Public Law Project

Public Law Project
House of Lords Second Reading Briefing

Retained EU Law (Revocation and Reform) Bill

February 2023

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1. Summary and recommendations

1. This Bill sets out the process for how retained EU law will be either repealed or brought into UK law. The process the Bill creates will undermine the supremacy and sovereignty of Parliament by giving the Government broad powers to amend laws covering a vast range of policy areas including: employment law, environmental protection, health and safety, and data protection. The Bill will automatically repeal retained EU law at the end of 2023 unless specifically 'saved' by a minister. **The Bill's promise to restore democratic control over our statute book rings entirely hollow**. Instead of respecting and promoting Parliament's constitutional role, the power to make and amend the law is handed over to ministers and placed at the mercy of the sunset provisions which will automatically repeal our laws at the end of this calendar year. **According to a recent estimate, the sunset would affect c.3,700 pieces of legislation covering more than 400 unique policy areas**.[1] This estimate is likely incomplete. We consider the Bill constitutionally inappropriate, practically unfeasible, and potentially deeply harmful.

2. The Bill's complex and opaque provisions would:
    - Undermine the supremacy and sovereignty of Parliament by handing a blank cheque to ministers to rewrite our laws
    - Place vitally important rights and protections on a cliff-edge, and
    - Create considerable legal uncertainty.

3. PLP's starting point is that this Bill should be scrapped in its entirety. However, should the Bill proceed, PLP's primary recommendation is **that the operation of the sunset should be reversed so that only identified legislation disappears at the end of 2023**. This would mean empowering ministers to lay in the House of Commons a list of retained EU law to be repealed, with an opportunity for Parliament to vote on each item of this list. **We call this a 'Sovereignty Clause', restoring democratic oversight of legislative change.** This controlled, practicable method stands in contrast to the unpredictable and unparliamentary operation of the Bill as it stands. A version of this recommendation - the 'Creasy Amendment' - attracted cross-party support in the House of Commons.[2] PLP offers in this briefing its own version of this proposal (**see page 12 of this briefing**).

4. Besides the recommendation to reverse the operation of the sunset, PLP makes the following recommendations:
    - Ensure any powers granted to ministers cannot be exercised without proper consultation, parliamentary scrutiny, and where appropriate the consent of devolved authorities
    - 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

[1] Peter Foster and George Parker, 'UK review of EU laws expanded after 1,000 pieces of legislation added', *Financial Times* (30 Jan 2023) (Accessible at: https://www.ft.com/content/060b957b-97e8-4580-ad48-a538fcc423fd).
[2] Amendment number 36. Accessible at: https://bills.parliament.uk/bills/3340/stages/17180/amendments/10004278.

- Require the courts to have regard to legal certainty before departing from retained EU case law

2. Taking control from 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). The most notable, in terms of their breadth, can be found in clause 15. These powers would expire on 23 June 2026.

   i. Clause 15(1): the power to revoke any secondary retained EU law (this term is described below) without a replacement provision.

   ii. Clause 15(2): the power to revoke any secondary retained EU law and replace it with an 'appropriate' provision that 'achieve[s] the same or similar objectives' as the provisions being revoked.

   iii. Clause 15(3): the power to revoke any secondary retained EU law and make 'alternative provision' for the revoked retained EU law. The replacement could pursue different objectives to the revoked law.

6. These powers may only be used for a deregulatory purpose; clause 15 powers may not enhance regulation. Clause 15 powers may not, therefore, be used to enhance rights and protections enjoyed by individuals; they are only capable of being used to reduce or remove rights and protections.

7. There are at least two major problems with these powers.

Problem 1.1: Handing a blank cheque to ministers

8. These powers would confer on ministers a blank cheque to rewrite or repeal valued rights and protections.[3]

9. Below is a table of provisions of retained EU law that would (a) disappear at the sunset unless 'saved' and 'restated' by a minister, and (b) be vulnerable to modification, revocation, or replacement by ministers.

Retained EU Law	Description
General Data Protection Regulation (GDPR)	The source of important data protection rights, such as the right to be informed, the right of access, the right to rectification, and the right to erasure

[3] 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]).

Working Time Regulations 1998 (SI 198/1833)	Maximum weekly working time and right to holiday pay (including case law on formula for calculating holiday pay)
Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE)	Protects the rights of workers whose jobs are outsourced or transferred to another business
Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551)	Protects part-time workers from being treated less favourably than full-time workers just because they are part-time
Information and Consultation of Employees Regulations 2004 (SI 2004/3426)	Require employers to establish arrangements for informing and consulting their employees
Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513)	Employers have a duty to consult with their employees, or their representatives, on health and safety matters
Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034)	Protects fixed-term workers from being treated less favourably than full-time workers just because they're part-time
Agency Workers Regulations 2010 (SI 2010/93)	Agency workers are entitled to the same or no less favourable treatment for basic employment/working conditions
Habitats Directive 92/43/EEC (& implementing regulations)	Protects special habitats and/or species, e.g. through the designation of Special Areas of Conservation
Environmental Impact Assessment Directive 2011/92/EU (& implementing regulations)	Development projects that are likely to have a significant environmental impact must be identified and have their environmental impact assessed
Strategic Environmental Assessment Directive 2001/42/EC (& implementing regulations)	Public plans and projects are subject to an assessment of their environmental impact

10. The UK's system for scrutinizing delegated legislation does not have the capacity to provide proper parliamentary oversight for powers of wide breadth and scope. Delegated legislation in the UK is 'virtually invulnerable to defeat'.[4] Only 17 statutory instruments (SI) have been voted down in the last 65 years and the House of Commons has not rejected a SI since 1979.[5] Not a single SI was defeated during the process of legislating for Brexit and Covid-19. Since SIs are unamendable, MPs and peers often feel they cannot vote down an SI with problematic provisions because the instrument in its entirety will be lost.

11. If Parliament enacts clause 15, it will be giving away control over rights and protections that MPs' constituents value and rely upon every day.[5]

Problem 1.2: Lack of scrutiny and consultation

12. 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.

[4] Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), Parliament and the Law (Hart Publishing, 2018).

[5] According to polling conducted by Opinium for the TUC, 71% of voters support retained EU-derived workers' rights like holiday pay, safe limits on working times, and rest breaks. See https://www.tuc.org.uk/news/government-risks-voter-backlash-if-it-follows-through-plans-rip-key-workers-rights-tuc-warns [Accessed 20/10/2022].

13. Part of the difficulty of understanding the breadth of the blank cheque being handed to ministers is the terminology of retained EU law. The Bill labels the laws subject to clause 15 'secondary' and 'subordinate' legislation. This implies that there are of a technical nature, rather than the basis for important rights and protections. The difficulty with this terminology is that EU-derived legislation does not neatly slot into UK categories of law. In the EU, the treaties are primary legislation, and 'legislative acts' are secondary legislation. Despite being 'secondary legislation' in the EU legal order, legislative acts are the equivalent of UK acts of Parliament in substantive content and importance. It is therefore a category error to treat 'EU secondary legislation' (legislative acts) in the same way as 'UK secondary legislation (statutory instruments).

14. The GDPR is an example of a piece of retained EU secondary legislation. This Bill would treat the GDPR and other EU legislative acts as if they were technical UK statutory instruments in terms of the ease with which ministers will be able to amend them. The GDPR 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 had two years of lead-in time to prepare for its coming into force. The GDPR is a detailed piece of substantive legislation, on par with the Data Protection Act 2018 in importance, and a source of important data protection rights. 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.[6]

Recommendations

15. The Bill should:

i. **Not transfer broad and unconstrained legislative powers to ministers. The clauses that would transfer such powers should be removed or significantly tightened**

ii. **Include provision for meaningful consultation and debate on the proposed exercises of ministerial powers**

iii. **Limit the power of UK ministers to legislate in areas of devolved competence without the consent of devolved authorities (e.g. the creation of a consent mechanism)**

iv. **Not allow EU-derived legislation that is equivalent to Acts of Parliament in substantive content and importance – such as GDPR – to be amended as if it were a statutory instrument**

3. Cliff-edge for rights and protections

[6] 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]).

16. 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, even if it wishes to ensure that this does not happen. 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.

Problem 2.1: State capacity

17. The sunset provisions in clauses 1, 3, 4, and 5 will create a very considerable amount of work for ministers and civil servants. Ministers and their civil servants will need to find the time to carefully review and consider over 2,000[7] pieces of retained EU law to decide which of their many different powers under this or other legislation to use in relation to each. It is important to note that ministers and civil servants will be forced to go through this process 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.

Problem 2.2: Risk of mistakes

18. 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. This amounts to 16% of the total number of Brexit SIs laid in this time. This should be compared to the figure for the 2015-2016 parliamentary session: 4.6% of all SIs were wash-up SIs. This increase in mistakes, produced in haste, 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.

Problem 2.3: Limited power to delay the sunset

19. These mistakes, even if just the result of oversight, could have serious consequences. For example, the Bill would place important rights retained by section 4 of EUWA at risk of intended or unintended repeal.

20. There is a crucial difference between the sunset of EU-derived legislation (clause 1) and the sunset of section 4 rights (clause 3). Clause 2 of the Bill would empower ministers to delay the former sunset. If ministers get to the end of 2023 and find they have not been able to restate enough pieces of retained EU legislation, they can delay the sunset.

21. By contrast, there is no power to delay the sunset for section 4 rights. This is all the more concerning given the nature of rights retained under section 4 of EUWA. By their nature, these rights are not

[7] Graeme Cowie, Research Briefing: Retained EU Law (Revocation and Reform) Bill 2022-23 (House of Commons Library, 2022), paragraph 2.4, p. 20.

contained in pieces of legislation, but are derived from case law. There is a real risk of certain section 4 rights being missed and allowed to lapse.

Case Study: Article 157 TFEU (right to equal pay for equal work and work of equal value)

Section 4 of EUWA retains the directly effective right to equal pay for equal work and work of equal value. This free-standing right is derived from Article 157 of the Treaty on the Functioning of the European Union (TFEU).

This right is more powerful than the right to equal pay under the Equality Act 2010, since it does not entail the Equality Act's more restrictive approach to comparators. The Article 157 right allows women to compare themselves to men with respect to pay if their pay is determined by the same single source (*K v Tesco Stores* [2021] IRLR 699). This is particularly useful for supermarket workers, since under this retained EU rule supermarket shop workers (mostly female) can compare themselves to distribution staff (mostly male).

Unless specifically 'reproduced' (i.e., codified) by a minister before the end of 2023 using the power contained in clause 13(8), the Article 157 right to equal pay will disappear at the end of 2023. The minister may choose to make any change they consider appropriate for 'resolving ambiguities' or 'removing doubts or anomalies' (clause 14(3)(a)-(b)). This power may allow ministers to choose between different interpretations of the right, narrowing the right in question.

Recommendations

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

    i. **The operation of the sunset should be reversed, so that only identified legislation is revoked at the end of 2023. We have prepared draft text of an amendment to this effect, which can be found in the appendix on page 12.**

    ii. **There should be a power to extend all the sunset provisions in the Bill;**

    iii. **There should be clear limits to the types of provisions that can disappear at the sunset;**

    iv. **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.**

4. Legal uncertainty

23. 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:

    i. Clause 4 (abolition of supremacy and the creation of a new rule of interpretation that goes beyond the orthodox UK constitutional rule that says later laws repeal earlier laws (see new subsection (A2))

ii. Clause 5 (abolition of general principles, which are used as a tool for interpreting retained EU law)

iii. Clause 7 (which seeks to lower the threshold for departing from precedent, creates a novel EU-style system for references on points of law to higher courts, and creates a mechanism for government law officers to intervene in private disputes relating to retained EU law)

iv. Clause 14(2) (which provides that restatements may 'use words or concepts that are different from those used in the law being restated'; this could, presumably, have the effect of changing the meaning of the restated law)

24. 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.

a. Legal advice will need to be sought where before the law was certain. Settled matters may need to be litigated.

b. Where there has been some dispute over the proper interpretation of retained EU law (for example, with respect to holiday pay), individuals and businesses will need to anticipate the re-litigation and potential reversal of the interpretations under which they have been operating.[8]

c. The effect of this uncertainty will be increased costs, 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

25. 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.

[8] E.g. see *British Gas Trading Ltd v Lock & Anor* [2016] EWCA Civ 983.

5. Appendix

"Sovereignty Clause" – An amendment to reverse the operation of the sunset, to restore parliamentary control over legislative change. Under this amendment, retained EU law would by default remain on the statute books, rather than disappearing, so that only identified legislation is revoked at the end of 2023. This would ameliorate one of the current problems with the Bill, which is that 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, in the interests of parliamentary sovereignty, transparency, and certainty, the sunset should only apply to a list of legislation approved by Parliament. Stella Creasy MP introduced a 'reversed operation' amendment in the Commons. This amendment attracted substantial cross-party support. PLP supports the Creasy Amendment. PLP's proposed 'Sovereignty Clause' would operate according to the requirements set out in recommendation (iv) below.

a. Remove clause 1, from page 1, line 1, to page 2, line 3, and replace with the following new clause 1:

(1) A Minister of the Crown may lay in the House of Commons an itemised "Revocation List".

(2) In the Revocation List, a Minister of the Crown may list as separate items:

(a) specific provisions of EU-derived subordinate legislation; and
(b) specific provisions of retained direct EU legislation.

(3) In this section, "EU-derived subordinate legislation" means 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.

(4) In subsection (3), "domestic subordinate legislation" means any instrument (other than an instrument that is Northern Ireland legislation) that is made under primary legislation.

(5) The items listed in the Revocation List under subsection (2) are revoked at the end of 2023, subject to subsection (6).

(6) The revocations of items per subsection (5) of provisions listed under subsection

(1) shall not have effect until—

(a) four months have elapsed since the Revocation List was laid in the House of Commons,
(b) the House of Commons has voted to approve the item; and
(c) the House of Lords has voted to approve the item.

(7) The revocation of an instrument by subsection (5) does not affect an amendment made by the instrument to any other enactment.

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