

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

33rd Report of Session 2022–23

**Retained EU Law
(Revocation and
Reform) Bill:
Government Response**

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The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
 - (b) section 7(2) or section 19 of the Localism Act 2011, or
 - (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
 - (a) section 85 of the Northern Ireland Act 1998,
 - (b) section 17 of the Local Government Act 1999,
 - (c) section 9 of the Local Government Act 2000,
 - (d) section 98 of the Local Government Act 2003, or
 - (e) section 102 of the Local Transport Act 2008.

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Contacts for the Delegated Powers and Regulatory Reform Committee

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103. The Committee's email address is hldelegatedpowers@parliament.uk.

Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

Thirty Third Report

RETAINED EU LAW (REVOCATION AND REFORM) BILL: GOVERNMENT RESPONSE

1. We considered this Bill in our 25th 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, Department for Energy Security and Net Zero. The response is printed at Appendix 1.

1 Delegated Powers and Regulatory Reform Committee, *25th Report*, (Session 2023–23, HL Paper 147)

APPENDIX 1: RETAINED EU LAW (REVOCATION AND REFORM) BILL: GOVERNMENT RESPONSE

Letter from Lord Callanan, Parliamentary Under Secretary of State for Energy Efficiency and Green Finance, Department for Energy Security and Net Zero, to the Rt Hon. the Lord McLoughlin CH, Chair of the Delegated Powers and Regulatory Reform Committee

I am writing in response to the Delegated Powers and Regulatory Reform Committee's 25th Report (HL Paper 147), which included scrutiny of the Retained EU Law (Revocation and Reform) Bill.

I have considered the Committee's report and its recommendations in relation to the Bill in detail, and the Government's response is set out below. The Government has listened to the Committee, and parliamentarians in both Houses. As such I am proposing a number of amendments to the Bill, which aim to substantially address many of the concerns the Committee raised. I hope that the Committee will support the intention of these amendments at the Bill's Report stage.

The Government still remains strongly committed to both the principle and practice of retained EU law reform, and hence has not brought forward amendments to the other powers in this Bill, which are important to delivering meaningful reforms. I will provide further information regarding the Government's rationale as to why the powers highlighted in your report are justified and necessary.

Clause 1-3: Sunsets of retained EU law

The Committee's finding:

27. The powers conferred by clause 1(2), when read with clause 1(1), are inappropriate and should be removed from the Bill.

33. The power in clause 2(1)—combined with the scale of the task of determining which pieces of REUL are to be retained, revoked or amended - gives rise to significant uncertainty as to what the sunset date will be. Given the importance of the power, we consider that its use merits affirmative procedure scrutiny.

The Government's response:

Government amendments to the Bill have been tabled that replace the current scope and change the existing operation of the sunset. Specifically, the current scope of the sunset in clause 1, which proposed the revocation of a broad category of retained EU law, will be replaced with a new Schedule to the Bill. This schedule will contain retained EU law (REUL) that departments have identified for removal and this will be revoked on 31 December 2023. This Schedule format is in line with the Schedule set out in the Financial Services and Markets Bill.

The Schedule will provide greater clarity on exactly what will be revoked at the end of the year. REUL not listed in the Schedule would still be stripped of its special status and become assimilated law at the end of the year, but would not sunset. Specifically, assimilated law would not be subject to the principle of supremacy, and the application of rights, powers, or liabilities retained under section 4 of the European Union (Withdrawal) Act 2018, and general principles of EU law would end.

Finally, the Bill will still include a limited preservation power that will continue to be conferred on both UKG Ministers and the DAs. This power is only intended

to be used subsequent to Royal Assent in the case of technical errors where REUL may have been wrongly included on the revocation schedule. This power will be time limited to 31 October 2023 and will be subject to the affirmative procedure so that Parliament can scrutinise and approve any changes to the schedule.

As a consequence, clause 2 of the Bill that lays out the exceptions to the sunset in clause 1, is no longer necessary and will be removed from the Bill. Moreover, given that the current form of the sunset in clause 1 will no longer stand, the extension power, previously in clause 2 and now clause 3 following amendments at Lords Committee, is no longer necessary, and will be removed from the Bill.

This Government amendment is intended to substantially address the concerns the Committee raised with regards to clause 1 of the Bill, providing clarity and legal certainty regarding which REUL will sunset at the end of this year.

Clause 11: Scope of powers (previously clause 10)

The Committee's finding:

38. Clause 10, which effects a significant transfer of power to Ministers, should be removed from the Bill. It is an unacceptable interference with the position in the European Union (Withdrawal) Act 2018 that substantial policy changes should be for Parliament to decide in primary legislation rather than for Ministers to decide in secondary legislation.

The Government's response:

The Government disagrees with the Committee's conclusion regarding clause 11. Clause 11 is an important element of REUL reform, and is necessary to ensure that UK statute has the right balance between UK law and REUL. Now that we have left the EU it is not appropriate that retained EU regulations would continue to be treated equally to an Act of Parliament that has undergone months of scrutiny in both Houses.

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. Clause 11 will address this issue by ensuring retained direct EU legislation is easier to update and reform.

This provision does, as your Committee notes, amend the European Union (Withdrawal) Act 2018 (EUWA). This is required now because whilst EUWA was a necessary step at the time, to provide continuity, it was never envisioned that it would maintain the EU status quo forevermore. Much of retained EU law comprises technical regulations which do not equate to legislation included in an Act of Parliament. For instance individual provisions adding cheese and honey to the Simplified Active Substance list in the Biocidal Products Regulation currently require an Act of Parliament to update them. This is clearly not appropriate.

By amending Schedule 8 to EUWA, we will ensure that retained direct EU legislation and assimilated direct legislation can be more easily amended as part of our dynamic regulatory approach. Now is the time to make these vital amendments, taking the necessary steps to put the UK statute book on a sustainable footing whilst also guaranteeing that we can seize the opportunities of Brexit.

Clauses 13 and 14: Power to restate retained EU law and Power to restate assimilated

law or reproduce sunsetted retained EU rights, powers, liabilities etc (previously 12 and 13)

The Committee's finding:

45. Clause 12 should be removed from the Bill because it inappropriately delegates legislative power. It gives Ministers powers to legislate to achieve effects that ought instead to belong to Parliament and be achieved in subject-specific primary legislation.

46. The power in clause 13—to restate assimilated law—is only exercisable from 1 January 2024, the point at which secondary REUL becomes “assimilated law”. The points made above in relation to clause 12 apply equally to clause 13. Clause 13 should be removed from the Bill because it inappropriately delegates legislative power. It gives Ministers powers to legislate to achieve effects that ought instead to belong to Parliament and be achieved in subject-specific primary legislation.

The Government's response:

The Government disagrees with this conclusion, as clauses 13 and 14 are, first and foremost, only powers for “restatement”. This means the powers can only be used to clarify, consolidate and restate legislation, providing for the codification of the effects of retained EU-derived principles of interpretation where necessary to maintain the existing policy effect.

Such a process, more broadly, complements the assimilation process for retained EU law set out in the Bill. Restated provisions will be purely UK legislation and will be interpreted in accordance with domestic rules of statutory interpretation. Moreover, the Government may use the powers to reproduce the precise effects that were produced by interpretive effects such as retained general principles, thereby ensuring the same policy outcome. Such an approach will further legal certainty for individuals and businesses by replacing the application of obscure general principles with clear, precise effects on the face of the legislation.

The Committee also raised the concern that powers under these clauses could be used to effect policy change, as it could tip the balance between two competing interpretations on policy. The Government does not accept this characterisation. The purpose of these powers is to enable the Government to clarify, consolidate, codify and restate REUL to preserve the effect of the existing law in order to maintain the existing policy effect where it is considered to be appropriate for the UK in a post-Brexit setting. These powers are limited in the sense that the restated legislation must provide substantially the same policy effect. It is unable to put in place policy change from the status quo.

Clause 16: Powers to revoke or replace (previously 15)

The Committee's finding:

62. Clause 15 contains an inappropriate delegation of legislative power and should be removed from the Bill.

The Government's response:

The Government disagrees with the Committee's recommendation that this clause should be removed from the Bill. The powers to revoke or replace are important crosscutting enablers of the reform of retained EU law in the Bill. The powers will enable the Government to overhaul outdated and overly burdensome retained

EU laws in secondary legislation across many sectors of the economy and replace them with domestic laws that are tailored to, and beneficial for, the UK.

The Committee raises concerns over the “extraordinarily wide discretion” the delegated powers give Ministers to revoke and replace secondary retained EU law. The Government acknowledges that the power in clause 16 is broad, which is why we have sought to include important safeguards on the use of the power. The exercise of the powers have been restricted in that they are in effect “one shot” powers. Once used on a piece of secondary retained EU law or assimilated law, they cannot then be used again on that domestic legislation made under the powers (because such provisions will not be retained EU or assimilated law, the powers are incapable of acting upon them). Secondly, the powers are only available for a time limited window; they cannot be used after 23 June 2026. Finally, the powers are restricted in that they cannot increase the overall regulatory burden.

The Committee raises concerns over the use of secondary legislation to amend retained EU law, stating that many of the changes should be the subject-matter of primary legislation. 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.

Relying purely on primary legislation to reform retained EU law would neither be a good use of parliamentary time, nor allow Departments to make straightforward changes to retained EU law that could support economic growth. It is critical, therefore, that we provide the Government with the ability to act quickly and get right regulations in order to capitalise on our newfound regulatory freedoms and seize the opportunities of Brexit.

Furthermore, the powers to revoke or replace will enable us to create a regulatory environment which is the right fit for the UK and reflects the UK’s new regulatory freedoms. This will enable the UK to fully grasp the myriad of opportunities to create modern and agile regulation to support the ambitions of our sovereign nation.

Conclusion

The Government is grateful to the Committee for their time in scrutinising the Bill. The Government has listened closely to the concerns raised by the Committee, and parliamentarians in both Houses about the broad nature of the sunset clause in clause 1, and has tabled a Government amendment that provides greater clarity and legal certainty regarding which EU laws will sunset at the end of this year. We welcome continued engagement from the Delegated Powers and Regulatory Reform Committee on this Bill.

10 May 2023

APPENDIX 2: MEMBERS' INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <https://www.parliament.uk/hregister>. The Register may also be inspected in the Parliamentary Archives.