority may revoke any secondary retained EU law without replacing it.

Subsection (2) and (3) provide that a national authority may either replace the revoked law with a provision which it considers appropriate to achieve the same or similar objectives or make an alternative provision as it considers appropriate. We take the view that the national authority should be under an obligation to consult those who may be affected before revoking, replacing or enacting an alternative provision. Will the replacement be capable of further amendment in the future?

Subsection (4) sets out the parameters for both the replacement and alternative legislation. This provision should reflect the analogous provision in section 8 of the EUWA.

Subsection (9) provides that no regulations may be made under this section after 23 June 2026. Our previous comments in relation to this formulation apply.

Subsections (5) and (6) require that no provision may be made by a national authority unless the authority considers that the overall effect of the changes does not increase the regulatory burden.

Subsection (10) defines “burden” as including (among other things)— (a) a financial cost; (b) an administrative inconvenience; (c) an obstacle to trade or innovation; (d) an obstacle to efficiency, productivity or profitability; (e) a sanction (criminal or otherwise) which affects the carrying on of any lawful activity.

This definition is slightly different from the definition of “burden” in section 1(3) of the Legislative and Regulatory Reform Act 2006 which means any of the following—

- (a) a financial cost;
- (b) an administrative inconvenience;
- (c) an obstacle to efficiency, productivity or profitability; or
- (d) a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.

“Burden” defined under the Bill is in a non-exhaustive list – and “among other things” extends to include “an obstacle to trade or innovation”. The Government should explain how the two statutory definitions of “burden” apply especially as section 1(6) of the Legislative and Regulatory Reform Act 2006 is amended by clause 17 of the Bill but section 1(3) is not.

Clause 16 Power to update

We note that the national authority is given power to update regulations any secondary retained EU law, or of any provision made by virtue of section 12, 13 or 15 to take account of— (a) changes in technology, or (b) developments in scientific understanding.

This limitation on the reason for such updating should also reflect other activities such as changes in society or economics.

Clause 17 Power to remove or reduce burdens and Clause 18 Abolition of business impact target

We have no comment to make on these clauses.

Clause 19 Consequential provision

Clause 19 provides that a Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act. We take the view that the Minister should only make regulations which are necessary and therefore objectively justifiable rather than according to the more subjective test of being “appropriate”.

Clause 20 Regulations and Clause 21 Interpretation

We have no comment to make on these clauses.

Clause 22 Commencement, transitional and savings

We note that financial services regulations are excepted from the impact of the bill.

Clause 23 Extent and short title

We have no comment to make.

Schedule 1 — Amendment of certain retained EU law

We have no comment to make.

Schedule 2 — Regulations: restrictions on powers of devolved authorities

With regard to Paragraph 4 it would be helpful if the Government could explain what are the regulations to which this provision applies, particularly having regard to paragraph 4(4)(b).

Schedule 3 — Regulations: procedure

What is Paragraph 1(2) intended to achieve? Section 27 of the Interpretation and Legislative Reform (Scotland) Act 2010 defines that is meant by a “Scottish statutory instrument” but where are the provisions which provide that Scottish Ministers may make a Scottish statutory instrument? Is it intended that regulations made by Scottish Ministers should be made by SSI as defined in section 27? If so, that should be stated on the face of the bill.

Is Paragraph 2 intended to apply to Scotland?

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