HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

39th Report of Session 2022–23

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

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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.

Members

Lord De Mauley
Baroness Harris of Richmond
Lord Hunt of Wirral (Chair)
Lord Hutton of Furness
Baroness Lea of Lymm
Lord Powell of Bayswater
Baroness Randerson
Baroness Ritchie of Downpatrick
Lord Rowlands
Lord Russell of Liverpool
Lord Thomas of Cwmgiedd

Registered interests

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

Publications

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

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Chris Smith (Adviser), Jane White (Adviser) and Riona Millar (Committee Operations Officer).

Further Information

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

The progress of statutory instruments can be followed at https://statutoryinstruments.parliament.uk/

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Thirty Ninth Report

LOSING CONTROL?: THE IMPLICATIONS FOR PARLIAMENT OF THE RETAINED EU LAW (REVOCATION AND REFORM) BILL: GOVERNMENT RESPONSE

1. We reported on the Retained EU Law (Revocation and Reform) Bill in our 28th Report of this Session.[1] The Government have responded by way of a letter from Lord Callanan, Parliamentary Under Secretary of State for Energy Efficiency and Green Finance at the Department for Energy Security & Net Zero. The response is printed at Appendix 1.

1 SLSC, *Losing Control?: The Implications for Parliament of the Retained EU Law (Revocation and Reform) Bill*, 28th Report (Session 2022–23, HL Paper 145).

APPENDIX 1: RETAINED EU LAW (REVOCATION AND REFORM) BILL (28TH REPORT OF SESSION 2022–23): GOVERNMENT RESPONSE

Letter from Lord Callanan, Parliamentary Under Secretary of State for Energy Efficiency and Green Finance at the Department for Energy Security & Net Zero, to the Rt Hon. the Lord Hunt of Wirral, Chair of the Secondary Legislation Scrutiny Committee

Thank you for your report following the Committee's scrutiny of the provisions of the Retained EU Law (Revocation and Reform) Bill.

The Government has listened to the Committee, and parliamentarians in both Houses, and is proposing a number of amendments to the Bill, which will substantially address many of the important points the Committee raised.

The Government has tabled an amendment to replace the current scope of the sunset contained in the current clause 1 of the Bill. The Bill, as originally drafted, proposed the revocation of a broad category of retained EU law. We have listened to the Committee's concerns regarding the timeline of the sunset clauses and its operation. The amendment will replace that broad sunset with a Schedule and lists specific legislation to be revoked on 31 December 2023. All retained EU law (REUL) not revoked by the Schedule would still be assimilated into domestic law (stripped of its EU interpretive effects) at the end of the year. Further REUL may still be revoked after the Schedule is finalised using the powers to revoke and replace already in the Bill (clause 16). The Secondary Legislation Scrutiny Committee will play a significant role in scrutinising the use of the powers to restate, replace, revoke or update REUL in clauses 13 to 17 of the Bill.

In addition, the Government has carefully considered the Committee's findings and our response is set out below.

Parliamentary scrutiny

The Committee's finding

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 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.

The Government's response

The Schedule approach means that a definitive list of REUL to be sunset has, in fact, been compiled. This Schedule is subject to parliamentary debate and approval. The Schedule provides a suitable mechanism by which both Houses are informed about, and given an opportunity to debate, how ministers propose the sunset provisions to apply. We believe that this will address the Committee's concerns, as set out in paragraph 31 of your report.

In the context of a Schedule approach the Government proposes to remove the extension power in clause 3 as it would no longer be necessary. However, we propose retaining a limited preservation power to enable legislation to be saved from the revocation Schedule where appropriate and necessary.

We have acknowledged concerns raised and believe this approach will provide the sought after legal clarity around the specifics of what will be revoked.

In tandem with taking the steps to provide this legal certainty over what REUL will sunset and what will remain, the Government will continue to drive meaningful reforms that will have a positive impact on all within the UK. These reforms will empower business to be more agile and innovative, ready for the opportunities of the future.

The Committee's finding

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.

Government response

The Government disagrees that the scrutiny of secondary legislation falls short of the scrutiny of primary legislation. The scrutiny procedures for secondary legislation are long standing and are endorsed by Parliament during the passage of legislation. 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. 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. It largely corresponds with the sifting procedure under the European Union (Withdrawal) Act 2018.

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 retained EU law.

The Government also disagrees that any REUL should be given the status of primary legislation as a matter of course.

Currently, much retained direct EU legislation can only be amended via an Act of Parliament. Therefore, we are unable to update it in a timely manner in order to keep pace with technological or other advances in policy. This situation perpetuates legal and business uncertainty as regulations keep pace neither with technological advances or with changes in other jurisdictions. There is also a

principled objection to retained direct principal EU legislation retaining the status of primary legislation when it did not receive full parliamentary scrutiny before it became law in the UK. Clause 11 will address this issue by ensuring retained direct EU legislation is easier to update and reform.

The changes the Bill intends to make aim to improve the efficiency of the process to reform REUL while maintaining the necessary level of parliamentary scrutiny. The proposed change will provide a more flexible and streamlined process for amending retained direct principal EU legislation and rights retained under section 4 of the European Union (Withdrawal) Act 2018, while maintaining the appropriate level of parliamentary scrutiny.

The Committee's finding

38 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.

Government response

There are well established scrutiny processes for Parliament to consider secondary legislation. Subject to Royal Assent of the REUL Bill, all statutory instruments (SIs) which significantly reform REUL, or restate specified interpretive effects by proposed amendment to primary legislation, will be subject to the affirmative procedure and will therefore be debated and subject to approval in both Houses. In addition, SIs which reform REUL in any limited way, revoke REUL (which is separate to the proposed revoke Schedule), or restate specified interpretive effects but without amending primary legislation, will be subject to the sifting procedure. 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 Parliament an active role in determining the level of scrutiny which individual SIs should receive once laid. In light of the necessary Parliamentary endorsement for scrutiny mechanisms for secondary legislation, and subsequent opportunities to examine and debate SIs, we do not consider it necessary to introduce any additional, enhanced scrutiny mechanism to the Bill.

Delegated Powers and scrutiny mechanisms

The Committee's finding

39 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.

Government response

The Government has been clear regarding its aims for retained EU law reform since the work was announced by Lord Frost (former Minister for the Cabinet Office) in September 2021. Further information on the Government's approach

to 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 bring 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, The legislative programme required to reform REUL by department or sector by way of primary legislation alone would take decades. It would also grant these laws more parliamentary scrutiny upon their repeal or reform than they had at the point of their enactment. Therefore, the Government considers it necessary and appropriate to have the delegated powers in the REUL Bill - powers which are capable of acting on a wide range of REUL, covering a variety of policy areas.

The Government has taken 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. Furthermore, we have 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.

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. This will give the UK Parliament the opportunity to take an active role in the development of this legislation. In addition to this, the sifting procedure which these clauses are subject to largely corresponds with the sifting procedure under the European Union (Withdrawal) Act 2018.

It is therefore not necessary or appropriate to subject REUL to enhanced scrutiny procedures. Any such procedures would also place additional pressure on parliamentary time and could delay delivering this Government's objective of bringing about much needed REUL reform.

Scrutiny of the exercise of clauses 13, 14 and 16 powers

The Committee's finding

45 Any enhanced scrutiny mechanism (see paras 37–39 above) should apply to the exercise of powers under clauses 12, 13 and 15[2].

46 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.

The Government's response

The UK Government will ensure any reform of REUL provided for by the powers in the Bill will receive the appropriate level of scrutiny by the relevant legislatures and will be subject to usual processes for consultation and impact assessment.

Departments will be expected to follow the standard approach regarding consultation as part of their delivery plans for REUL reform. Which consultation processes are appropriate will depend on the extent and impact of the reform, which departments are best placed to assess. Therefore, we do not consider a commitment to consult on the face of the Bill is appropriate or necessary.

Power to update

The Committee's finding

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[3] 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 Government's response

The power to update in Clause 17 of the Bill ensures that secondary REUL, assimilated law or legislation made using the powers in the Bill can be updated insofar as a change in technology or developments in scientific understanding has occurred. As the Committee notes, there have been repeated assurances that the power is not intended to enable fundamental policy change. The use of the power for any purpose other than to take account of a change in technology or developments in scientific understanding would be beyond the vires of this power and therefore not lawful. It will be at the discretion of UK and devolved Ministers to decide what is considered an 'appropriate' amendment for the purposes of changes in technology or developments in scientific understanding. It will be for the relevant national authority to ensure they are satisfied that the way in which the power is used is within the vires set out in clause 17.

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2 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 (Power to revoke or replace), respectively.

3 Clause 16 (Power to update) is now clause 17.

The scope of this power is necessary to ensure it allows for technical updates over time and is able to keep pace with scientific and technological developments to uphold the UK's high standards whilst ensuring laws remain tailored to, and beneficial for, the UK. The use of powers by the Government to enable legislation to respond to such changes in technology or developments in scientific understanding is not unusual.

Adding an affirmative or sifting requirement on the use of this limited power would be disproportionate for this type of power and would place additional resource pressure on Parliament. The Government disagrees with the Committee on the potential risk of any government seeking to utilise this power to achieve a fundamental change in policy.

Legislative Reform Orders

The Committee's finding:

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[4] and about what guidance and encouragement departments will be given to use it.

The Government's response

Clause 18 acts as an amendment to the Legislative Reform Orders (LROs) power to make it clear LROs can be made to amend retained direct EU legislation (RDEUL). This power will be subject to the relevant scrutiny procedures already set out in the Legislative and Regulatory Reform Act 2006 (LRRA). It is right that this power is afforded proper scrutiny and will be subject to the scrutiny procedures as set out in the LRRA.

The LRO process will enable Ministers to use their order-making powers to amend RDEUL through the current LRO procedures (i.e. to make legislation removing or reducing burdens) and ensure that departments are able to use this power regarding their plans for REUL reform.

As you will be aware, the LRO power is conferred on a Minister of the Crown only. As such, it is not exercisable by the Devolved Administrations and the amendments under this Bill make no changes to this. The existing LRO procedure is not generally available for UK Ministers to use in devolved areas, although certain exceptions exist (i.e. acting with agreement of the Welsh assembly/ministers. For example, consequential amendments).

The procedures involved in the LRO process are not altered by the Bill and thus will remain unchanged. Any RDEUL amended under the LRO procedure will be subject to the parliamentary procedure as set out in the LRRA (i.e. the negative, affirmative and super-affirmative procedures will all apply to RDEUL in the same way that they apply to all other legislation).

In addition to this, the Brexit Opportunities Unit (BOU) is working to produce cross- Whitehall guidance to support departments with the exercise of identifying REUL for potential reform and their wider delivery plans for REUL reform, including on the use of the powers.

4 Clause 17 (Power to remove or reduce burdens) is now clause 18.

Sifting and its role in scrutiny

The Committee's finding

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[5], but believe that there is a case for its being extended to the exercise of powers under clause 16 (see paragraph 50 above).

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.

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.

The Government's response

I gave a commitment during Lords Committee stage of the Bill to review the 10 day scrutiny period for sifting. Having considered this carefully and in particular how the existing 10 day sifting practice works, the Government remains of the view that a 10 day sifting period is sufficient for SIs laid using the powers in the Retained EU Law Bill. This time period was well-precedented during EU Exit, allowing Parliament to have a say in how certain instruments are scrutinised while enabling the delivery of a significant volume of SIs. The retained EU Law programme is a similar challenge, but it is no more complex or demanding than EU Exit. A 10 day period worked well previously with our programme of SIs for EU Exit and we continue to have full confidence that it will work well in this scenario.

Explanatory memorandums

The Committee's finding:

63 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.

The Government's response

The Government agrees that all Explanatory Memoranda (EM) should be clear, accessible and comprehensive, and notes the requirements to provide both a statement and an EM alongside proposed negative instruments for sifting as was the case during EU Exit.

The Leader of the House of Commons has reminded colleagues previously of the importance of high quality EMs, and I will also reiterate this to colleagues

5 Clauses 12, 13, 15 and 16 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), 16 (Power to revoke or replace), and clause 17 (Power to update).

specifically in relation to the REUL programme. Officials in BOU, who are working on the coordination of the REUL SIs, have also issued communications to departmental colleagues to stress this point. I am grateful to the clerks of the SLSC for agreeing to support departmental training on drafting EMs.

Impact assessments

The Committee's finding

64 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.

The Government's response

As the Government stated in its response to the SLSC's 23rd report 'Losing Impact: why the Government's impact assessment system is failing Parliament and the public' (HL Paper 116), "the Government is committed to delivering the [Impact Assessment] information Parliament needs, where possible, when an instrument is laid, irrespective of the reporting year."

The Government will continue to be committed to the appraisal of any regulatory changes relating to REUL.

The nature of this appraisal will depend on the type of changes that departments make and the expected significance of the impacts. Where applicable, such as when REUL is a regulatory provision and is being reformed significantly via a statutory instrument- the example referenced in this question - departments will be expected to put their measures through the government's systems for regulatory scrutiny.

Where impacts on business exceed the de-minimis threshold set out in the existing Better Regulation Framework, a full Impact Assessment must be submitted to scrutiny by the Regulatory Policy Committee. In all cases, proportionate impact information should be set out in the explanatory memorandum. Where measures are being revoked, departments will be expected to undertake proportionate analytical appraisal.

Post-implementation review

The Committee's finding

66 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.

The Government's response

The Government noted the SLSC's recommendation in its 23rd report for Post-Implementation Reviews (PIRs) to ensure that PIRs are monitored, that a review should consider how PIRs are published to make them more easily accessible and how officials can be encouraged to make use of them when formulating subsequent legislation.

As stated in the Government response to the recommendation:

> "The PIR process is being reviewed as part of the proposed reforms to the Better Regulation Framework. Government publications relating to legislation, including a PIR setting out the conclusions of a review, should be published on www.legislation.gov.uk alongside therelevant regulations. The Better Regulation Executive is working with The National Archive to update guidance for departments to ensure PIRs are published on www.legislation.gov.uk."

The Government is committed to embedding into our culture the effective use of monitoring and evaluation, including the use of PIR where appropriate. This will help us understand whether policies are having the intended effect and improve future decision-making.

It has been agreed that any use of powers from the REUL Bill will have a bespoke scrutiny approach. The new proposed Schedule of revocations approach will reduce the burden that the original blanket mechanism of the sunset would have imposed on the Committee and Government departments. As part of the ongoing REUL delivery process, departments will submit their REUL delivery plans for independent scrutiny. For any SI where the expected business impacts (as measured by the Equivalent Annualised Net Direct Cost to Business, EANDCB) exceed the ± £5m de-minimis threshold, departments will need to submit a full IA for regulatory scrutiny.

The Government is grateful to the Committee once again for its report and hopes it is reassured by the points addressed above. As ever, the Government would be more than happy to discuss if the Committee requires any further information.

10 May 2023

APPENDIX 2: INTERESTS AND ATTENDANCE

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.

For the business taken at the meeting on 11 May 2023 and included in this report, Members declared no interests.

Attendance

The meeting was attended by Baroness Harris of Richmond, Lord Hunt of Wirral, Baroness Lea of Lymm, Lord Powell of Bayswater, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Russell of Liverpool, and Lord Thomas of Cwmgiedd.