



Public  
Law  
Project

# **Public Law Project Bill Report Stage Briefing**

## **Retained EU Law (Revocation and Reform) Bill**

January 2023

# 1. Summary and recommendations

1. The Retained EU Law Bill would give the Government broad powers to amend 'retained EU law', a category of UK law that covers a vast range of everyday topics. The Bill would also automatically repeal all retained EU law at the end of 2023 unless specifically 'saved' by a minister. We consider this to be constitutionally inappropriate, practically unfeasible, and potentially deeply harmful.
2. The Bill's complex and opaque provisions would:
  - hand a blank cheque to ministers to rewrite our laws and undermine Parliament
  - put vitally important rights and protections on a cliff-edge, and
  - create considerable legal uncertainty.
3. PLP's primary recommendation is that this Bill should be scrapped in its entirety.
4. However, should the Bill proceed, **PLP makes the following recommendations:**
  - Ensure any powers granted to Ministers are amended so that they cannot be exercised without proper consultation, parliamentary scrutiny, and where appropriate the consent of devolved authorities.
  - Reverse the operation of the sunset, so that only identified legislation is revoked at the end of 2023.
  - Ensure ministers have the power to extend the sunset for all rights, not just some.
  - Prevent anything disappearing at the sunset without consultations, impact reports, and parliamentary approval.
  - Require the courts to have regard to legal certainty before departing from retained EU case law.

## 2. The Bill hands a blank cheque to ministers and undermines Parliament

5. The Bill contains a suite of broad delegated powers to change UK domestic law that has an EU link (known as EU-derived legislation). For example, Clause 15 gives Ministers the power to revoke any secondary retained EU law and choose whether to replace it or not, and even replace it with legislation that achieves different objectives entirely. Ministers may use Clause 15 only to de-regulate and to reduce or remove rights. The powers cannot be used to enhance or protect the rights enjoyed by individuals.

### 2.1: This is constitutionally inappropriate

6. These powers would confer on ministers a blank cheque to rewrite or repeal valued rights and protections.<sup>1</sup> A number of important rights and protections would be vulnerable. These could include laws requiring the environmental impact of public plans and projects to be assessed, and those protecting part-time workers.<sup>2</sup>
7. The Bill treats all EU-derived law as if it were inherently illegitimate or not in UK interests. This appears to be the rationale for proposing legislation that will allow ministers to bypass the full parliamentary process. One example is the GDPR: a detailed piece of substantive legislation, on par with the Data Protection Act 2018 in importance, and a source of important data protection rights. It took several years of consultation and gestation before being implemented: time in which businesses and stakeholders were able to provide their views. Businesses and civil society then had two years of lead-in time to prepare for its coming into force. But because it is retained EU secondary legislation, this Bill would allow Ministers to amend it as easily as if it were a technical UK statutory instrument. Clause 15 would allow ministers to tweak, substantially change, or even completely rewrite GDPR with no consultation, very little parliamentary debate, and no opportunity for amendment.<sup>3</sup>
8. The UK's system for delegated legislation does not provide proper parliamentary oversight of wide powers like the ones given to ministers under the Bill. Delegated legislation in the UK is 'virtually invulnerable to defeat'.<sup>4</sup> Only 17 statutory instruments (SI) have been voted down since 1950, a

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<sup>1</sup> Lord Anderson of Ipswich KBE KC, Notes for Remarks on the Retained EU Law (Revocation and Reform) Bill at the Bar Europe Group – Matrix Chambers (19 October 2022), paragraph 3 (<https://www.daqc.co.uk/wp-content/uploads/sites/22/2022/10/RETAINED-EU-LAW.pdf> [Accessed 20/10/2022]).

<sup>2</sup> Environmental Impact Assessment Directive 2011/92/EU (& implementing regulations); Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

<sup>3</sup> The maximum time for debates on statutory instruments is 90 minutes. In practice, debates rarely last this long. See: Alexandra Sinclair and Joe Tomlinson, 'Plus ça change? Brexit and the flaws of the delegated legislation system' (Public Law Project, 2020), p. 8 (<https://publiclawproject.org.uk/content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf> [Accessed: 20/10/2022]).

<sup>4</sup> Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing, 2018).

rejection rate of 0.01% of the total number of SIs considered in over six decades.<sup>5</sup> The House of Commons has not rejected a SI since 1979.<sup>6</sup> Since SIs are unamendable, MPs and peers feel they cannot vote down an SI with problematic provisions because the instrument in its entirety will be lost.

## 2.2: This is poor law-making

9. The Bill's effects are not fully understood. Parliament is being asked to hand ministers powers to rewrite our statute book before the work has been done to evaluate what impact this might have. This concern was raised by the Government's independent Regulatory Policy Committee, who pointed out that the Government has not undertaken 'any substantive analysis to support the Bill' and has not 'provided an assessment of the potential impact of sunseting retained EU Law'.<sup>7</sup> The Minister's response, that 'efforts are underway to understand the potential impact of sunseting',<sup>8</sup> betrays the fact that the effects of this process have not been understood yet by the Government, even though it is asking Parliament to pass this into law now.
10. As the Bill stands, there is no requirement for Ministers to consult on proposed changes to retained EU law. EU-derived legislation continues to regulate complex areas of the economy and society. Consultation is vital to ensure mistakes are not made and unintended consequences not brought about.

## Recommendations

11. If the Bill is not scrapped, it should be amended as follows:

- i. **Prevent the transfer of broad and unconstrained legislative powers to Ministers by removing clauses 10-16.**
- ii. If these clauses are not removed, they should be significantly tightened along the following lines:
  - a. **Ensure that ministers can only exercise these powers after consultation and proper parliamentary scrutiny.** Meaningful sectoral consultation should be a condition for the exercise of the delegated powers in the Bill. Parliament should be guaranteed an adequate amount of time to consider and debate proposed exercises

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<sup>5</sup> Hansard Society, 'Westminster Lens: Parliament and delegated legislation in the 2015-2016 session' (2017) 5; Philip Loft, *Acts and Statutory Instruments: The volume of UK legislation 1950 to 2019*, House of Commons Library, Commons Briefing papers (CBP-7438 2019).

<sup>6</sup> Alexandra Sinclair and Joe Tomlinson, *Plus ça change? Brexit and the flaws of the delegated legislation system* (Public Law Project, 2020), 12, 33.

<sup>7</sup> Regulatory Policy Committee, Retained EU Law (Revocation and Reform) Bill: RPC Opinion, page 2 (<https://www.gov.uk/government/publications/retained-eu-law-revocation-reform-bill-rpc-opinion-red-rated> [Accessed: 12/01/2022]).

<sup>8</sup> Rt Hon Grant Shapps MP, Letter to Darren Jones MP of 21 Dec 2022, paragraph 6 (<https://committees.parliament.uk/publications/33409/documents/181538/default/> [Accessed 12/01/2023]).

of the ministerial powers.

- b. **Increase the threshold for the exercise of delegated powers.** The test for the exercise of these powers should be one of necessity, not the less onerous test of appropriateness. In the legislation, the word 'appropriate' should be removed and replaced with the word 'necessary'.
- c. Prevent UK ministers from rewriting legislation in areas of devolved competency without the consent of the devolved authorities.
- d. **Put clear limits on the type of provision that ministers can remove and rewrite. Rights of substantive importance, such as GDPR, should only be amended or removed by full parliamentary process.**

### 3. The Bill puts rights and protections on a cliff-edge

12. Clauses 1, 3, 4, and 5 place important rights and protections on a cliff-edge. If Parliament enacts these provisions, it will be entirely powerless to prevent the disappearance of rights at the end of 2023. The Bill makes no provision for a confirmatory parliamentary vote, provides no constraints on the types of rights that could disappear, and gives ministers complete discretion over whether to extend the ‘sunset’ period to 23 June 2026.

#### 3.1: The State lacks capacity to meet the Bill’s deadlines

13. The sunset provisions in clauses 1, 3, 4, and 5 will create a considerable amount of work for Ministers and civil servants, who will need to find the time to carefully review and consider over 2,000<sup>9</sup> pieces of retained EU law to decide whether to save, rewrite or repeal each law. The scale of this task is not yet defined, as new sources of EU law continue to be identified by Government.<sup>10</sup> According to press reports, Ministers and civil servants themselves are uncertain that this can be carried out before the deadline of the end of this year.<sup>11</sup>

14. Ministers and civil servants will be forced to go through this process of review even for provisions of retained EU law that they deem to work satisfactorily, because without action they would simply disappear. The Government has not made a clear case for why this massive bureaucratic exercise is necessary.

15. There is a real risk of mistakes being made given the tight turn-around required by the sunset provisions and the amount of preparatory paperwork necessitated by the Bill. For example, when the Government had two years to prepare the statute book for Brexit, there was a significant increase in mistakes in SIs. Ninety-seven ‘wash-up’ SIs (SIs that correct mistakes in other SIs) were laid up until Exit Day. These mistakes occurred against the backdrop of the Article 50 two-year timer. This Bill would give ministers even less time than they had to prepare the UK for Exit Day.

#### 3.2: The Bill gives ministers powers to delay the sunset for some, but not all rights

16. Clause 2 of the Bill allows Ministers to delay the sunset for EU-derived legislation. By contrast, there is no power to delay the sunsets in clauses 3–5. This leaves rights that are derived from case law and

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<sup>9</sup> Graeme Cowie, Research Briefing: Retained EU Law (Revocation and Reform) Bill 2022–23 (House of Commons Library, 2022), paragraph 2.4, p. 20.

<sup>10</sup> Graeme Cowie, Progress of the Retained EU (Revocation and Reform) Bill 2022–23 (House of Commons Library, 2023), P. 29

<sup>11</sup> Steven Swinford, ‘Lords will delay Rishi Sunak’s bonfire of EU laws’, The Times, 2 January 2023 (<https://www.thetimes.co.uk/article/rishi-sunak-eu-laws-lords-plans-2024-nqr3h6bgk> [Accessed: 12/01/2023]); George Parker, ‘UK’s Rishi Sunak eases off on taking Brexit axe to EU laws’, Financial Times, 27 October 2022 (<https://www.ft.com/content/ec7142e5-6798-4a2b-901a-b3d583fea2b2> [Accessed: 12/01/2023])

retained under section 4 of EUWA at risk. An example of such a right is that to equal pay for equal work and work of equal value.<sup>12</sup> This right is more powerful than the right to equal pay under the Equality Act 2010. Unless specifically reproduced in law by ministers before the end of 2023, this right to equal pay will disappear. Ministers must be able to extend the sunset for these rights.

## Recommendations

17. The following changes should be made to the Bill:

- i. **Reverse the operation of the sunset, so that only identified legislation is revoked at the end of 2023.** No one knows what exactly will be revoked at the end of 2023. It is highly unsatisfactory that the Bill would have such an uncertain and unascertained effect on so many regulatory regimes. Accordingly, the sunset should only apply to a list of legislation approved by Parliament.
- ii. **Ensure that ministers are able to extend the sunset for all rights, not just some.** Clause 2 allows for the extension of the sunset in clause 1, but not the sunsets in clauses 3-5 – this should be corrected.
- iii. **Nothing should be allowed to disappear at the sunset without consultations, impact reports, and either a parliamentary vote in favour, or the opportunity for Parliament to remove items from a list of what the Government wishes to repeal.**

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<sup>12</sup> Article 157 TFEU; *K v Tesco Stores* [2021] IRLR 699.

### 3. The Bill creates legal uncertainty

18. The Bill contains many provisions with uncertain effects, which will probably need to be litigated to determine what they mean and what they do. These include: Clause 4, which creates a new rule for how the courts interpret laws and abolishes the principle of the supremacy of EU laws, and Clause 7, which creates a new system for references on points of law to higher courts, and a mechanism for government law officers to intervene in private disputes relating to retained EU law.
19. Where parties have, in the past, lost cases on points of retained EU law, the Bill might allow them to re-open settled matters to seek their desired outcome. This is undesirable for two reasons:
- i. **Firstly**, where the courts depart from precedent, this has retrospective as well as prospective effect. If courts depart from precedent too liberally, this can have the effect of unsettling contracts, employment arrangements, and regulatory arrangements.
  - ii. **Secondly**, the unsettling of the law will increase costs for individuals and businesses, which will impact growth and the attractiveness of the UK as a location for investment. It will also mean greater stress, anxiety, and expense for individuals who will not be clear where they stand in relation to their retained EU rights.

#### Recommendations

20. We recommend the following changes to the Bill:
- i. **Insert a provision requiring that courts must have regard to legal certainty and the principle that significant changes to the law should be made by Parliament before departing from retained EU case law.**



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