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Secondary Legislation Scrutiny Committee

28th Report of Session 2022–23

Losing Control?: The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 12 May 2022, are set out on the website but are, in summary:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

And, to scrutinise –

> (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
>
> (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

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Information about interests of Committee Members can be found in the last Appendix to this report.

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The Committee's Reports are published on the internet at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/

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Further Information

Further information about the Committee is available at https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/

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EXECUTIVE SUMMARY

This is a report on the Retained EU Law (Revocation and Reform) Bill. In making this report, we are in no way commenting on the decision to leave the EU. We are doing so because we believe that the Bill is an extreme example of a skeleton bill and, as such, would lead to a significant shift of power not to Parliament but to ministers.

In reporting on this piece of *primary* legislation, we, the Secondary Legislation Scrutiny Committee (SLSC), a committee charged with scrutiny of *secondary* legislation, have taken an exceptional step which reflects the significance of our concern about the implications of the Bill for the effective scrutiny of the secondary legislation made under it. We are empowered to consider "general matters relating to the effective scrutiny of secondary legislation". This report, which is intended to complement reports from the Delegated Powers and Regulatory Reform Committee (DPRRC) and the Constitution Committee, identifies the ways in which we believe the Bill runs directly counter to the principles of parliamentary democracy and represents a significant backward step in the narrative highlighted in our report *Government by Diktat: A call to return power to Parliament* and in the DPRRC's report *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*.

In this report, we focus on the sunset clauses (clauses 1 to 3), the modification provisions (clauses 10 and 11) and the delegated powers provisions (clauses 12 to 17).

- With regard to the **sunset clauses**, we draw attention to the risk of inadvertent omission—that some retained EU law (REUL) might expire at the end of the year without anyone knowing because departments have failed to identify it—and the absence of parliamentary scrutiny of the REUL which ministers have decided should be sunsetted.
- With regard to the **modification provisions** which, amongst other things, downgrade direct principal retained EU legislation so that it can be amended by "ordinary powers to amend secondary legislation" rather than by primary legislation, we draw attention to the weakness of parliamentary scrutiny of secondary legislation compared to scrutiny of primary legislation. We refer to our statement in *Government by Diktat* that where scrutiny of primary legislation is deficient (because a bill is merely a skeleton bill) then that deficiency should be remedied by a more challenging scrutiny procedure at the secondary legislation stage. We call for the Bill to contain an enhanced scrutiny mechanism that enables Parliament to decide that an instrument makes changes of such policy significance that the usual "take it or leave it" procedures—even if affirmative—relating to statutory instruments should not apply but that a further option should be available, namely a procedure by which the Houses can either amend, or recommend amendments to, the instrument.
- With regard to the **delegated powers provisions** in clauses 12, 13, 15 and 16, we call for the powers to "restate", "replace", "revoke", "make alternative provision" and "update" to be subject to an enhanced scrutiny mechanism and that the power to update in clause 16 should, like clauses 12,13 and 15, be subject to the sifting procedure under the Bill. We also call for statutory consultation in relation to the exercise of powers under clauses 12, 13, 15 and 16.

Finally, we draw attention to the need for every instrument laid under the bill to be accompanied by a clear, accessible and comprehensive **explanatory memorandum** and complete and comprehensive **impact information**, and we reiterate our call for thorough and timely **post-implementation reviews**.

Conclusion

In this report we set out our concerns about the REUL Bill, focusing on issues relating to the sunset provisions and the effective scrutiny of secondary legislation. We have raised them at this early stage so that they are available to members of the House in advance of the second reading debate on the Bill and subsequent stages. Amending the Bill so that the shift in power between Parliament and the executive is reversed will require a great deal of thought and creativity, and commitment to the overarching aim of redressing the current imbalance of power. And addressing these concerns upstream in the Bill will enable us to give the House better help downstream, when the Bill is passed, and the statutory instruments begin to flow.

Losing Control?: The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill

CHAPTER 1: INTRODUCTION

Purpose of the report

1. In November 2021, we published our report *Government by Diktat: A call to return power to Parliament*.[1] At the same time, the Delegated Powers and Regulatory Reform Committee (DPRRC) published a linked report *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*.[2] Since then, we have published two further reports on related themes: *What next? The Growing Imbalance between Parliament and the Executive* (July 2022),[3] and *Losing impact: why the Government's impact assessment system is failing Parliament and the public* (October 2022).[4] The principal message of each of these reports is that for some time now power has been shifting from Parliament to the executive, a shift exacerbated by the twin challenges of Brexit and the COVID-19 pandemic, and that it is now a matter of urgency that the balance of power should be re-set in favour of a reassertion of parliamentary control.

2. The issues highlighted by each of these reports have resonated in the House. This was evident from the contributions to a debate in the House on 6 January 2022 about the increasing number of skeleton bills.[5] It was further amply demonstrated by the recent joint debate, on 12 January 2023, on *Government by Diktat* and *Democracy Denied?* during which members from across the House supported the recommendations of the Committees.[6]

3. The Secondary Legislation Scrutiny Committee (SLSC) is charged with considering all secondary legislation laid before Parliament upon which proceedings may be, or might have been, taken. The bulk of our work concerns statutory instruments subject to either the affirmative[7] or negative resolution procedure but also extends to other types of instruments such as proposed negatives (see paragraph 54 below), published drafts (see paragraph 17, under clause 11, below), statutory codes of practice and Environmental Principles Policy Statements. The Committee is also empowered to "consider such other general matters relating to the effective scrutiny of secondary

1 Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament* (20th Report, Session 2021–22, HL Paper 105).
2 Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (12th Report, Session 2021–22, HL Paper 106).
3 SLSC, *What next? The Growing Imbalance between Parliament and the Executive: End of Session Report 2021–22* (38th Report, Session 2021–22, HL Paper 200).
4 SLSC, *Losing Impact: why the Government's impact assessment system is failing Parliament and the public* (12th Report, Session 2022–23, HL Paper 62).
5 HL Deb, 6 January 2022, cols 759 –94 (Lords Chamber).
6 HL Deb, 12 January 2023, cols 1532–1591 (Lords Chamber).
7 Affirmatives are usually laid as draft instruments, and these require the approval of both Houses to become law. Recently, a greater number of "made affirmatives" have been laid, and these require approval of both Houses either to come into force or to remain in force.

legislation and arising from the performance of its functions … as the Committee considers appropriate".

4. For the first time since our inception in 2003, we have taken evidence about, and are reporting to the House on, a piece of primary legislation—the Retained EU Law (Revocation and Reform) Bill ("the REUL Bill").[8] We are taking this exceptional step because, in our view, the REUL Bill runs directly counter to the principles of parliamentary democracy for which we have argued so strongly and urgently in our recent reports. The Bill is an extreme example of skeleton legislation and, in the words of Sir Jonathan Jones KCB KC, is "a further step down [the] road" towards the shift in power from Parliament to the executive.[9] In *Democracy Denied?*, the DPRRC asserted that the threshold between primary and secondary legislation should be founded on the fundamental principle that the principal aspects of policy should be on the face of a bill and only its detailed implementation left to secondary legislation, because otherwise Parliament would be unable to perform effectively its constitutional function of holding the executive to account. The REUL Bill is a signal breach of this principle.

5. Holding the executive to account involves not only close examination of the powers being sought by the Government in primary legislation but also close examination of how those powers are exercised. It is for the DPRRC to advise the House on whether any of the delegated legislative powers contained in the Bill are "inappropriate" and, as such, whether they should be amended or removed entirely from the Bill, and it is for the Constitution Committee to report on its constitutional implications. It is for the SLSC to consider the accountability of ministers for how the delegated powers are exercised.

6. **The purpose of this report, therefore, is to draw to the attention of the House our concerns about the impact of the REUL Bill on effective parliamentary scrutiny of the very broad sweep of secondary legislation that may be made under the provisions of the Bill and also the consequences of the absence of parliamentary scrutiny of the revocation of secondary legislation implicit in the sunsetting provision in clause 1. As the DPRRC states in *Democracy Denied?*, parliamentary scrutiny "is a cornerstone of parliamentary democracy".**[10]

7. In reporting on this Bill, we emphasise that we are not commenting on the decision to leave the EU. **Our remit does not extend to commenting on policy decisions. Successive governments have to justify these at the ballot box. So, this is not a report about Brexit.** Nor shall we be commenting on the provisions of the Bill relating to the change in legal status of retained EU law or those relating to its operation within devolved

8 In 2017, the Committee commented on an earlier piece of Brexit primary legislation by way of two submissions to the House of Commons Procedure Committee inquiries into the delegated powers in the "Great Repeal Bill" and the White Paper, Legislating for the United Kingdom's withdrawal from the European Union. See SLSC, 33rd Report, Special Report: Submissions to the House of Commons procedure Committee inquiry on the delegated powers in the "Great Repeal Bill", Session 2016–17, HL Paper 165.In the first submission, the Committee made clear its standing in commenting: "The [Procedure Committee] call for evidence is wide-ranging. It covers issues relating both to the nature of the delegations of power contained in the Bill and to the scrutiny of the secondary legislation resulting from the exercise of those delegations. Given that the remit of the SLSC is to examine secondary legislation, the focus of this submission is on the latter and, in particular, on the scrutiny role currently undertaken by the Committee."

9 Q 1 (Sir Jonathan Jones).

10 *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive*, p 5.

administrations. Our focus is on how the Bill affects the relationship between Parliament and the executive in terms of the extent to which it delegates legislative powers to UK ministers and the consequences for effective scrutiny by the Westminster Parliament, and also the impact of other provisions of the Bill, in particular the sunset provisions, which relate to the work of the Committee and about which the Committee is well-placed to comment.

Acknowledgments

8. On 22 November 2022, we heard evidence from Dr Ruth Fox, Director and Head of Research at the Hansard Society, and Sir Jonathan Jones KCB KC, former Treasury Solicitor and Permanent Secretary of the Government Legal Department. On 6 December, we heard evidence from Lord Callanan, Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (BEIS); Beatrice Kilroy-Nolan, Director-General, Trade and Opportunities, Cabinet Office; and Chris Carr, Director, Brexit Opportunities Unit, formerly in the Cabinet Office and now in BEIS. We wish to thank all our witnesses for their contributions.

9. We would also like to express our thanks to the Libraries of both Houses for their very helpful briefings on the Bill.[11]

Terminology

10. Explaining this Bill involves an array of different terms. We have therefore set out in the Box below a guide to their meaning.

11 House of Commons Library Research Briefing, *Retained EU Law (Revocation and Reform) Bill 2022–23*, (17 October 2022): https://researchbriefings.files.parliament.uk/documents/CBP-9638/CBP-9638.pdf [accessed 31 January 2023] and House of Lords Library Briefing, Retained EU Law (Revocation and Reform) Bill HL Bill 89 2022–23, (27 January 2023): https://researchbriefings.files.parliament.uk/documents/LLN-2023–0007/LLN-2023–0007.pdf [accessed 31 January 2023].

Box 1: Guide to terminology

Primary legislation: another name for an Act of Parliament.

Secondary legislation (also called delegated or subordinate legislation): laws made by ministers or public bodies under powers conferred by an Act of Parliament.

Tertiary legislation: law made by people who have had law-making power conferred on them not directly by Parliament but indirectly by minsters or public bodies.

Retained EU law (REUL): under the provisions of the European Union (Withdrawal) Act 2018 ("the 2018 Act"), the "snapshot" of EU law as it applied to the UK on 31 December 2020 which continued to apply in domestic law.

Assimilated law: in accordance with clause 6 of the REUL Bill, the name given to any retained EU law that still applies after 31 December 2023.

EU-derived subordinate legislation (EDSL): domestic secondary legislation that transposed EU obligations, including EU directives, into domestic law.

Retained direct EU legislation (RDEUL): EU regulations, relevant EU decisions directed at the UK, and EU tertiary legislation. (It does not include EU directives.)

Direct principal EU legislation: "generally, this is REUL that originated as an EU regulation"; and **Direct minor EU legislation**: "this is REUL that originated as an EU decision or EU tertiary legislation". Under the 2018 Act, each type of RDEUL has a different legal status. The former can only be modified (that is, amended, repealed or revoked) by an Act of Parliament, pre-existing Henry VIII powers[12] or by secondary legislation made under Acts passed after the 2018 Act and which expressly authorise such modification. There are fewer restrictions on the use of secondary legislation to modify the latter.[13]

Legislative Reform Orders: a form of delegated legislation, made under the Legislative and Regulatory Reform Act 2006, which can be used for the purpose of removing or reducing burdens resulting from legislation.

12 Powers conferred by primary legislation which enable a minister, by secondary legislation, to amend, repeal or otherwise alter the effect of an Act of Parliament.

13 House of Lords Library Briefing, *Retained EU Law (Revocation and Reform) Bill HL Bill 89 2022–23*, (27 January 2023) p 9: https://researchbriefings.files.parliament.uk/documents/LLN-2023–0007/LLN-2023–0007.pdf [accessed 31 January 2023].

CHAPTER 2: BACKGROUND

11. The decision to withdraw from the EU has given rise to a number of Acts of Parliament, many of which have been described by the DPRRC as skeleton bills and criticised for containing significant Henry VIII powers.[14] To date, the European Union (Withdrawal) Act 2018 ("the 2018 Act"), as amended by the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act"), may be regarded as the most far-reaching in that it provided for the repeal of the European Communities Act 1972 ("the 1972 Act") and the retention of the whole body of EU-derived law that would have otherwise disappeared following repeal of the 1972 Act.[15] The DPRRC described the 2018 Bill as "one of the most important Bills in the constitutional history of the United Kingdom", while the Constitution Committee said the Bill was " … likely to be the most important legislation that this Parliament will consider. The political, legal and constitutional significance of the Bill—in particular its potential implications for the balance of power between Parliament and the executive—is unparalleled".[16] The purpose of the REUL Bill is in effect to "completely overhaul"[17] the body of law created by the 2018 Act known as retained EU law. **Given this, it seems fair to say that the REUL Bill is at least of equal significance to the 2018 Act. Arguably, it is of even greater significance since the purpose of the 2018 Act was to preserve EU law, whereas the purpose of the REUL Bill is, amongst other things, to enable UK ministers and devolved authorities to amend, replace, or repeal retained EU law.**

European Union (Withdrawal) Act 2018

12. The European Union (Withdrawal) Act 2018 received Royal Assent in June 2018. It repealed the European Communities Act 1972 and, in order to provide legal continuity and certainty, incorporated into UK domestic law much of the EU law that had previously applied in the UK. In November 2019, the UK concluded a Withdrawal Agreement with the EU. As a result, the European Union (Withdrawal Agreement) Act 2020 was passed and received Royal Assent in January 2020. The 2020 Act amended the 2018 Act. On 31 January 2020 the UK left the EU. EU law continued to apply during a transitional period which expired on 31 December 2020, at which point EU law as it applied in the UK at that point was incorporated into UK domestic law as retained EU law (REUL).

13. On 16 September 2021, Lord Frost, then Minister of State at the Cabinet Office, announced that the Government would conduct a review which would cover both the policy substance and the legal status of REUL.[18] He explained:

14 For examples, see *Democracy Denied?*, paras 63 and 78.

15 The DPRRC explained in its report on the Bill: "We are talking about 60 years of EU-derived law: the 44 years since the UK joined the EEC on 1 January 1973 and the previous 16 years' law, dating from the creation of the EEC in 1957, which the UK inherited when it joined.". DPRRC, 3rd Report (Session 2017–19, HL Paper 22, footnote 1).

16 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19, para 5).

17 House of Commons Library Research Briefing, *Retained EU Law (Revocation and Reform) Bill 2022–23*, (17 October 2022) p 4: https://researchbriefings.files.parliament.uk/documents/CBP-9638/CBP-9638.pdf [accessed 31 January 2023].

18 HL Deb, 16 September 2021, col 1533 (Lords Chamber).

> "In doing so, we have two purposes in mind. First, we intend to remove the special status of retained EU law so that it is no longer a distinct category of UK domestic law but normalised within our law, with a clear legislative status. …
>
> Our second goal is to review comprehensively the substantive content of retained EU law. … We will make this a comprehensive exercise. I want to be clear: our intention is eventually to amend, replace or repeal all retained EU law that is not right for the UK. That problem is obviously a legislative one. Accordingly, the solution is also likely to be legislative. We will consider all the options for taking this forward. In particular, we will look at developing a tailored mechanism for accelerating the repeal or amendment of this retained EU law in a way which reflects the fact that, as I have made clear, laws agreed elsewhere have intrinsically less democratic legitimacy than laws initiated by the Government of this country."

14. On 9 December 2021, Lord Frost made a further statement.[19] He described the arrangement under the 2018 Act as a "short-term bridging measure" and said that it was the Government's intention "to amend, replace, or repeal all the REUL that is not right for the UK".

Retained EU Law (Revocation and Reform) Bill—what the Bill does

15. The REUL Bill was introduced into the House of Commons on 22 September 2022. The second reading debate took place on 25 October and the Bill was in Public Bill Committee on 8, 22, 24 and 29 November. Report and third reading took place on 18 January 2023 and the Bill was introduced in the House of Lords on 19 January. The second reading debate in the House of Lords will take place on 6 February. All amendments made to the Bill in the House of Commons were government amendments and were simply clarificatory.[20]

16. The Bill is comprised of seven groups of clauses:

- Sunsets of retained EU law (clauses 1 to 3),
- Assimilation of retained EU law (clauses 4 to 6)
- Interpretation and effect of retained EU law (clauses 7 to 9)
- Modification of retained EU law (clauses 10 and 11)
- Powers relating to retained EU law and assimilated law (clauses 12 to 17)
- Business impact target (clause 18)
- Final provisions (clauses 19 to 23).

17. Our principal focus is on the sunset provisions (clauses 1 to 3), modification provisions (clauses 10 and 11) and delegated powers provisions (clauses 12 to 17). These are briefly described below. Reference is made below to

19 Written Statement, 9 December 2021, HLWS445 (Lords Chamber).

20 House of Lords Library Briefing, *Retained EU Law (Revocation and Reform) Bill HL Bill 89 2022–23*, (27 January 2023) p 1: https://researchbriefings.files.parliament.uk/documents/LLN-2023–0007/LLN-2023–0007.pdf [accessed 31 January 2023].

"assimilated law". This is the name given under clause 6 to all retained EU law (REUL) that remains in force after 2023.

Sunsets of retained EU law

- **Clause 1** would cause two categories of retained EU law—EU-derived subordinate legislation (EDSL) (much of which consists of regulations made under section 2(2) of the 1972 Act) and retained direct EU legislation (RDEUL) (which consists mainly of EU regulations, decisions and tertiary legislation as at 31 December 2020)—to expire on 31 December 2023. Clause 1(2) would enable a minister or devolved authority to exclude an instrument from the sunset clause ("power to preserve"). The power is exercisable by negative regulations.

- **Clause 2** enables a UK minister to specify that one or more pieces or types of EDSL or RDEUL (that is, "a specified instrument or a specified description of legislation") should not expire on 31 December 2023 but be put back to a date no later than 23 June 2026. The power is exercisable by negative regulations and cannot be exercised by devolved authorities.

- **Clause 3** repeals section 4 of the 2018 Act on 31 December 2023. Section 4 of that Act reserves certain legal effects of EU law (including, for example, directly effective rights contained in EU treaties and in EU directives). There is no extension provision in relation to clause 3.

Modification of retained EU law

- **Clause 10** amends Schedule 8 to the 2018 Act. Currently, Schedule 8 modifies powers in other statutes to make secondary legislation with regard to their use to amend RDEUL or rights under section 4 of the 2018 Act. These modifications are subject to a number of restrictions on their use. The restrictions are greater for amendments to retained direct *principal* EU legislation and section 4 rights etc. than for amendments to direct *minor* EU legislation. The Delegated Powers Memorandum ("the Memorandum") states that the effect of clause 10 is to "downgrade" the status of retained direct *principal* EU legislation so that, like retained direct *minor* EU legislation, it can be amended by ordinary powers to amend secondary legislation.[21]

- **Clause 11** repeals the parliamentary scrutiny requirements, set out in paragraphs 13 to 15 of Schedule 8 to the 2018 Act which apply to the amendment or revocation of subordinate legislation made under section 2(2) of the 1972 Act. It concerns, amongst other things, the so-called "published drafts" procedure, well known to this Committee because we have been charged with considering the so-called published drafts. Paragraph 13 of Schedule 8 to the 2018 Act requires that all instruments which amend or revoke subordinate legislation made under section 2(2) of the 1972 Act should be subject to the affirmative procedure, and paragraph 14(2) further requires ministers to publish a draft of the instrument at least 28 days before the instrument is laid before Parliament. The effect of clause 11 is to abolish these requirements.

21 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, p 36.

Powers relating to retained EU law and assimilated law

- **Clause 12** confers a power on UK ministers and devolved authorities to "restate" any secondary retained EU law (that is, any retained EU law that is not primary legislation or that is primary legislation the text of which was inserted by secondary legislation (so made by a Henry VIII power)). According to the Memorandum, the power "… enables the UK to clarify, consolidate and restate legislation that is secondary REUL to preserve the effect of the current law whilst removing it from the category of REUL".[22] It also states that the power "… would not allow the function or substance of legislation to change nor introduce substantive policy change".[23] The power expires at the end of 2023. The power is exercisable by both the affirmative and negative resolution procedure, but if the latter then subject to the sifting procedure (see paragraphs 54 to 56 below).

- **Clause 13** confers an almost identical power as clause 12 post-2023 with respect to secondary assimilated law, as well as to "reproduce" sunsetted EU rights, powers, liabilities etc. until 23 June 2026. The power is exercisable by both the affirmative and negative resolution procedure, but if the latter then subject to the sifting procedure.

- **Clause 14** makes provision about the exercise of the restatement powers in clauses 12 and 13, including (clause 14(5)) that they can be used to modify primary legislation (and are therefore Henry VIII powers).

- **Clause 15** confers broad powers on UK ministers and devolved authorities to "revoke" (and not replace), "replace" or make "alternative provision" for secondary REUL. Power to make regulations under clause 15 expires on 23 June 2026. It cannot be used to create new delegated powers, criminal offences or monetary penalties, levy taxes, create a new public authority or increase the overall regulatory burden. Regulations could, however, recreate delegated powers, criminal offences or monetary penalties of a similar kind to those being revoked, confer functions and discretion on any person, charge fees, and establish voluntary schemes. The power is exercisable by both the affirmative and negative resolution procedure, but if the latter then subject to the sifting procedure.

- **Clause 16** confers on UK ministers and devolved authorities a power to "update" secondary REUL or successor provision in the light of technological or scientific developments. The power is subject to the negative resolution procedure.

- **Clause 17** amends the Legislative and Regulatory Reform Act 2006 and clarifies that Legislative Reform Orders (LROs) can be used to modify RDEUL. The procedure is explained in more detail in paragraphs 51 to 53 below.

22 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, p 20.
23 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, p 21.

Overall impact of the REUL Bill

18. According to the House of Commons Research Briefing on the Bill:[24]

> "It is difficult to assess the impact this Bill will have on the substantive law of the UK. If it is enacted, and nothing is done legislatively thereafter, vast reams of REUL would fall away at the end of 2023. This would create precisely the "gaps" in domestic law the EU (Withdrawal) Act 2018 was designed to avoid. This is a very unlikely outcome, however.
>
> It is more plausible that the different powers in the Bill, to preserve, restate, replicate, revoke, replace and update parts of REUL, will be used extensively before the end of the sunset period. What is difficult to predict, however, is exactly how those powers will be used, and which powers the UK Government (and devolved authorities) will rely on most heavily. The complexity of the new legislative regime could create some degree of legal uncertainty in policy areas heavily impacted by REUL.
>
> This Bill would enable far more decisions about the content of REUL to be taken by the UK and devolved executives, rather than by legislatures. Moreover, to the extent legislatures are still involved, those decisions would be taken with less oversight than there is at the moment. Organisations including the Hansard Society and Public Law Project have expressed concerns about Parliament being marginalised."

19. A Hansard Society paper entitled *Five problems with the Retained EU Law (Revocation and Reform) Bill* argues that the Bill sidelines Parliament "because it proposes to let all REUL expire on the sunset deadline unless ministers decide to save it, with no parliamentary input or oversight", and that it will provide ministers "with a series of broad 'blank cheque' powers to amend or replace REUL … across policy areas as diverse as animal welfare, consumer rights, data protection, employment, environmental protection, health and safety, and VAT, and all subject to only limited parliamentary oversight".[25] A briefing by the Public Law Project made a similar point. It asserts that the Bill would "[u]ndermine parliamentary sovereignty by transferring vast powers to ministers to exercise with minimal parliamentary oversight or control".[26]

20. In the following sections of this report we set out our concerns about the impact of the Bill.

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24 House of Commons Library Research Briefing, *Retained EU Law (Revocation and Reform) Bill 2022–23*, (17 October 2022) p 7: https://researchbriefings.files.parliament.uk/documents/CBP-9638/CBP-9638.pdf [accessed 31 January 2023].

25 Hansard Society, *Five problems with the Retained EU Law (Revocation and Reform) Bill* (October 2022), p 4: https://assets.ctfassets.net/n4ncz0i02v4l/92Se5TjP16LbAeBIKGCQE/fe6a83322be99844cefd6d2bae363377/5_Problems_with_the_REUL_-Revocation_and_Reform-_Bill_-_Oct_2022.pdf [accessed 31 January 2023].

26 Public Law Project, *Retained EU Law (Revocation and Reform) Bill* (November 2022), p 3: https://publiclawproject.org.uk/content/uploads/2022/11/Commons-Committee-stage-briefing-REUl-Bill-V2.0.pdf [accessed 31 January 2023].

CHAPTER 3: THE CHALLENGE OF THE SUNSET PROVISIONS

21. Clause 1 provides for the revocation of EU-derived subordinate legislation and retained direct EU legislation on 31 December 2023. This is subject to powers in clauses 1(2) and 2 which, respectively, confer a power (power to preserve) on relevant national authorities to disapply an instrument, or a provision of an instrument, from the sunset provision in clause 1(1), and confer a power to amend the sunset date in clause 1(1) to a date no later than 23 June 2026, the tenth anniversary of the EU referendum, in relation to "a specified instrument or a specified description of legislation". Clause 3 would revoke—sunset—the EU rights and obligations retained by section 4 of the 2018 Act.

22. Following the review announced by Lord Frost in September 2021 (see paragraph 13 above), which included commissioning departments to determine the content of retained EU law relevant to their policy areas, the Cabinet Office published a Retained EU Law Dashboard.[27] The purpose of the dashboard is to show the outcome of the review as an authoritative catalogue of REUL. Following its latest update on 30 January, the dashboard currently states that there are over 3,700 pieces of retained EU law, across 400 policy areas. According to the departmental breakdown, those with the greatest amount of REUL are the Department for Environment, Food and Rural Affairs (DEFRA) (1,781), HM Treasury (452), Department for Transport (DfT) (424), and Department for Business, Energy and Industrial Strategy (BEIS) (337). During the remaining stages of the Bill in the House of Commons on 18 January, the Minister, Ms Nusrat Ghani MP, Minister for Industry and Investment Security, referring to a figure prior to the most recent update, said: "Much has been said about the dashboard. I should be clear: at the moment, the figure we have identified and verified for EU law is 3,200 and we expect it to be 4,000".[28] Lord Callanan had informed us about the revised figure of 3,700 in a letter to the Committee dated 30 January 2023 (set out in Appendix 2 to this report). The House of Lords Library Briefing on the Bill refers to "… a particular challenge in cataloguing exactly what EU law was retained by section 4 [of the 2018 Act] because it is not found in defined legislative text".[29]

Inadvertent omission

23. Lord Callanan told us that the dashboard will be one of the main vehicles for keeping Parliament informed about the fate of different pieces of retained EU law.[30] We asked him whether the dashboard was complete or whether there was a risk that some retained EU law would fall inadvertently. He said: "We are conducting an extensive programme of work internally with every department, with the help of the National Archives, to identify every piece of retained EU law. We have published a dashboard containing something like 2,500 pieces of law. We think we are just about there but, of course, we are continuing to work to make sure that every last piece is uncovered".[31]

27 Cabinet Office, 'Retained EU Law Public Dashboard': https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance [accessed 31 January 2023].
28 HC Deb, 18 January 2023, col 462 (Commons Chamber).
29 House of Lords Library Briefing, *Retained EU Law (Revocation and Reform) Bill HL Bill 89 2022–23*, (27 January 2023) pp 11–12: https://researchbriefings.files.parliament.uk/documents/LLN-2023-0007/LLN-2023-0007.pdf [accessed 31 January 2023].
30 Q 8 (Lord Callanan).
31 Q 2 (Lord Callanan).

24. Sir Jonathan Jones and Dr Fox of the Hansard Society were less sanguine. They both referred to the risk of inadvertent omission. Sir Jonathan said, for example: "… on any view, we are talking about a very large volume of EU law, and departments will no doubt be doing their best to identify what is covered" but it would be difficult to quantify the risk that some things will be missed and "the consequence of something being missed is that it just drops off the statute book altogether".[32] During the Commons Public Bill Committee hearings, reference was made to the "slash and burn" approach of the sunset provisions. Professor Catherine Barnard of the University of Cambridge, for example, said: "The way in which the legal system has worked and has run successfully over the decades is on the basis of incremental change rather than this really quite remarkable slash and burn approach proposed by the sunset clause".[33]

25. We pressed the Minister further about the risk of inadvertent omission. He remained confident that the review exercise would ensure that every piece of relevant legislation would be identified. That said, we note an uneasy disjunct between the Minister's assertion that "[w]e think we are just about there", and his later assertions that the dashboard was "being constantly updated"[34] and then that he was "*fairly* confident that the dashboard, as it exists at the moment, is pretty comprehensive …" (emphasis added).[35] When asked when the dashboard would be completed, Lord Callanan said that he could not give a specific date because "… if a week after that date another piece is identified, we have not met our own deadline …it is always possible that some other stray piece of small case law will originate that we have not come across previously".[36] But the fact is that the Bill, as currently drafted, contains a hard deadline of 31 December 2023 and the Minister's comments raise the question what if a "stray piece of … law", whether small or large, were found after the end of 2023? The answer is that this late discovered law would have fallen by accident.

26. Chris Carr, Director of the Brexit Opportunities Unit, confirmed that the dashboard was a work in progress. He said that the review exercise was still ongoing and that "it will continue to go on throughout [2023]".[37] Mr Carr also explained to us why the dashboard had not been updated as quickly as planned:[38]

> "… our proactive engagement with the National Archives was precisely to cross-check the reviews we had undertaken with departments against its more comprehensive database. It is correct that its database contains tens of thousands of pieces of European legislation and judgment, but not all those are captured by the definition of retained EU law. It has found some additional pieces of retained EU law—for example, some of those that were made by departments of state that no longer exist—and we have been working with it and departments to update the dashboard.
>
> We originally intended to update the dashboard quarterly, but our first update was delayed by some political events in the early autumn. We are

32 Q 3 (Sir Jonathan Jones).
33 Commons Public Bill Committee 8 November 2021, col 15, Q 26.
34 QQ 2 and 4 (Lord Callanan).
35 Q 5 (Lord Callanan).
36 Q 5 (Lord Callanan).
37 Q 6 (Chris Carr).
38 Q 6 (Chris Carr).

> still waiting to update the dashboard and intend to update it quarterly as that work concludes."

He suggested that the final figure would be between 3,000 and 3,500 pieces of retained EU law. As we have mentioned above (paragraph 22), Lord Callanan has now given a figure of 3,700, following an update on 30 January, and the Minister, Ms Ghani MP, says she expects that number to reach 4,000. The total is therefore still in flux and ever-increasing.

27. Compiling an exhaustive list of relevant retained EU law is undoubtedly an immense task. The pressure on departments to complete this work is exacerbated by the deadline by which the work has to be completed. The sunset provision in clause 1 takes effect on 31 December 2023. Between now and sometime prior to the end of the year (to allow time for regulations to be drafted and laid), ministers will have to decide the fate of every piece of relevant retained EU law, and this will include which of the laws falling within clause 1 should expire and which should be kept going under either clause 1(2) or clause 2.

28. **The scale of the task, both in terms of cataloguing a definitive list of relevant legislation and the deadline by which it has to be achieved, as a result of the sunset provisions is extraordinary and deeply troubling. The work is still ongoing, and we remain wholly unconvinced that there is not a significant risk of inadvertent omission and that some pieces of REUL will fall by accident.**

Absence of parliamentary scrutiny

29. If departments were able to compile a definitive list of all relevant retained EU law in time, then at least this would suggest that inadvertent omission might be avoided. But even if this were the case—and we have our doubts—the key issue remains, namely that decisions about which REUL should fall will rest solely with ministers and the revocation of potentially swathes of law would happen without Parliament knowing which laws were involved or the impact of their revocation.

30. The Hansard Society in *Five problems with the Retained EU Law (Revocation and Reform) Bill* commented: "This Bill invites parliamentarians to give Ministers a cliff-edge power without knowing what, if any, pieces of REUL may be thrown off the cliff on sunset day". The paper goes on: "If the powers in this Bill are granted, Parliament will thus have no say in whether a piece of REUL is repealed: that will be a matter solely for ministerial decision. This will entrench the dominance of the executive and sideline Parliament in this important legislative process".[39] Sir Jonathan Jones told us: "… some law will simply drop off the statute book with no parliamentary scrutiny at all beyond the Bill itself".[40] And the Bill itself tells us nothing about which laws will expire under clause 1.

31. **Even if a definitive list of the relevant law were eventually compiled in time for the deadline set out in the Bill, there will be no parliamentary scrutiny of the decisions of ministers that specific pieces of law should**

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39 Hansard Society, *Five problems with the Retained EU Law (Revocation and Reform) Bill* (October 2022), p 6: https://assets.ctfassets.net/n4ncz0i02v4l/92Se5TjP16LbAeBIKGCQE/fe6a83322be99844cefd6d2bae363377/5_Problems_with_the_REUL_-Revocation_and_Reform-_Bill_-_Oct_2022.pdf [accessed 31 January 2023].

40 Q 1 (Sir Jonathan Jones).

fall or the implications of their revocation. At the very least, the Bill should contain some mechanism by which both Houses are informed about, and given an opportunity to debate, how ministers intend the sunset provisions to apply, including decisions about the individual pieces of retained EU law that they intend should fall at the end of 2023 and the reasons for their decisions.

CHAPTER 4: DOWNGRADING THE STATUS OF DIRECT PRINCIPAL REUL

32. The Memorandum states that the effect of clause 10 is to "downgrade" the status of direct principal retained EU legislation and any directly effective rights etc. applying under section 4 of the 2018 Act "so that it can be amended by ordinary powers to amend secondary legislation".[41] The Lords Library Briefing describes the current status of such legislation as being similar to domestic primary legislation in terms of how it can be modified, and that the effect of clause 10 would be to change that status so that it would be treated in the same way as domestic secondary legislation.[42] The Memorandum goes on:[43]

> "Overall, the change in status will make it possible to amend or repeal a greater amount of [retained direct EU law] using secondary legislation, which will enhance the ability for amending RDEUL more quickly without the need for primary legislation. This is a more proportionate status for RDEUL, as when made it was not subject to the same degree of UK Parliamentary scrutiny as an Act of Parliament or even domestic secondary legislation. It is proportionate therefore not to treat RDEUL the same as a UK Act of Parliament for the purposes of amendment."

The Memorandum also notes that the downgrading "will save parliamentary time".[44]

33. **It is generally acknowledged that the scrutiny of secondary legislation falls very far short of the scrutiny afforded primary legislation. Downgrading the status of direct principal retained EU legislation so that it can be amended by "ordinary powers to amend secondary legislation" rather than by primary legislation inevitably means therefore a corresponding downgrading of effective parliamentary scrutiny. Suggesting that this will have the advantage of saving parliamentary time does not make the Government's justification for this change any more persuasive. It is a matter for Parliament to decide how it should use its time.**

34. In *Government by Diktat*, we set out three ways in which scrutiny of secondary legislation is far less robust than the scrutiny applied to primary legislation:[45]

- first, secondary legislation cannot be amended and so the two Houses have only an "all or nothing" choice—to accept or reject the legislation in its entirety, even if members of either House may wish to object only to parts of an instrument;

- second, and linked to the fact that secondary legislation cannot be amended, it is not subjected to line-by-line scrutiny over a number of days, and to "to and fro" (ping pong) between the Houses in the way

41 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, pp 7 and 36.
42 House of Lords Library Briefing, *Retained EU Law (Revocation and Reform) Bill HL Bill 89 2022–23*, (27 January 2023) p 21: https://researchbriefings.files.parliament.uk/documents/LLN-2023–0007/LLN-2023–0007.pdf [accessed 31 January 2023].See about Box: Guide to Terminology above.
43 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, pp 36–7.
44 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, p 36.
45 *Government by Diktat: A call to return power to Parliament*, para 18.

that bills are; and if it is debated (and most secondary legislation is not), it is debated only once in each House; and,

- third, rejection of secondary legislation by Parliament is a very rare occurrence. Since 1968, when the Lords rejected the draft Southern Rhodesia (United Nations Sanctions) Order 1968, the Government have been defeated in the House of Lords on only six motions relating to five statutory instruments–four motions to reject and two motions to defer. Added to which, when–on the most recent of those rare occasions–the House did oppose a statutory instrument, there were significant political consequences in the shape of the Strathclyde Review.

Triaging mechanism

35. During the Commons Public Bill Committee hearings, Sir Stephen Laws, former First Parliamentary Counsel, when asked whether there were adequate safeguards for scrutiny under the Bill, said that it was important that Parliament should be able to identify "… the bits of legislation that are politically salient …" and that that could be achieved "… by having a really rigorous system of triaging subordinate legislation made under the Bill to ensure that Parliament picks up the things that are politically salient. … The Bill establishes the conventional methods of scrutiny, but they need to be backed up by a parliamentary process decided by Parliament and not set out in legislation".[46]

36. To an extent, we agree. Triaging secondary legislation is critically important in enabling members of the House to navigate their way through the morass of instruments laid year in and year out. This was recognised in the report, published in January 2000, of the Royal Commission on the Reform of the House of Lords (chaired by the Rt Hon. Lord Wakeham DL) ("the Wakeham Report") which recommended that a "sifting" mechanism should be established whereby a parliamentary committee would examine every statutory instrument subject to a parliamentary procedure with a view to " … focusing parliamentary attention on those few statutory instruments which were of real significance"—in terms of both the intrinsic significance of the issue concerned and the instruments' political salience.[47] This recommendation led to the establishment of the SLSC (then called the Merits of Statutory Instruments Committee) in 2003, and, since that time, the Committee has worked hard in its efforts to assist the House by discharging this function, a function which has become all the more important when ministers are being given significant delegated powers which enable them to make substantial policy changes through secondary legislation.

Enhanced scrutiny procedures and amendability

37. But even the most effective triaging arrangement does not meet the more fundamental point about the deficiencies in the scrutiny of secondary legislation described in paragraph 34 above. We make a similar point about the statutory sifting procedure in relation to instruments made under clauses 12, 13 and 15 of the REUL Bill (see paragraphs 54 and 55 below) which is also intended to direct the Houses to more significant statutory instruments

46 Commons PBC 8 November 2021, cols 5 and 6, Q 2.

47 Royal Commission on the Reform of the House of Lords, *A House of the Future*, Cm 4534 (January 2000), p 74, para 7.23: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/266061/prelims.pdf [accessed 31 January 2023].

by providing an opportunity for them to be upgraded to the affirmative resolution procedure.

38. In *Government by Diktat*, we said that where scrutiny of primary legislation was deficient (because a bill was merely a skeleton bill) then that deficiency should be remedied by a more challenging scrutiny procedure at the secondary legislation stage. This is the crux of the issue. **The Bill should contain an enhanced scrutiny mechanism that enables Parliament to decide that an instrument makes changes of such policy significance that the usual "take it or leave it" procedures—even if affirmative—relating to statutory instruments should not apply but that a further option should be available, namely a procedure by which the Houses can modify an instrument.**

39. Such an enhanced scrutiny mechanism might involve the Houses having power to amend a statutory instrument. We are aware, as Sir Jonathan Jones told us, that the issue of amendable secondary legislation "carries complications".[48] But, we note, there is a precedent in - section 27(3) of the Civil Contingencies Act 2004. Alternatively, it may involve a mechanism along the lines of the Legislative Reform Order (LRO) procedure (see paragraph 51 below) whereby a committee of the House examines an order and makes recommendations for amendment. However, in contrast to the existing LRO procedure under the Legislative and Regulatory Reform Act 2006, which places the minister in control of which recommendations would be accepted, we envisage a version of the procedure which places Parliament in control. **These are options but the overriding principle is that where a Bill contains, in effect, a request from the Government for such extensive delegation of legislative powers, we believe that it is incumbent on the Government to propose such a solution**.

48 Q 5 (Sir Jonathan Jones).

CHAPTER 5: POWERS DELEGATED TO MINISTERS—A BLANK CHEQUE?

Power to "restate"

40. Clause 12 (1) confers a power on relevant national authorities to "restate, to any extent, any secondary retained EU law". Once restated, the law is no longer retained EU law. According to the Memorandum, "[t]his power enables the UK to clarify, consolidate and restate legislation that is secondary REUL to preserve the effect of the current law whilst removing it from the category of REUL" but it "cannot substantively change the policy effect of legislation".[49] The power expires at the end of 2023. Clause 13 makes similar provision to clause 12 but relates to assimilated law.[50] The power under clause 13 expires on 23 June 2026.

Power to "revoke", "replace" or "make alternative provision"

41. Clause 15 confers powers on relevant national authorities, enabling them:

- to revoke secondary retained EU law and not to replace it (clause 15(1));
- to revoke secondary retained EU law and replace it "with such provision as the relevant national authority considers to be appropriate and to achieve the same or similar objectives" (clause 15(2)); and
- to revoke secondary retained EU law and "make such alternative provision as the relevant national authority considers appropriate" (clause 15(3)).

42. The scope of the powers in clause 15, especially clause 15(3), is immense. Lord Anderson of Ipswich KBE KC, in a webinar for the Hansard Society, described clause 15 as "the constitutional concern that will dwarf all others".[51] Sir Jonathan Jones referred to the "huge range of policy areas"[52] covered by clause 15 (and clause 16), and Dr Fox described clause 15 as "essentially a blank cheque".[53] Clause 15(4) states that regulations made under subsections (2) and (3) may, amongst other things, "create a criminal offence that corresponds or is similar to a criminal offence created by the revoked retained EU law" and may impose monetary penalties "in cases that correspond or are similar to" cases in the revoked retained EU law. They may provide for the charging of fees but may not impose taxation or establish a public authority.

43. The Memorandum states that clause 15 is subject to "important safeguards". First, it expires on 23 June 2026. Second, subsection (2) is limited to achieving "the same or similar objectives" and so, it is claimed, "the functionality of this limb of the power [is limited] to essentially adjusting existing policy to better fit the UK context, rather than radically departing from the existing legislation", and subsection (3) is limited to making "alternative provision" and so "any replacement legislation must therefore cover similar ground to

49 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, pp 20 and 21.
50 The name given under clause 6 to all retained EU law (REUL) that remains in force after 2023.
51 Hansard Society, 'Unpicking the Retained EU Law Bill: What does it mean for Parliament?': https://www.hansardsociety.org.uk/events/webinars/retained-eu-law-bill-parliament-what-does-it-mean [accessed 31 January 2023].
52 Q 4 (Sir Jonathan Jones).
53 Q 7 (Dr Ruth Fox).

the REUL or assimilated law being replaced".[54] Third, clause 15(5) prohibits the use of clause 15 powers in relation to a particular subject area "unless the relevant national authority considers that the overall effect of the changes made by it … does not increase the regulatory burden".

44. It appears to us that these "safeguards" provide little comfort, particularly in relation to clause 15(3) and the power to make alternative provision, since, as the Memorandum acknowledges, alternative provision, although it must cover the same ground as the replaced law, may seek to achieve different objectives.[55]

Scrutiny of the exercise of clauses 12, 13 and 15 powers

45. **Any enhanced scrutiny mechanism (see paragraphs 37 to 39 above) should apply to the exercise of powers under clauses 12, 13 and 15.**

Statutory consultation

46. Thorough, meaningful consultation is part of the bedrock of sound policymaking. For this reason, inadequacy of the consultation process relating to an instrument is one of the six grounds on which we may draw an instrument to the special attention of the House. There is no consultation required under the REUL Bill. **Given the significance of the policy changes that may be made under the Bill, we believe that the Bill should include a requirement to consult. Furthermore, whether or not a statutory requirement under the Bill, when scrutinising the instruments made under the Bill, we shall be vigilant in investigating the quality of the consultation exercises undertaken in preparation for the legislation.**

Power to update

47. Clause 16 confers power on relevant national authorities to modify any secondary retained EU law (or, after 2023, assimilated law), or any provision made under clauses 12, 13 or 15, considered appropriate to take account of "changes in technology" or "developments in scientific understanding". Regulations made under clause 16 will be subject to the negative resolution procedure. The sifting procedure does not apply, and the power is not sunsetted. The Memorandum states that the power is "not intended to make significant policy changes" but only "technical updates".[56] It justifies the power on the ground that it will enable departments to "efficiently update their REUL … without placing a burden on parliamentary time".[57] The negative procedure is justified on the ground that the power is expected to be used to make only "minor, technical amendments".

48. Dr Fox said of clause 16:[58]

> "If you look at the wording of clause 16, it is, "Ministers may make modifications to secondary retained EU law that they consider 'appropriate to take account of … changes in technology, or … developments in scientific understanding." None of that is defined

54 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, pp 27 and 28.
55 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, p 28.
56 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, p 30.
57 Delegated Powers Memorandum to the Retained EU Law (Revocation and Reform) Bill, p 31.
58 Q 6 (Dr Ruth Fox).

> on the face of the Bill. What does "appropriate to take account of" mean? Who decides whether something is a change in technology or a development in scientific understanding? There is no requirement for Ministers to reference the advice of an expert advisory body or any kind of consultation, and so on. We have concerns that that being open-ended, the fact that it is not sunsetted and is not subject to the sifting process could give rise to considerable policy change with limited scrutiny."

49. In contrast, the Minister said that the power had been drafted so that it was "as narrow as possible" and repeated that it was intended for "technical updates" only.[59]

50. **We are not convinced that the power under clause 16 cannot be used to make significant policy changes despite the intention expressed in the Memorandum and repeated by the Minister. Any enhanced scrutiny mechanism (see paragraphs 37 to 39 above) and statutory consultation requirements (see paragraph 46 above) should apply to the exercise of powers under clause 16 as well as clauses 12, 13 and 15. In any event, we believe that there is a case for regulations made under clause 16 being, at the very least, subject to the sifting procedure.**

The use of Legislative Reform Orders

51. Clause 17 amends the Legislative and Regulatory Reform Act 2006 ("the 2006 Act") to allow Legislative Reform Orders (LROs) to be used to amend any retained direct EU legislation. LROs are a form of delegated legislation, made under the 2006 Act, which can be used for the purpose of removing or reducing burdens resulting from legislation. They are subject to mandatory public consultation and a strengthened scrutiny procedure which provides for committees in each House (in the Lords, the DPRRC) to scrutinise a draft order, to report on whether it satisfies the requirements of the 2006 Act (including whether it removes or reduces burdens) and to make a recommendation on the level of scrutiny to be applied to the order (negative, affirmative or super-affirmative). The committees also have a power of veto.

52. The extension of the LRO procedure, which enables committees of the two Houses to comment on drafts of proposed orders, goes some way to meet concerns about the scrutiny of instruments intended to make significant policy change. The decision, however, about whether this procedure will be used is down to ministers.[60] It is disheartening that in evidence to us the Minister was unable to tell us more about the Government's thinking in relation to the use of this provision.[61] Dr Fox[62] commented on how LROs are not used often.

53. **We would welcome further explanation by the Minister about the Government's intentions in relation to the extension of the LRO procedure under clause 17 and about what guidance and encouragement departments will be given to use it.**

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59 Q 13 (Lord Callanan).
60 Q 13.
61 Q 13 (Chris Carr).
62 Q 8 (Dr Ruth Fox).

Sifting and its role in scrutiny

54. The sifting procedure—not to be confused with the "sifting" mechanism mentioned in the context of the Wakeham Report in paragraph 36 above—applies to clauses 12 and 13 unless an instrument is amending primary legislation (in which case the draft affirmative procedure applies). It also applies to clause 15 unless regulations confer a power to make subordinate legislation or create a criminal offence under clause 15(2) or where alternative provision is being made under clause 15(3) (in which case the draft affirmative procedure applies). It is in the same form as the sifting procedure under the 2018 Act and the European Union (Future Relationship) Act 2020 whereby, in circumstances where a minister may make a choice between the negative or the affirmative resolution procedure in relation to a regulation-making power and proposes the former, the instrument is first considered by this Committee (and the European Statutory Instruments Committee (ESIC) in the Commons) as a "proposed negative" instrument, and it is open to either Committee to recommend that the procedure be upgraded to the affirmative procedure. To date, it has always been the case that a recommendation to upgrade by either Committee has been accepted by the Government.

55. We asked Dr Fox about the value of the sifting procedure. She responded: "In terms of the value of sifting, we have always held the position that it is better than nothing, given what we deem to be the inadequacies of the normal delegated legislation process".[63]

56. **We share Dr Fox's view. In that context, we welcome the adoption of the sifting procedure in relation to clauses 12, 13 and 15, but believe that there is a case for its being extended to the exercise of powers under clause 16 (see paragraph 50 above).**

Extending the period for scrutiny

57. As with the procedure under the 2018 Act, the committees of the two Houses charged with the sifting function under the REUL Bill will have 10 sitting days in which to consider a proposed negative and to make a recommendation. If no recommendation to upgrade is made by the expiry of that period, the minister may make the instrument which will then be subject to the negative resolution procedure.

58. We know from our own experience in scrutinising proposed negatives under the 2018 Act that, depending on the day of the week on which a proposed negative has been laid, meeting that 10-day deadline could be challenging. This was despite the fact that the purpose of proposed negatives laid under the 2018 Act was comparatively limited in that it largely concerned instruments intended to deal with correcting deficiencies in retained EU law.[64] The Hansard Society has suggested, and we agree, that scrutiny of proposed negatives under the REUL Bill may well amount to a more substantial function.[65] Dr Fox said: "What we are talking about here would

63 Q 6 (Dr Ruth Fox).

64 Power to make regulations under section 8 of the 2018 Act (dealing with deficiencies arising from withdrawal) expired at the end of 2022, as did the sifting function in relation to the European Union (Future Relationship) Act 2020.

65 Hansard Society, *Five problems with the Retained EU Law (Revocation and Reform) Bill* (October 2022), p 10: https://assets.ctfassets.net/n4ncz0i02v4l/92Se5TjP16LbAeBIKGCQE/fe6a83322be99844cefd6d2bae363377/5_Problems_with_the_REUL_-Revocation_and_Reform-_Bill_-_Oct_2022.pdf [accessed 31 January 2023].

be sifting of retained EU law regulations that delve into the realm of policy. They would be more politically salient than we have seen through the period since the EU Withdrawal Act was passed".[66]

59. **In order to take account of the greater challenges in assessing proposed negatives laid under the REUL Bill compared to those laid under the 2018 Act, and the potential volume of them, the statutory 10-day scrutiny period should be increased to at least 15 days.**

60. The REUL Bill, like the 2018 Act, requires the minister to lay a statement alongside a proposed negative stating their opinion that the negative procedure should apply and the reasons for that opinion. Proposed negatives are also accompanied by an explanatory memorandum (EM), as is the usual practice for all statutory and other instruments considered by the SLSC. It is always important that an EM should provide explanations that are clear, accessible and comprehensive. In the case of proposed negatives, we expect the EM also to set out—clearly, accessibly, and comprehensively—how the policy changes brought into effect by an instrument meet the description of the provision under which it is made. So, for example, for an instrument to be made under clause 15(2), the EM will need to explain the objectives of the legislation to be revoked and how the replacement legislation will achieve the same or similar objectives, and, if similar (rather than the same), how the objectives under the revoked and replacement legislation differ and why.

61. **To ensure that the sifting procedure can be used effectively, departments should be required to provide, alongside each proposed negative, an EM which fully explains the policy and legislative background to the proposed negative and sets out clearly, accessibly, and comprehensively how the policy changes brought into effect by the instrument meet the description of the provision under which it is made.**

66 Q 6 (Dr Ruth Fox).

CHAPTER 6: THE IMPORTANCE OF SUPPORTING INFORMATION AND POST-IMPLEMENTATION REVIEWS

62. We anticipate that a great deal of secondary legislation will be laid under the REUL Bill once enacted. Lord Callanan said that current estimates were about 1,000 instruments.[67] We have in this report and elsewhere expressed our concerns about the adequacy of parliamentary scrutiny of secondary legislation, particularly where a parent Act includes skeleton provision. In this report, we have made some proposals for procedural changes. There are also practical measures which departments can take to assist effective parliamentary scrutiny. They are not new, but they are worth repeating.

Explanatory memorandums

63. We have already made recommendations in the context of the sifting procedure about the content of the EM accompanying a proposed negative. **We wish to take this opportunity to emphasise that EMs accompanying any instrument laid under the provisions of the REUL Bill, whether or not subject to sifting, should also explain clearly, accessibly, and comprehensively the policy and legislative background to the instrument and the nature of the policy changes being made, and what result is anticipated from any changes, deletions or revocations.**

Impact assessments

64. In our recent report *Losing Impact: why the Government's impact assessment system is failing Parliament and the public* we highlighted the importance of the two Houses being given complete and comprehensive information about the basis on which policy choices are made and the reasons why alternative options have been rejected. We also stressed that that information should be available at the time when Parliament is considering an instrument—not after.[68] In evidence to us, Lord Callanan confirmed that instruments laid under the REUL Bill which make significant policy changes will be accompanied by an impact assessment.[69] He said: "If we produce substantial policy changes, of course there will be an impact assessment of that …". **We welcome the Minister's commitment but reiterate—to all departments—that instruments laid under the REUL Bill must be accompanied by complete and comprehensive impact information and that that information should be available when the instrument is laid so that it can be taken into account when it is being scrutinised by the Houses.**

Post-implementation review

65. We also raised in *Losing Impact* the importance of post-implementation review (PIR) of regulations.[70] We drew attention in our report to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 which requires that any regulatory provision that passes the impact assessment threshold[71] should be reviewed five years after commencement and every five years after

67 Q 6 (Lord Callanan).
68 *Losing Impact: why the Government's impact assessment system is failing Parliament and the public*.
69 Q 1 (Lord Callanan).
70 *Losing Impact: why the Government's impact assessment system is failing Parliament and the public*, paras 41 to 49.
71 An impact assessment is required for any regulations with an impact on business or the voluntary sector of over £5 million.

that. We noted however, with disappointment, the low numbers of PIRs that were being conducted despite often being a statutory requirement. The Minister, Lord Callanan, at an evidence session for our inquiry into impact assessments, referred to plans to support departments in monitoring PIRs, but in our report we stressed that that support should be accompanied by effective penalties to ensure compliance.

66. The importance of post-legislative scrutiny was raised on several occasions during the debate on 12 January 2023 on *Government by Diktat* and *Democracy Denied?* (see paragraph 2 above), and **we again wish to press our concern that effective steps should be taken to ensure that departments make PIRs a priority, and also that it is embedded in the culture of departments that the results of PIRs should be used as a resource in informing subsequent policy development**.

CHAPTER 7: CONCLUSION

67. In this report we have set out our concerns about the REUL Bill, focusing on issues relating to the sunset provisions and the effective scrutiny of secondary legislation. We have raised them at this early stage so that they are available to members of the House in advance of the second reading debate on the Bill and subsequent stages. Amending the Bill so that the shift in power between Parliament and the executive is reversed will require a great deal of thought and creativity, and commitment to the overarching aim of redressing the current imbalance of power. Addressing these concerns upstream in the Bill will enable us to give the House better help downstream, when the Bill is passed, and the statutory instruments begin to flow.

APPENDIX 1: LIST OF MEMBERS AND INTERESTS

Members

Baroness Bakewell of Hardington Mandeville
Lord De Mauley
Lord German
Viscount Hanworth
Lord Hodgson of Astley Abbotts
Lord Hutton of Furness
The Earl of Lindsay
Lord Lisvane
Lord Powell of Bayswater
Lord Rowlands
Baroness Watkins of Tavistock

Interests

Committee Members' registered interests may be examined in the online Register of Lords' Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

APPENDIX 2: CORRESPONDENCE ON THE RETAINED EU LAW DASHBOARD

Letter from Lord Callanan, Minister for Business, Energy and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy to Lord Hodgson of Astley Abbotts, Chair of the Secondary Legislation Scrutiny Committee

Retained EU law Dashboard

I am writing to let you know that the Government is planning to update the Retained EU Law dashboard on Monday 30th January.

The REUL dashboard currently catalogues 2,417 pieces of legislation, but as Minister Ghani set out at the Despatch Box during the Bill's Report Stage, since then more REUL has been found. This is because the Brexit Opportunities Unit has worked closely with departments and The National Archives to identify additional pieces of legislation. Between July 2022 and January 2023 departments were able to identify approximately 1,000 additional pieces of REUL. This information will be publicly made available once the REUL dashboard is updated, bringing the currently verified total of REUL to over 3,700 individual pieces of legislation.

We know that your Committee is keen to use the REUL dashboard to track which pieces of REUL have been assimilated, and which still require action from the Government ahead of the sunset. This functionality is not straightforward to achieve. We have commissioned departments to provide this more detailed information. However, as this work may require a restructuring of the current dashboard, it will not be complete in time for this update. We will strive to have this information available for the spring 2023 update and will update the Committee on our progress to meet this commitment.

However, the next update of the dashboard does include a number of additional features to improve usability. This includes adding a progress tracker so that you can see how much REUL has been "completed" in percentages across the top, which may go some way towards helping the Committee to assess the overall progress towards REUL reform. We have also included a new function that will allow users to download the full catalogue of REUL via the REUL dashboard gov.uk page, and have slightly amended the descriptions to add further clarity.

The dashboard update will also provide a more in depth overview of REUL due to the additional data departments have collected. This additional data includes the territorial extent of each piece of legislation, where applicable, the date on which a piece of REUL was amended, repealed or replace; a brief explanation of if REUL has been repealed or replaced and details on what it has been replaced by.

I have enclosed an outline of the work which has been conducted in identifying REUL and the new features the dashboard will contain following the upcoming update as an annex.

I very much look forward to hearing your expert views on the update and would be happy to meet with you to explain the updates we have made, at your convenience.

30 January 2023