

Acas Private Office
8th Floor, Windsor House
50 Victoria Street
Westminster
London
SW1H 0TL

T 0330 109 3796
sclews@acas.org.uk

18 November 2022

Dear Committee

Call for written evidence: Retained EU Law (Revocation and Reform) Bill

Acas (the Advisory, Conciliation and Arbitration Service) welcomes the opportunity to respond to the Committee's call for evidence.

Acas is a statutory, independent, non-departmental public body with a duty to improve employment relations throughout Great Britain. It has considerable experience of providing impartial advice on employment law and good practice to employers, workers, their representatives and other stakeholders in the workplace.

Acas provides a range of advisory services including a website and Helpline, as well as expert advisory work carried out directly with employers, workers and representatives inside their workplaces. It offers an impartial conciliation service in all potential and actual employment tribunal cases, as well as in collective disputes between employers and trades unions.

The interactions Acas has with millions of employers and workers each year through these services afford Acas with unique, impartial insights into the challenges that can arise in respect of employment law, including how it is understood and used by employers and workers in the workplace.

Acas has a strong track record of informing the development and implementation of government policy across all areas of employment law and good workplace practice, through engaging in public consultations as well as engaging directly with government ministers, policy officials and other stakeholders.

Considerations on the Bill

Acas does not offer comment on the overall policy intention of the Bill. We do, however, encourage careful consideration of the proposed 'sunset' provisions in the Bill, particularly in respect of the potential effects and unintended consequences these may have with regard to:

1. The opportunity for the Government to undertake a thorough review of all affected areas of law.
2. Appropriate opportunities for stakeholders, including Acas, to inform the reform process with evidence and expertise in affected areas of law.
3. The legal uncertainty that will be faced by employers and workers both before the sunset and after it.
4. The importance of clarity and predictability regarding the law in promoting the early settlement of workplace disputes and employment tribunal claims.

1. Opportunity for a thorough review of all affected law

The Committee will be aware that the Bill facilitates reforms to over 2,400 pieces of retained EU law (as per the Bill's Explanatory Notes). Acas would urge the Committee to consider carefully the full extent of the review that the Bill necessitates and, accordingly, whether the Bill's proposed sunset date affords appropriate time for this.

Much of the commentary around this issue has focussed on the volume of statutory regulations that fall within scope of the Bill's provisions. However, in addition to its direct impact on regulations, it is important to consider further the implications of the Bill removing the interpretive effects of EU law on the UK statute book (for instance, through the abolition of general principles of EU law and the establishment of a new priority rule requiring retained direct EU legislation (RDEUL) to be interpreted and applied subject to domestic legislation).

Such provisions mean, in effect, much of the case law from court and tribunal decisions over the past 50 years, which have determined the legal interpretation of EU-derived law in the UK, falls within scope of the sunset. After the sunset, this case law will no longer provide legal certainty with respect to remaining EU-derived law unless the Government codifies that case law in new or replacement statutory regulations, or specifies the preservation of interpretative principles of EU law in certain policy areas.

As the Committee will be aware, this means that a thorough review of the law that will be affected at the sunset necessitates not only the identification of all statutory regulations within scope – a task which the Government's [REUL Dashboard](#) notes is not yet complete. Moreover, the entire body of relevant case law over the past 50 years must also be identified and then, along with all affected regulations, assessed in terms of the potential impacts of preserving, repealing or reforming each of them.

The Committee will appreciate that, by any measure, this is an enormous task. Should the review in any way fall short of completion, there is a risk that law which the Government might otherwise have decided to preserve, or to retain in a modified form, could slip off the statute book, or disappear as a principle of case law, simply through oversight or for want of more time. Clearly, there are associated risks of unintended consequences here and we would urge the Committee to consider whether resources and appropriate engagement can feasibly be put in place to support this process before the currently envisaged sunset date.

2. Opportunities to inform the reform process

The timing of any sunset provisions should further take into account that the exercise of powers under the Bill – to preserve, revoke, restate, replace etc. retained EU law – will benefit greatly from appropriate opportunities to consider relevant evidence and views from experts and other interested parties.

As already noted, Acas has a strong track record of informing the development and implementation of government policy in areas relevant to its expertise. The value of Acas's input is that it can provide insights from its in-depth knowledge and experience of the dynamics of employment relations to anticipate the challenges that new or reformed employment law may present for employers, workers and industrial relations. This can include, for instance, anticipation of areas where confusion and/or disputes may arise in the workplace, and associated impacts on Acas Early Conciliation and employment tribunal complaints.

It is important that the sunset provisions in the Bill do not potentially compromise opportunities for good quality consultation during the review and reform process. Opportunities for consultation could be constrained, for example, by the overriding need for the Government to introduce legislation as the sunset approaches in areas where it intends to preserve or reform law. Equally, a raft of speedy consultations over a relatively short period of time might stretch not only departmental resource but also that of stakeholder organisations with expertise to share across a number of policy areas. Any loss of such opportunities would, naturally, result in less-informed policy making.

3. The impacts of legal uncertainty on businesses and workers

We have concerns also that the scale and rapidity of reform enabled by the Bill will lead to a great deal of uncertainty for businesses and workers, with respect to a large body of employment law, over the next year and beyond.

As noted above, the body of law within scope of the Bill includes not only a wide range of secondary legislation, but also the case law that has clarified the legal interpretation both of those regulations and of other EU-derived law contained in primary legislation.

Even were the Government to decide to 'preserve' all REUL, including the codification of all relevant case law, there will still be much uncertainty until that is achieved in practice. In other, perhaps more likely, scenarios, the greater the extent of reform or revocation of law, the greater the uncertainty will be. This uncertainty will prevail both before the sunset, regarding what may change and when, and after the sunset, as new or replacement laws bed in and case law develops.

The areas of law affected by this uncertainty include regulations on some fundamental aspects of the employment relationship, such as working time, maternity and parental leave, and rules and protections during business takeovers. Elements of the Equality Act 2010 are also affected in terms of interpretive principles, as are certain EU-derived rights brought in by the Employment Rights Act 1996.

Introducing uncertainty about such a broad range of core employment regulation, all at one time, presents a challenge that will affect businesses and workers alike. Some of the impacts that can be reasonably anticipated include:

- Businesses will no longer have certainty about: the future of many of their employment obligations; the associated future costs of employing their workforce; and whether they may be faced with having to find time and resource to write new, or rewrite existing, workplace policies and employment contracts where those reference statutory rights within scope of the Bill. Such challenges could impact on business costs, planning and growth.
- Workers will lack certainty as to: which of their statutory employment rights and protections may disappear or remain, and in what form; and how courts and tribunals may change the interpretation of those rights. As noted below, this could lead to increased workplace tensions and litigation.

4. The impacts of legal uncertainty on workplace conflict, litigation and conciliation

For both employers and workers, legal uncertainty in any area of employment law can increase workplace conflict in individual cases and in industrial relations.

[Acas analysis](#) has found that, in 2018-19, in total the cost of conflict to UK organisations was £28.5 billion – the equivalent of more than £1,000 for each employee. The CIPD research informing this analysis estimated that close to 10 million people experienced conflict at work. Of these, over half suffered stress, anxiety or depression as a result; just under 900,000 took time off work; nearly half a million resigned, and more than 300,000 employees were dismissed.

Early intervention in conflict saves money, time and promotes better wellbeing for all concerned. However, legal uncertainty can undermine the prospects of early resolution in the workplace, and indeed can encourage parties to seek certainty through proceeding with litigation rather than agreeing conciliated settlements of employment tribunal claims.

Predictability of legal outcomes based on the certainty of the law is one powerful factor in encouraging the early settlement of disputes in potential and actual employment tribunal claims. If much of the case law on retained EU law loses its interpretive authority at a single, shared sunset date, one consequence will be that parties, and those who advise them, including lawyers, trade unions, and independent experts like Acas, will no longer be able to reliably discuss the likely outcomes of legal proceedings with reference to that case law. Losing that predictability may accordingly make settlements harder to achieve and litigation more likely.

Increased volumes of Acas Early Conciliation and employment tribunal cases may also be expected for other reasons, both before the sunset and after it:

- Before the sunset: when employment law changes in any area, it is not uncommon to see spikes in conciliation and tribunal claims, as parties seek to ensure that opportunities for claims are not lost as the end date of the 'outgoing' law approaches.

- After the sunset: new or replacement regulations and/or new interpretive principles in UK courts may be expected to generate new cases as parties pursue opportunities for new interpretations of both preserved or reformed laws. Since litigation and appeal processes can take many years to conclude, the opportunities for seeking new legal interpretations, and the higher motivation to litigate that goes along with that, could persist for many years to come.

In conclusion

Acas emphasises again that the considerations above are not intended to comment on the overall principle of the Bill, nor to speculate on the Government's intentions to reform or preserve any particular area of retained EU law.

Acas's comments on the Bill are focussed primarily on timing considerations around the provision of a single, shared sunset date for most REUL, the challenges this creates from a process perspective, and the ensuing uncertainty to business and workers. Acas urges the Committee to give these challenges careful consideration.

I trust you will find these considerations helpful. Acas would be pleased to provide further information at the Committee's request.

Yours,

Susan Clews

[signed electronically]