Hansard Society Evidence to the European Scrutiny Committee Inquiry into Retained EU Law

25 February 2022

This submission contains material relevant to questions 1, 2 and 3 of the Committee's call for evidence. It covers:

- context: the Hansard Society's Delegated Legislation Review;
- the diversity of retained EU law (REUL);
- amending REUL: policy objectives and regulatory frameworks;
- to whom does amendment of REUL matter? and
- parliamentary scrutiny of delegated legislation.

Summary

1. Retained EU law (REUL) is not homogeneous: a one-size-fits-all approach to either its status or its amendment is unlikely to be feasible without entailing risks for legal certainty and/or parliamentary accountability.
2. Parliamentary scrutiny of the modification of REUL should be calibrated according to the legal, political and policy importance of the changes being made. This provides a 'reset' opportunity for the UK to devise a more democratic and transparent approach to regulating.
3. There is a significant risk that Parliament's legislative authority will be undermined by current Government proposals. Neither a generic broad power to modify REUL nor a catalogue of more policy-focussed powers in one Bill would provide for effective parliamentary scrutiny and oversight over executive action.
4. Modification of REUL will not always be a technical or parochial exercise: its production and scrutiny must therefore be responsive to public interest; the impacts on business, workers and consumers; implications for international agreements and the devolution settlements; and other cross-cutting issues.
5. The approach taken to the amendment of REUL will be a critical element of the overall post-Brexit balance of law-making power. What is at stake is who should inherit legislative powers now repatriated from the EU, how they should exercise their new expanded discretion, and how they should be scrutinised in doing so. Simply creating wide powers for the UK Government to modify REUL will perpetuate the bypassing of Parliament in the formation of UK policy in those areas that were previously EU competences.
6. An approach to REUL modification that bypasses Parliament and simply creates vast executive powers to enact new rules in areas that were previously EU competences would also represent a serious lost opportunity. There is a chance now for the UK to design an approach to regulating that better suits the needs of both the UK and modern society. Part of this must be democratic processes that give Parliament the powers and resources it needs to enact key policy choices in law and effectively scrutinise and check executive power.

Context: the Hansard Society's Delegated Legislation Review

7. The Hansard Society has longstanding and deep-rooted concerns relating to the use of delegated powers and delegated legislation.[1] We believe delegated legislation has an essential role to play in modern governance, but that the system needs wholesale reform to prevent further erosion of Parliament's legislative authority. For this reason, the Society is currently undertaking a Delegated Legislation Review (with financial support from The Legal Education Foundation), to develop proposals for reform.[2]

8. The Hansard Society's concerns relate to both stages of the delegated legislation process – the delegation of powers in parent Acts, and the scrutiny of the resulting Statutory Instruments (SIs).[3] In summary, our concerns are that:

    - Broad, vague and ambiguously worded powers, which are open to wide interpretation and confer excessive ministerial discretion, are now commonplace. Too many Bills are now 'skeleton' Bills that contain powers rather than policy, for reasons of ministerial convenience or incomplete policy development. Delegated legislation was initially designed to be used for technical or administrative detail, but is now increasingly used for important policy decisions. This blurring of the distinction between the content of primary and delegated legislation also alters the constitutional balance of power between Parliament and the executive.

    - Parliamentary scrutiny procedures for delegated legislation are largely inadequate. There is no mechanism to ensure that the scrutiny of an SI is commensurate with its policy content or the level of political interest it attracts. Government control of Commons time, the lack of penalty for poor quality accompanying documentation and confusing terminology all compound the underlying issues that prevent parliamentarians from effectively scrutinising legislation. The absence of any power of amendment and the negligible risk of an Instrument being rejected by Parliament also act as powerful disincentives to scrutiny.

9. The Hansard Society Delegation Legislation Review is working on the basis that a complete overhaul of current rules and practice is required. The Review will likely make recommendations for a new Statutory Instruments Act and new Standing Orders for both Houses. It is addressing questions such as:

    - What defines the boundary between primary and delegated legislation?
    - Should Parliament ever be able to amend delegated legislation?
    - How can reform help government better manage the delivery of its SI programme?
    - What procedures, resources and support would enable parliamentarians to scrutinise SIs more effectively?

[1] Fox, R. & Blackwell, J. (2014), *The Devil is in the Detail: Parliament and Delegated Legislation* (London: Hansard Society)
[2] https://www.hansardsociety.org.uk/projects/delegated-legislation-review
[3] Hansard Society (2021), *Delegated legislation: the problems with the process* (London)

The diversity of retained EU law

10. Retained EU law (REUL) is not a uniform or homogeneous body of law. There are at least three causes of its diversity: (i) the different statuses it occupied in the hierarchy of EU law; (ii) the diverse ways in which it has become part of UK law; and (iii) the diverse policy areas it covers.

11. The current status of REUL, for the purposes of its amendment, is undeniably complicated. However, a wish for simplification would not on its own justify a one-size-fits-all approach to REUL's future amendment. Any alteration to the current position must take the diversity of REUL into account by not treating unlike cases alike.

12. REUL incorporates law that had different statuses as a matter of EU law. In particular, it includes rules that formed part of:

    - primary EU law (the overarching legal architecture of the EU treaties);
    - secondary EU law (policy-area specific legal frameworks in the form of regulations, directives, and decisions); and
    - tertiary EU law (detailed and technical provisions in the form of delegated and implementing acts).

13. This diversity is compounded by the fact that different elements of what is now REUL came to form part of UK law by different mechanisms, including:

    - Statutory Instruments made under s 2(2) of the European Communities Act 1972;
    - standalone Acts of Parliament pre-dating 2016; and
    - the European Union (Withdrawal) Act 2018 (EUWA).

14. There is no direct or inevitable correspondence between the EU and UK hierarchies of law. UK secondary (delegated) legislation is much more analogous to tertiary EU law than it is to secondary EU law. (Tertiary EU law contains technical detail and must not change the "essential elements of an area".[4]) However, this does not mean that the REUL found in UK Statutory Instruments is exclusively tertiary EU law, or vice versa. Any type of EU law could (at least in theory) have been implemented into UK law by a number of different means.

15. Section 7 EUWA addressed this complex issue for REUL which was retained directly in UK law via EUWA. However, the status of retained EU law that had already been implemented into UK law via Acts of Parliament or SI remained unchanged. As a consequence, important REUL which was initially transposed by SI (such as the Working Time Regulations 1998 or the Air Quality Standards Regulations 2010) remain as such.

16. Retained EU law is also diverse because it covers a wide range of policy areas, such as working hours, air quality, data protection, cybersecurity, child benefits, agency workers, energy and renewables, clean water, copyright, chemicals, medicines authorisation and food

[4] Treaty on the Functioning of the EU (TFEU) Article 290(1)

safety. Each of these areas may consist of some combination of primary, secondary and tertiary EU law, ranging from overarching legal constructs to detailed technical updates.

17. The diversity of REUL makes it questionable whether a single procedure will be appropriate for its future amendment. Both the policy content and the legal form matter when determining how law ought to be modified. Whether or not a policy area was previously an EU competence is unlikely on its own to be a meaningful basis for determining who should now make law in the UK and what oversight should attach to that process.

Amending REUL: Policy objectives and regulatory frameworks

18. The approach taken to the modification of REUL will be critical in shaping how the UK distributes and exercises the powers repatriated following EU exit. It will affect the way in which power is allocated between the legislature and the executive, between the legislature and regulators, among existing and new regulators, and between the nations of the UK. These are sensitive and politically important matters, which weigh against rushing or over-simplification. The UK's approach to regulating should be forward-looking and should promote democracy, transparency, engagement and quality.

19. The Government's 'Benefits of Brexit' policy paper posits the creation of a power to amend REUL "to deliver the UK's regulatory, economic and environmental priorities".[5] The paper outlines plans in over 30 policy areas, each of which includes a number of priorities. Some of these are regulatory and some not.

20. We consider there are four main ways that the Government could seek to amend REUL:

    - Option (i): taking a single power to do so in a single Bill;
    - Option (ii): taking multiple, policy-area specific powers in a single Bill;
    - Option (iii): introducing new pieces of primary legislation that amend REUL (and that might also take powers to do so); and/or
    - Option (iv): using existing powers in other Acts.

21. **Option (i)**, the taking of a single power to amend REUL, might maximise the speed and ease with which REUL could be amended. However, this would come at a cost in terms of Parliament's legislative scrutiny role. It is unclear how such a power could be drafted without it being excessively broad and thus transferring huge amounts of power from Parliament to the executive. Furthermore, a blanket power to amend REUL would risk perpetuating and entrenching the lack of control that Parliament has over policy decisions in areas previously covered by EU law.

22. The regulatory priorities in the 'Benefits of Brexit' policy paper are highly diverse. They include, for example:

[5] HM Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU*, January 2022, p. 33

- enabling a "secure independent digital marketplace based on a framework of standards, governance and legislation";[6]
- a "more innovative and tailored approach to aviation regulation";[7]
- "introducing new product categories, and other changes to the marketing of wine";[8]
- "a new system of regulation to ensure the sustainability of English football";[9] and
- "repealing the EU Port Services Regulation".[10]

It is not clear how a single power could be drafted to enable the enactment of all of these priorities without it being an egregiously broad power.

23. The broad power that would be involved in option (i) would not be comparable to either the section 8 EUWA power to 'correct deficiencies' or the section 2(2) ECA power to implement EU law obligations. Both of these were constrained, and neither could be used to simply enact whatever policy the executive wished. (Even so, there were serious criticisms made of both these powers.)

24. A better comparator for a single broad power to amend REUL might be the broad powers in sections 1 and 2 of the Legislative and Regulatory Reform Act 2006 (powers to "remove or reduce burdens" and / or ensure that regulatory activities are "transparent, accountable, proportionate and consistent"). The 2006 Act was heavily criticised for its attempts to bypass Parliament. A strengthened scrutiny procedure (the super-affirmative procedure) was included in the Act to enhance Parliament's oversight of the use of the powers. However, in some cases Legislative Reform Orders subject to this procedure have taken longer to complete the parliamentary process and become law than would have been the case had the matter been enshrined in a Bill.

25. Instead of a single broad power to amend REUL, a Bill could set out a number of disparate powers tailored to the various policy objectives outlined in the 'Benefits of Brexit' policy paper **(Option (ii))**. While this would provide for more targeted powers, it might create a 'Christmas Tree' Bill that would be difficult to scrutinise and lacking in coherence.

26. Alternatively, a range of powers in a single Bill could be designed around new 'regulatory principles'. However, those set out on pages 22-30 of the 'Benefits of Brexit' policy paper may be too general or political for this task. (They comprise "a sovereign approach", "leading from the front", "proportionality", "recognising what works" and "setting high standards at home and globally".)

27. Delivering a number of the Government's policy priorities may require new regulatory frameworks. New regulatory frameworks will, by definition, need primary legislation. Amending REUL in new pieces of primary legislation would be **Option (iii)**.

[6] HM Government, *The Benefits of Brexit: How the UK is taking advantage of leaving the EU*, January 2022, p. 44
[7] ibid, p. 57
[8] ibid, p. 64
[9] ibid, p. 65
[10] ibid, p.76

28. New primary legislation would present an opportunity to update REUL in each of the relevant policy areas. As well as amending REUL directly, a Bill covering a particular policy area could create powers tailored to the modification of REUL in the policy area concerned. This approach would reflect current practice. Many of the policy areas discussed in the 'Benefits of Brexit' policy paper in any case refer to recent or forthcoming primary legislation.

29. A further advantage of the primary legislation-based approach is greater certainty. Piecemeal or incomplete modification or removal of REUL may create vacuums and an absence of clear alternative instructions to regulators and other stakeholders. There would be a consequent risk of organisational culture adhering or reverting to previous behaviour, through bureaucratic inertia. A clear shift in policy through primary legislation would bring clarity and certainty over the desired changes in practice.

30. However, the primary legislation-based approach also has risks. Any powers to modify REUL in Bills that establish new regulatory frameworks must be accompanied by parliamentary scrutiny procedures that are responsive to the policy content of, and political interest in, the changes concerned (see paras. 36-44).

31. There may be existing powers on the statute book that can be used to modify REUL. Using such powers is **Option (iv)**. However, relying on these powers may be problematic given that they may have been designed to be used in the context of EU membership. Using powers in ways that were unanticipated at the time they were granted may prove controversial. The Genetically Modified Organisms (Deliberate Release) (Amendment) (England) Regulations 2022, made under powers in the Environmental Protection Act 1990, provides an example (see para. 33 below).

To whom does amendment of REUL matter?

32. Given the wide scope of REUL, modifications to it are likely to be of considerable interest to businesses, workers and consumers across the UK – that is, constituents. Amendment of REUL may also impact competitiveness, bureaucratic burdens and access to markets. Legal certainty is therefore crucial.

33. For example, the House of Lords Secondary Legislation Scrutiny Committee (SLSC) has recently drawn attention to the Genetically Modified Organisms (Deliberate Release) (Amendment) (England) Regulations 2022. It noted that:

> *"This instrument proposes a change in policy and regulation away from the current approach in retained EU law … The critical submissions we received, and the number of consultation responses indicate a significant interest amongst producers, consumers and the wider public in the issues*
>
> *…*
>
> *Given the interest in, and concerns about, policy relating to GMOs, including in the House during the passage of the Agriculture Bill, and the number of issues that this instrument in particular has raised, in part caused by the absence of the associated*

guidance, we see strength in the argument that primary, rather than secondary, legislation would have been more appropriate in this case".[11]

34. Many people and organisations are likely to both monitor and care about changes made to REUL. They will expect their elected representatives to have a say in how it is done.

35. Modification of REUL may also have important consequences for the UK's international legal obligations and domestic constitutional arrangements. Parliament may wish to have meaningful oversight of these matters, even if they do not receive the same degree of public interest as some policy decisions with a high media or campaign profile. For example, changes to REUL may impact:

    - the operation of the Trade and Co-operation Agreement (TCA) with the EU, in particular the level playing field;
    - other (current or prospective) international commitments of the UK;
    - the operation of the UK Internal Market; and
    - areas of devolved competence and relations between the nations of the UK (in particular with respect to the Northern Ireland Protocol).

Parliamentary scrutiny of delegated legislation

36. The Hansard Society has argued for a number of years that the procedures for parliamentary scrutiny of delegated legislation must be reformed.[12] Current arrangements prevent parliamentarians from being able to carry out their proper function as legislative scrutineers. The system is also confusing and convoluted, with a proliferation of different procedures. (There is a myriad of bespoke 'strengthened scrutiny' procedures – such as those for Remedial Orders, Legislative Reform Orders and Public Bodies Orders – on top of the four 'normal' ones: 'made/draft' and 'affirmative/negative'.)

37. The Society's view is that a complete overhaul of the delegated legislation system is required. We will be publishing proposals to this effect towards the end of 2022. Our comments on this issue are thus provisional pending the outcome of our Review (see paras. 7-9 above).

38. The enactment of any new delegated powers leaves Parliament stuck between a rock and a hard place – that is, with a choice between:

    - the creation of yet another bespoke scrutiny procedure, risking further complication and confusion; or
    - reliance on existing inadequate procedures.

    The dilemma is especially acute in the case of delegated powers as broad as those that Ministers may be contemplating with respect to the amendment of REUL.

[11] SLSC (2021-22), 29th Report, HL Paper 156, paras. 30, 32

[12] Fox, R. & Blackwell, J. (2014), *The Devil is in the Detail: Parliament and Delegated Legislation* (London: Hansard Society)

39. Given the exceptional circumstances, and the likelihood that the prospective 'Brexit Freedoms' Bill will precede root and branch reform of the delegated legislation system, we consider that the first of the two options above is preferable.

40. A way forward may be to devise a system by which the parliamentary scrutiny of modifications to REUL can be calibrated to the actual policy content of the change that is at issue and/or the level of political interest surrounding it.

41. At present, MPs spend a disproportionate amount of time scrutinising uncontroversial SIs because of decisions taken in a Bill often decades ago about the scrutiny procedure that should attach to the exercise of a power. The objective should be to ensure that MPs can focus their time and their scrutiny on SIs containing important and significant policy detail.

42. In designing a new scrutiny procedure, consideration should be given to the lessons to be learnt from the sifting of SIs under EUWA by the European Statutory Instruments Committee (ESIC) and SLSC.

43. Simply bolting a sifting mechanism onto existing scrutiny procedures (negative and affirmative) is problematic. These procedures do not provide for a particularly robust form of scrutiny. As such, the European Scrutiny Committee may wish to consider the merits of incorporating one or more additional element into the scrutiny process. For example:

    - scrutiny being undertaken by relevant Select Committees or other specialists;
    - mechanisms to secure more than one debate on an Instrument if follow-up scrutiny was deemed appropriate;
    - amendment of Instruments (either direct textual amendment or 'conditional' amendment whereby Members could indicate the changes they would like to see to an Instrument to bring it within the realm of acceptability for approval);
    - longer time periods for scrutiny;
    - consultation requirements;
    - stronger requirements in relation to supporting documentation; and/or
    - clearer requirements on the Government to explain Instruments' potential impact on the UK's international obligations and/or the devolution settlements.

44. The time pressures that applied during the EU-exit process do not apply in the same way to the process for the consideration of the future of REUL. This next stage of legislative change provides a valuable opportunity to pilot new approaches to the scrutiny of delegated legislation with potential benefits for MPs and their constituents.