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& Net Zero

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Department for Energy, Security
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The Baroness Drake CBE
Chair, Constitution Committee
House of Lords
London
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10 May 2023

Dear Baroness Drake,

Government Response to the Select Committee on the Constitution Report - Retained EU Law (Revocation and Reform) Bill (13th Report of Session 2022–23)

Thank you for the Constitution Committee's report on the Retained EU Law (Revocation and Reform) Bill. The Government has carefully reviewed your report and considered the points you have raised. Our full response to the Committee's findings is set out below.

Delegated powers

The Committee's findings:

7: The Bill empowers ministers to decide the future of a significant amount of law across a wide range of policy areas with little parliamentary scrutiny. We reiterate our conclusion that the Government must provide an exceptional justification for the use of skeleton legislation, particularly where it can be described as "hyperskeletal". *The House may wish to seek further justifications for the Bill's broad delegations of powers to ministers.*

The Government's response:

The Government disagrees with the Committee's assertion that the Retained EU Law (Revocation and Reform) Bill is framework legislation. The Government has provided a continuous flow of information regarding its aims for retained EU law reform since the work was announced by Lord Frost in September 2021. Further information on the Government's approach to retained EU law (REUL) was set out in the *Benefits of Brexit* Report, published in January 2022, and reiterated in May 2022 when the Government announced it would be bringing forward the Bill in the third session of this Parliament.

To ensure that REUL reform was transparent to Parliament and the public, the Government developed a catalogue of REUL, and has now identified over 4,800 pieces of REUL across 16 departments. This catalogue was published in June 2022 to ensure the public and parliamentarians can hold the Government to account

regarding which EU laws remain on the statute book, and how the Government plans to reform them. This public catalogue has been viewed over 200,000 times since June 2022.

Where the Government is reforming REUL in a way that fundamentally changes existing legislative and policy frameworks it has used, and will continue to use, primary legislation to make those changes. The Financial Services and Markets Bill and the Procurement Bill are two examples of framework reforms to REUL.

However, relying purely on primary legislation to reform REUL would neither be a good use of parliamentary time, nor allow Departments to make straightforward changes to REUL that could support economic growth. The legislative programme required to reform these pieces of REUL by way of primary legislation alone would take decades. It would also grant these laws more parliamentary scrutiny upon their revocation or reform than they had at the point that they formed part of UK law.

Therefore, the Government considers it necessary and appropriate to have the delegated powers in the Retained EU Law Bill (REUL Bill) - powers which are capable of acting on a wide range of REUL, covering a variety of policy areas. Furthermore, every effort has been made to ensure that the powers in the Bill are as narrow as possible (including time limited), while achieving the Bill's aim of enabling REUL to be reformed or revoked, and for the special features it has in the UK legal system to be removed. In addition to this, the Government has been clear regarding its position on the inclusion of delegated powers within the Bill and published a Delegated Powers Memorandum on 22 September 2022 when the Bill was introduced in the House of Commons, setting out the rationale and the parliamentary procedure selected for each of the powers. An updated Memorandum was published on 20 January 2023.

Powers contained in clauses 13, 14 and 16 (previously clauses 12, 13 and 15)

The Committee's findings:

13: The powers in clauses 12, 13 and 15 are significant. That in clause 15(3) is particularly powerful since it provides a relevant national authority with the ability to alter the direction of a wide range of policy with little constraint. The appropriateness of this power and the level of parliamentary control applied to it merit serious consideration.

[To note: clauses 12, 13 and 15 are now clauses 13 (Power to restate retained EU law), 14 (Power to restate assimilated law or reproduce sunsetted retained EU rights, powers, liabilities etc) and 16 (Powers to revoke or replace), respectively]

The Government's response:

The Government has sought to ensure the powers in the Bill are as narrow as possible and to ensure they are subject to a level of scrutiny which is proportionate to their scope, whilst upholding the policy intent of the Bill. In addition, the Government has taken the necessary steps to ensure that this Bill contains robust scrutiny mechanisms that will enable the appropriate scrutiny of any amendments or repeals of REUL made under the delegated powers in this Bill.

For example, the powers within clauses 13, 14 and 16 are subject to the sifting procedure which has been purposefully drafted as a safeguarding measure for these powers. This allows for additional scrutiny for the use of these powers by Parliament, while retaining the flexibility of using the negative procedure where there are good reasons for doing so. The sifting procedure is well established as an effective scrutiny procedure. It was successfully utilised following EU Exit, in connection with the exercise of certain powers contained in the European Union (Withdrawal) Act 2018 and European Union (Future Relationship) Act 2020. The sifting procedure in the REUL Bill will similarly give the UK Parliament ample opportunity to take an active role in the development of legislation made under the powers in the Bill.

While recognising that the power under clause 16(3) is a broad power, it is important to note that it has a number of considerable constraints on how it can be used. Clause 16(3) may still only provide “alternative” provision to the REUL or assimilated law being replaced. Any replacement legislation must therefore cover broadly the same subject matter to the REUL or assimilated law being replaced. The powers in clause 16 are restricted in the sense that they cannot increase the overall regulatory burden in the particular subject area. In practice, this means that the legislation replacing the repealed legislation cannot add additional regulatory burdens over and above those the REUL already imposed.

Clauses 13 and 14 are limited in that generally the restated legislation must provide substantially the same policy effect as the provisions they replace. The intention is that these powers are exercised to produce greater legal certainty by the use of current best drafting practice to set out, in clear and express terms, the meaning and effect of the restated law.

The powers in clause 16 are also limited in the sense that they are one-shot powers. Once the power has been used to replace the secondary retained EU law or secondary assimilated law with other domestic legislation, the power cannot then be used on that domestic legislation, nor can the power be used after 23 June 2026. This is an important limit on the use of the power as it ensures departments have the necessary tools to create a regulatory environment which is the right fit for the UK, but does not allow them to continue to make changes indefinitely.

Alongside this, the powers are limited to secondary retained EU law or secondary assimilated law. They are therefore not Henry VIII powers, which also restricts how they can be used. The Government provided further information on this in the Delegated Powers Memorandum first published on 22 September 2022.

Parliamentary scrutiny

The Committee’s findings:

16: We reiterate our concerns about applying the negative resolution procedure to regulations which alter policy in areas previously governed by retained EU law. We recommend that the affirmative procedure is used for all regulations under the Bill which involve making policy.

19: We welcome the inclusion of a sifting mechanism in this Bill. The House may wish to consider whether the sifting arrangements in place for proposed negative instruments under the European Union (Withdrawal) Act 2018 and the European Union (Future Relationship) Act 2020 would also be appropriate in the case of this Bill.

The Government's response:

All statutory instruments (SIs) which reform REUL by making alternative provision using the power in Clause 16(3) will be subject to the affirmative procedure, as will SIs which amend primary legislation. As such, they will be debated and approved by both Houses. SIs which reform REUL in more limited ways, for example those SIs that revoke REUL, or which restate interpretive effects, will be subject to the sifting procedure which worked well for EU Exit SIs. The sifting committee is a tried and tested method of parliamentary scrutiny which delivers good results for everyone and draws on the expertise of our parliamentary committees. It also gives Parliament an active role in deciding how individual SIs should be scrutinised.

The Committee's findings:

22: The House may wish to seek assurances that the procedural requirements being removed by clause 11 are proposed for removal because there is no procedural need for them, and not for reasons of expediency.

[To note: clauses 11 (Procedural requirements) is now clauses 12]

The Government's response:

When the European Union (Withdrawal) Act 2018 was passed, additional parliamentary scrutiny requirements were applied to the amendment or revocation of subordinate legislation made under section 2(2) of the European Communities Act 1972 ("ECA"). These additional scrutiny requirements mean the affirmative procedure has to be followed for an SI which would otherwise be subject to a lesser parliamentary procedure; an enhanced scrutiny procedure applies in relation to certain statutory instruments made on or after Implementation Period completion day and certain explanatory statements are required to be made.

Now that section 2(2) ECA has been repealed, amendments are made to subordinate legislation made under section 2(2) ECA using other, existing powers. These powers have their own Parliamentary scrutiny procedure attached, which has been approved by Parliament, ensuring suitable scrutiny occurs. Indeed, these additional requirements only serve to add extra complexity for departments and take up unnecessary parliamentary time with no tangible benefit. We are therefore legislating to remove these additional requirements.

Use of "appropriate", sub-delegation of powers and Criminal offences

The Committee's findings:

27: The House may wish to consider the acceptability of “appropriateness” as a test for the use of powers under clauses 15(2) and (3) and 16.

[To note: clause 15 (Powers to revoke or replace) is now clause 16, and clause 16 (Power to update) is now clause 17]

Clauses 16(2) and (3) and 17 employ an appropriateness test - for example clause 16(2) provides that “a relevant national authority may by regulations revoke any 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”. Appropriateness tests are a common means of limiting the exercise of discretionary power and the use of appropriateness tests are well established in UK law.

Clause 16(2) imposes a double restriction. Relevant national authorities must consider the appropriateness of any replacement provision *and* the new provision must also achieve the same or similar objectives. The use of these powers will be subject to a reasonableness test: the determination that any new provision is appropriate must be reasonably exercised; and the assessment that the new provision achieves the same similar or objectives must also be reasonable.

The Government acknowledges that the discretionary powers in clause 16(2) and (3) are broad, but they are not unfettered. The Bill strikes a balance between the need to ensure that Departments have the necessary tools to create a regulatory environment which is the right fit for the UK and reflects the UK’s new regulatory freedoms, and the need to ensure that such reform is proportionate and appropriate. These powers will enable departments to remove regulations no longer deemed appropriate and enact more appropriate regulations that are better suited to the UK.

REUL was built up over decades with very little Parliamentary scrutiny. There is a need to reform REUL across every sector of the UK’s economy. It is right that the relevant national authorities are able to use their discretion to replace regulations, where required, with regulations that are appropriate within the context of the sector or policy area being considered. Alternative tests, for example a “necessity” test, would not work because there will often be a range of policy options, and it may be arguable that none are strictly necessary. The ‘appropriateness’ test which is included in these clauses is an established legal test which provides constraints on the use of powers so that the relevant national authorities exercise their discretion appropriately. It was - for example - the test applied to the making of regulations under section 8 of the European Union (Withdrawal) Act 2018. In accordance with their general public law duties, the relevant national authorities must act reasonably and fairly.

In addition, we have also sought to ensure there are legislative safeguards in place for clause 16(3). Where legislation is made under 16(3), the draft affirmative procedure must be used. This will ensure that the exercise of this discretion by a relevant national authority can be debated and actively approved by Parliament.

“Appropriateness” is therefore the correct test to be applied.

30: We share the concerns of the Delegated Powers and Regulatory Reform Committee that the sub-delegation of power potentially erodes democratic

accountability and should only be used in very specific and limited circumstances.

The Government has put forward appropriate powers that are as narrow as possible, whilst still allowing the Government to pursue its ambitious programme for REUL reform. The rationale for the powers in the Bill is set out in the Delegated Powers Memorandum.

Regarding sub-delegation, clause 16(4)(a) provides that regulations can only confer a power to make subordinate legislation that “corresponds or is similar to” a power that already exists in secondary retained EU law that is revoked under clause 16. In practical terms, this only allows for like-for-like replacement powers, and simply allows for the establishment of powers that correspond to, or are substantially similar to, powers which are already in existence.

33: We reiterate our conclusion that the use of delegated legislation to create criminal offences is in general constitutionally unacceptable. Clause 15(4) should be amended so that the power may not be used to create criminal offences.

[To note: clause 15 (Powers to revoke or replace) is now clause 16]

The Government’s response:

The Government agrees that it would not be constitutionally acceptable for delegated legislation to be used to create new criminal offences which Parliament has not had an opportunity to scrutinise. That is why any offences or penalties which are created by the powers in the Bill must correspond to, or be similar to, those which the revoked provisions already provided. In that sense, the power does not provide licence to create wholly new offences or penalties, but effectively allows like-for-like replacements for what already exists. These replacements would include similar conditions for the commission of an offence and similar penalties. This is to ensure that reforms can be undertaken to the underlying policy, without the risk of the offence being removed or being unsuitable for the reformed secondary retained EU law.

Use of power and interaction with the devolved administrations

The Committee’s findings:

39: We reiterate our position that UK ministers should make regulations in areas of devolved competence only after consulting the relevant devolved administration. In instances where common frameworks—a vital part of a co-operative union—are engaged, it is important that policy agreed by consensus through the common framework system is not undermined.

40: We recommend that the Bill is amended to require UK ministers to consult the relevant devolved administration before making regulations that affect areas of devolved competence. It would be welcome if the Government were to commit not normally to use the powers under the Bill in areas of devolved competence without having obtained the consent of the relevant devolved administration.

The Government's response:

The majority of the powers have been conferred concurrently on the devolved governments. This is in line with previous EU Exit related legislation and will give the devolved governments greater flexibility to decide how they regulate those areas currently governed by retained EU law in the future.

Powers for the UK Government to make statutory instruments in devolved areas are not new and have been used across a wide range of policy areas since the advent of devolution. It is often appropriate for the UK Government to amend existing regulations UK-wide or introduce new UK-wide ones, including in devolved areas. The UK Government would generally take this approach where the devolved governments agree, as it is more efficient and ensures greater coherence across the UK as well as making it easier for stakeholders to understand how the legislation operates and applies to them.

The concurrent nature of the powers is not intended to influence decision-making on devolved legislation. Rather, we assess that this would serve to reduce the additional resource pressure that the devolved governments may experience, by enabling the UK Government to act on a devolved government's behalf where they have confirmed they do not intend to take a different position to the UK Government. This will ensure that the most efficient and appropriate approach to REUL reform can be taken as well as providing greater legal certainty UK-wide.

We have been and are continuing to encourage departments to engage directly with their devolved counterparts as part of their 'Business As Usual' engagement to discuss and share plans for REUL reform as early, and in as much detail, as possible. We are also coordinating with the devolved governments centrally to best understand how they feel this should be approached. It is our expectation that departments will ensure any significant REUL reforms will receive the appropriate level of scrutiny and are subject to the usual processes for consultation and impact assessment.

In many cases, including where Common Frameworks apply, there will be existing fora and ways of working that will be appropriate for this engagement and it is therefore unnecessary to make this commitment when these fora are working well. The UK Government is committed to candid discussions with the devolved governments to ensure the Common Frameworks programme is successfully managed. The review mechanisms in the Frameworks are designed to ensure these sorts of discussions take place with respect to each Framework.

The Committee's findings:

43: We reiterate our recommendation that when there is disagreement between the Government and a devolved administration as to whether the legislative consent process is engaged the Government should justify its approach to the House at the beginning of a bill's consideration. In the case of this Bill, it should do so at the earliest opportunity.

The Government's response:

The UK Government remains committed to respecting the devolution settlements and the Sewel Convention. There are provisions in the Bill that engage the Legislative Consent Motion process. In light of this, we have sought legislative consent in principle for the provisions in the Bill from the Senedd, the Scottish Parliament, and if possible, the Northern Ireland Assembly.

In line with our commitments to the devolution settlements, the UK Government would not normally legislate in areas of devolved competence without agreement of the relevant devolved authority. Rather, the UK Government would seek agreement from the relevant devolved government before legislating in a devolved area.

Despite our close work with the Scottish and Welsh Governments, the Scottish Parliament and the Senedd have both decided to withhold legislative consent for the REUL Bill. We are disappointed with this outcome, but we will continue to work with Scottish and Welsh Government colleagues at ministerial and official levels. This Bill is vital for the whole of the UK to be able to fully take advantage of the benefits of Brexit.

We will continue to work collaboratively with all devolved governments and are committed to supporting sustained engagement on this moving forward.

Legal certainty

The Committee's findings:

48: Legal certainty is a fundamental tenet of the rule of law. *The House may wish to ask the Government how it intends to mitigate the legal uncertainty caused by the Bill.*

The Government's response:

The Government is intent on bringing clarity to the statute book. It is an important objective that citizens and businesses are clear as to the rights that they rely on, and that these rights are safeguarded in domestic statute. A comprehensive review of all REUL on the UK statute book began in September 2021. Departments have been assessing line by line, the desired policy intent and effects of REUL on the statute book and considering whether any action is required to be taken to maintain legal certainty.

The UK Government is making a number of important changes in the REUL Bill which address the special status that is currently afforded to REUL on the statute book. Specifically the REUL Bill will repeal rights, powers, liabilities, obligations, restrictions and remedies retained under section 4 of the EU (Withdrawal) Act 2018, abolish the principle of supremacy of EU law, and abolish general principles of EU law as aids to interpretation of the UK statute book, to the extent that these principles were retained by the European Union (Withdrawal) Act 2018.

These retained principles and measures provided continuity at the end of 2020 after the UK was no longer a member of the EU, but were not intended to remain on the

statute book indefinitely. In many cases, these retained principles and categories of rights are unclear and hard to identify, or overlap with provision elsewhere in UK domestic law, creating confusion. Law should be easily accessible and be capable of being relied on to mean what it says without being qualified by complex, obscure or general glosses, or requiring extensive legal research to understand.

Where it is desirable, the Bill provides powers to enable the Government to maintain any existing policy effects which are specifically produced by the application of retained EU-derived principles of interpretation or given effect to by retained case law. Regulations made under these powers (clauses 13 and 14) will use traditional domestic drafting techniques to ensure that these effects are expressed clearly and accessibly in domestic legislation.

Amendments to the Bill have been laid at Lords Report Stage that change the operation and scope of the sunset. Specifically, the current scope of the sunset in clause 1, which revokes a broad category of unspecified legislation, will be replaced with a revocation of only specified legislation listed in a Schedule to the Bill. This Schedule will list REUL that departments have identified for removal and which will be revoked on 31 December 2023. The Schedule provides legal certainty about which pieces of legislation will fall away on 31 December 2023, unlike the previous sunset clause that it replaces. It also mitigates the risk of REUL being inadvertently revoked. The REUL listed in the Schedule for revocation at the end of 2023 is the result of many months of coordinated work across Government assessing the stock of REUL that remains on our domestic statute book.

The measures in the Bill will bring clarity to the statute book by the end of 2023.

International obligations

The Committee's findings:

53: The House may wish to seek specific assurances from the Government about the action it proposes to take to ensure that the UK upholds its obligations in international law in the context of the automatic sunset.

The Government's response:

The provisions within the Bill are not intended to impact the UK's international obligations. Indeed, Ministers have committed at all stages of the Bill in both the Commons and the Lords, that the UK will uphold its international obligations.

Amendments to the Bill have been laid at Lord Report Stage that change the operation and scope of the sunset. Specifically, the current scope of the sunset in clause 1, which revokes a broad category of unspecified legislation, will be replaced with a revocation of only specified legislation listed in a Schedule to the Bill. This Schedule will list REUL that departments have identified for removal and this will be revoked on 31 December 2023. No REUL that is required to uphold international commitments will be included in the Schedule.

Once again, the Government is thankful for the Committee's careful scrutiny of this Bill. I look forward to continuing to engage with you as the Bill continues its passage through your Lordships House.

LORD CALLANAN