Written submission by the Law Society of Scotland (REUL20008)

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law and Human Rights Sub-committee welcomes the opportunity to consider and respond to the House of Commons European Scrutiny Committee Inquiry on Retained EU Law; the progress and mechanics of reform. The Sub-committee has the following comments to put forward for consideration.

General Comments

Questions

1. Are the Government's plans for the reform of retained EU law unique in terms of scope and potential impact on the UK legal system, or have similar endeavours been undertaken in the past, whether in the UK or another jurisdiction?

Our comment

We note the use of the term "UK legal system" in this question. The UK is a unitary state but is composed of three separate legal systems that of England and Wales, Scotland and Northern Ireland each with their own legislature, courts and bodies of law. Acknowledgement of this diversity in terms of the legal systems between England and Scotland is a keystone of the legislation creating the United Kingdom in 1707.

Retained EU law was a new and unique concept (see *Retained EU Law; A Practical Guide, Eleonor Dubs and Indira Rao*) in domestic law created by the European Union Withdrawal Act 2018 (EUWA) sections 2–4. Section 6 of the EUWA defines retained EU law:

Retained EU law" means anything which on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time).

There were three categories of retained EU law:

i. EU derived domestic legislation, e.g., regulations and statutory instruments which implemented EU law when the UK was a member of the EU preserved in UK law by section 2 EUWA,

ii. Direct EU legislation which was directly applicable in the UK incorporated into UK law by section 2 EUWA; and

iii. Other EU rights and obligations under section 4 EUWA.

In addition, there are the categories of retained EU case law (comprising retained EU case law and retained domestic case law) and retained general principles under section 6 EUWA.

legislation.gov.uk explains that "EU legislation which applied directly or indirectly to the UK before 11.00 p.m. on 31 December 2020 was retained in UK law as a form of domestic legislation.." https://www.legislation.gov.uk/eu-legislation-and-uk-law .

The Retained EU Law (Revocation and Reform) Act 2023 (the Act) enables the amendment of retained EU law (REUL) and to removes the special features it has in the legal systems across the UK. The Act gives effect to policies that were set out in the Benefits of Brexit Report and the Government's review into the substance and status of REUL in September 2021. The Act:

Revokes 587 instruments of REUL listed in Schedule 1 to the Act and assimilates all REUL remaining on the statute book by the end of 2023;

Repeals the principle of supremacy of EU law from UK law by the end of 2023;

Facilitates domestic courts departing from retained case law;

Provides a mechanism for UK Government law officers and law officers in the devolved administrations to intervene in cases regarding retained case law, or to refer them to an appeal court, where relevant;

Repeals directly effective EU law rights and obligations in UK law by the end of 2023;

Abolishes general principles of EU law in UK law by the end of 2023;

Establishes a new priority rule requiring retained direct EU legislation (RDEUL) to be interpreted and applied consistently with domestic legislation;

Downgrades the status of RDEUL for the purpose of amending it more easily;

Creates a suite of powers that allow REUL to be revoked or replaced, restated or updated and removed or reformed so as not to increase the regulatory burden in relation to a particular subject area.

Imposes a duty to update the retained EU law dashboard;

Imposes a duty to periodically report to Parliament on retained EU law reforms and set out plans for further reform.

The Government's plans for the reform of REUL

Transposing law from a pre-existing constitutional structure to a new one is not a new idea especially when reordering the legal system after a significant constitutional change. There are a number of examples from the history of the legal systems which comprise those currently operating within the UK. We have three examples of legislative approaches which contain some similar characteristics to offer:

A. It happened after the Reformation in Scotland in 1560. Judge Ian Forrester, a former judge of the General Court of the Court of Justice of the European Union identified this example in the McFadyen Lecture 2018 entitled "Brexit: a Judicial View": https://www.scottishlawreports.org.uk/publications/macfadyen-lectures/brexit-a-judicial-view/. Judge Forrester commented that:

In 1560, the Papal Jurisdiction Act abolished the jurisdiction of the Pope in Scotland. A separate Act abolished idolatry and another prohibited the saying of the Mass. However, in many respects, even though the jurisdictional authority of the Pope had been abolished, Scotland did not eliminate all traces of the old religion,

far from it... In particular, classical canon law remained part of the law of Scotland, albeit rooted in the civil law of Scotland and not in the authority of the Roman Catholic Church. To quote the venerable Stair's Institutions:

This pontifical law extended unto all persons and things relating to the Roman church … as orphans, the wills of defuncts, the matter of marriage and divorce. And so deep hath this canon law been rooted, that, even where the Pope's authority is rejected, yet consideration must be had to these laws, … as containing many equitable and profitable laws, which because of their weighty matter, and their being once received, may indefinitely be retained than rejected. (James, Viscount Stair, Institutions of the Law of Scotland, Book 1, Title 1, ed. David M. Walker (Edinburgh and Glasgow, 1981) p. 82.).

B. When the United Kingdom was created by the Union of the Parliaments in 1707, the pre-existing statutes of the former English and Scottish Parliaments were not repealed but remained a legitimate source of law. The Union with England Act 1707 Article XVIII states:

That the Laws concerning Regulation of Trade, Customs and such Excises to which Scotland is by virtue of this Treaty to be lyable be the same in Scotland from and after the Union as in England and that all other Lawes in use within the Kingdom of Scotland do after the Union and notwithstanding thereof remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain With this difference betwixt the Laws concerning publick Right, Policy and Civil Government and those which concern private Right That the Laws which concern publick Right Policy and Civil Government may be made the same throughout the whole United Kingdom but that no alteration be made in Laws which concern private Right except for evident utility of the subjects within Scotland.

C. A third example is the departure of colonies from the British Empire. For example, the Nigeria Independence Act 1960 states in section 1:

> (1) On the first day of October, nineteen hundred and sixty (in this Act referred to as "the appointed day"), the Colony and the Protectorate as respectively defined by the Nigeria (Constitution) Orders in Council, 1954 to 1960, shall together constitute part of Her Majesty's dominions under the name of Nigeria.
>
> (2) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Nigeria or any part thereof as part of the law thereof, and as from that day—
>
> (a) Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Nigeria or any part thereof; and
>
> (b) the provisions of the First Schedule to this Act shall have effect with respect to legislative powers in Nigeria.
>
> (3) Without prejudice to subsection (2) of this section, nothing in subsection (1) thereof shall affect the operation in Nigeria or any part thereof on and after the appointed day of any enactment, or any other instrument having the effect of law, passed or made with respect thereto before that day.

Provisions such as these were included in many Acts of Parliament as the process of decolonisation proceeded in the mid-20th century. Dr Garner cited the Irish Constitution Article 73 in the oral evidence session HC376 on 6 December 2023 at Q6,: "I think an interesting specific example of this is in Ireland. Article 73 of the Irish Constitution held that all previous laws would continue in full force but there is a caveat, that this would only be to the extent that it was not inconsistent with Irish law going forward.". That provision was found in the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922: Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, Schedule 1 (irishstatutebook.ie) and the Irish Free State Constitution Act 1922: ukpga_19220001_en.pdf (legislation.gov.uk). That Constitution was repealed by the Irish constitution of 1937 which provided in Article 50.1: "1 Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of

this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.": Irish Statute Book.

a) If example exists, what can be learnt from these reforms which can usefully guide the development of the REUL programme?

There are a number of lessons to be learned:

1. Amendments will be made over time which will transform the retained law from the law applicable immediately after the constitutional change to law which reflects the culture and requirements of Society at a future point in time. In terms of assimilated law which is exercised in the devolved context the procedures of the Scottish Parliament are able to deal with reform or revocation of that law.
2. To be effective law needs to change to meet the challenges of modern circumstances.
3. The demands of Good Law, clarity, cohesion, comprehensibility and accessibility will require future amendment of the retained law.

2. What progress has the Government made towards the reform of retained EU law?

The Retained EU Law (Revocation and Reform) Act 2023 received Royal Assent on 29 June 2023 providing for many regulatory reforms and the removal of REUL from UK law. Under the Act, REUL which was not revoked by 31 December 2023 became assimilated law which is not interpreted in line with EU principles of interpretation. Those principles were excised from domestic law by section 4 of the Act from 1 January 2024.

The Retained EU Law public dashboard has been updated and contains 6,757 REUL laws: Retained EU Law dashboard. In 2022 we estimated that there could be more than 5000 REUL laws in effect. That the dashboard contains as many as it does confirms that there was no accurate count in the pre-legislative review.

We understand that the UK Government will continue to update the Dashboard as departments identify where more legislation can be amended, repealed or replaced.

Section 17 of the Act contains provision for the Government to publish and lay before Parliament a report on the revocation and reform of retained EU law. The first reporting period ended on 23 December and the Government published the first report to the UK Parliament in December 2023: https://assets.publishing.service.gov.uk/media/65ae36e4751546000d7b4a80/retained-eu-law-parliamentary-report-june-2023-december-2023.pdf

The legislation listed in Schedule 1 expired on 31 December (under section 1) as were Retained EU rights, powers and liabilities (under section 2). The principle of the supremacy of EU law and the general principles of EU Law were abolished at the end of 2023 under sections 3 and 4 respectively. Under section 5 on 1 January 2024 REUL was renamed assimilated law.

a) What substantive revocations of retained EU law will be made by the retained EU Law (Revocation and Reform) Act schedule and have been made under the Act by secondary legislation?

The Schedule includes REUL which the Government has described as “defunct and unnecessary” or “burdensome and duplicative” such as Commission Implementing Decision (EU) 2018/1522 of 11 October 2018 laying down a common format for national air pollution control programmes under Directive (EU) 2016/2284 of the European Parliament and of the Council on the reduction of national emissions of certain atmospheric pollutants: Schedule of retained EU law - GOV.UK (www.gov.uk). The subject matter of these Directives has been replaced by section 72 (Local air quality management framework) and Schedule 11 of the Environment Act 2021: Environment Act 2021 (legislation.gov.uk).

The 2017 port services regulation and The Port Services Regulations 2019, were also included in the Schedule and repealed at the end of 2023. The Government’s reason for repealing these regulations was that they set out reporting and consultation requirements designed for the largely publicly-owned EU ports sector, which were inappropriate for the predominantly private-sector UK port operators: Repealing the EU port services legislation - GOV.UK (www.gov.uk).

The Department for Business and Trade maintains a webpage entitled REUL (Revocation and Reform) Act 2023 statutory instruments - GOV.UK (www.gov.uk) which details the list of statutory instruments (SIs) which will be laid under the REUL (Revocation and Reform) Act 2023 and categorises them according to the scrutiny mechanism. There are currently 15 affirmative, 5 negative to sift, 2 negative and 1 no procedure instruments on the list.

b) What substantive changes to retained EU law have been made other than by the Retained UK Law (Revocation and Reform) Act?

The Financial Services and Markets Act 2023 undertakes considerable changes to REUL. As the Explanatory Notes to the House of Lords print of the bill specify: “The Bill implements the outcomes of the Future Regulatory Framework (FRF) Review. The Bill therefore revokes retained EU law relating to financial services and enables HM Treasury and the financial services regulators to replace it with legislation designed specifically for UK markets, in a way that builds on the UK’s existing approach to financial services regulation: Financial Services and Markets Bill (parliament.uk) (paragraph 2).

Finance Acts will provide further legislation relating to tax and assimilated law. Legislation before the Retained EU Law (Revocation and Reform) Act 2023 included the Taxation (Cross-border Trade) Act 2018, which disapplied direct EU regulations in relation to customs duty, VAT and excise and introduced a UK tariff and domestic customs regime and the Taxation (Post Transition Period) Act 2020, which amended VAT treatment for the import of low value goods.

The Procurement Act 2023 was enacted for the purpose of reforming the UK public procurement regime following exit from the EU to create a system which was not based on transposed EU Directives.

We note that the Scottish Government has intimated its regret that Commission Implementing Decision (EU) 2018/1522 of 11 October 2018 and the related National Emission Ceilings Regulations 2018 (SI 2018/129) sunsetted at the end of 2023 by virtue of Schedule 1 without the opportunity being taken to preserve these instruments until appropriate arrangements could be agreed with Devolved Governments.

c) Is the current pace of reform appropriate?

The First REUL Parliamentary Report states in its summary that: *Looking further forward, this Report provides a roadmap for Government’s ambitious proposals to revoke and reform further REUL. The Government is on*

track to reform or revoke over half of the entire stock of REUL accrued in the more than 40 years that the UK was a member of the EU by June 2026.

Whether that objective in respect of assimilated law will be attained remains to be seen.

3. How should the Government approach the 'mechanics' of reforming retained EU law?

a) What regard should be given to:

- **Political-level ownership. Should the Government appoint a senior Minister to act as a REUL 'Tsar' with responsibility for delivery across Whitehall?**

This is a political matter on which the Society has no view.

- **The political-level structures required to deliver an efficient and effective reform programme e.g. should the Government stand up a 'Small Ministerial Group' – or similar – charged with oversight of REUL reform?**

This is a political matter on which the Society has no view.

- **Working with the Devolved Administrations and structures for managing policy divergence, such as UK Common Frameworks?**

The UK and Scottish Governments should work together in the interest of creating assimilated law which operates for the benefit of individuals and businesses and is clear, consistent, effective and accessible.

The Scottish Government has agreed with the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee that bi-annual Scottish Government REUL Act updates will be sent to that Committee, to follow each UK Government report. The arrangements are included in Annex B to the letter from Clare Adamson MSP Convener of the Constitution, Europe, External Affairs and Culture Committee to the Cabinet Secretary for Constitution, Europe and External Relations dated 30 January 2024.

The Scottish Government detailed that the *"core of updates will be a list of REUL Act SSIs and consent-engaging UK SIs as laid/notified in the relevant update period. • For this purpose, an instrument made by Scottish or UK Ministers under other powers but with the primary purpose of directly handling REUL Act changes that took effect on 1 January 2024 will be listed, for example the Importation of Animals and Related Products (Miscellaneous Amendment and Revocation) (Scotland) Order 2023. • The Scottish Government will incorporate "forward look" information on assimilated law policy including with regards to primary legislation that includes delegated powers recognisable to REUL Act powers, to the extent possible and meaningful given that Scottish Ministers do not share UK Ministers' deregulatory and divergent agenda for the future treatment of assimilated law."*

UK Statutory Instrument proposals are given consideration and potential consent in principle and notification under the Statutory Instrument Protocol with the Scottish Parliament and the Scottish Government which provides that:

"*10. It is expected that UK Ministers will seek the consent of Scottish Ministers whenever they propose to make secondary legislation containing provisions within devolved competence in relation to matters within the competence of the EU until immediately before IP completion day (31 December 2020 at 11pm). This should apply irrespective of whether there is a statutory obligation on UK Ministers to obtain such consent.*
11. It is recognised that Scottish Ministers will normally wish to give such consent where the policy objectives of UK and Scottish Ministers are aligned and there are no good reasons for having separate Scottish subordinate legislation.

12. However, it is also recognised that the Scottish Parliament should be able to scrutinise the giving of such consent by Scottish Ministers. Such scrutiny should be effective and proportionate. The Scottish Parliament should be given sufficient information and time to carry out its scrutiny function."

The scope of the protocol covers secondary legislation to be made by UK Ministers that include provisions that are within devolved competence and relate to matters within the competence of the EU until immediately before IP completion day (31 December 2020 at 11pm).

The Society considers that the UK Common Frameworks structure was the most successful aspect of intergovernmental relations to emerge from the Brexit process. The UK Government and the devolved administrations made progress on agreeing the majority of the frameworks in provisional form. However, in absence of a functioning Northern Ireland Assembly and Executive, the existing provisional frameworks cannot be finalised, nor can any further progress be made on the four remaining unpublished frameworks. It is disappointing that further development of the Common Frameworks programme is not possible. Re-establishment of a functioning Northern Ireland Assembly and Executive should be a priority for so many reasons including further work on the Common Frameworks programme.

On 24 October 2023, the Common Frameworks Scrutiny Committee Chair, Baroness Andrews, wrote to Rt Hon Michael Gove MP, Minister for Intergovernmental Relations, summarising the work and conclusions of the Committee since its appointment in September 2020 and reporting on the decision to disband the Committee: Letter from Baroness Andrews to Michael Gove MP on the Common Frameworks Programme and the Common Frameworks Scrutiny Committee .

- **The number of civil servants required; their skill profile e.g. policy experts, lawyers and project managers; and levels of seniority required to drive reform?**

The Cabinet Office is best placed to make these assessments.

- **Structures for intra-and inter-departmental working?**

There should be adequate provision for intra-and inter-departmental working including across all the Administrations in the UK.

- **Engagement with experts external to Government e.g. scientists with expertise in reforming technical regulation?**

We agree that engagement with experts in many fields is essential to ensure that the reform of assimilated law is properly carried out.

- **Engagement with businesses and people affected by possible reforms?**

Adequate consultation with those affected by reform of Retained EU law is essential to make sure that the resulting outcome is good law which is clear, effective, efficient and achieves its objective.

- **Parliamentary scrutiny?**

The Government should ensure that each bill which reforms or revokes Retained EU law will be properly consulted upon and the results of the consultation will be published along with any relevant impact assessments. The Government should ensure that each bill receives adequate Parliamentary scrutiny in terms of provision of time for debate. Statutory Instruments which reform or revoke Retained EU law should similarly be consulted on where they make substantive changes to the law as it transitions from Retained EU law to assimilated law.

- **The accessibility and clarity of the statute book?**

In the foreword to *Legislating for the United Kingdom s withdrawal from the European Union* (CM 9446, 2017) the Prime Minister, Teresa May MP, stated “Our decision to convert the ‘acquis – ’the body of European legislation – into UK law at the moment we repeal the European Communities Act is an essential part of this plan.

This approach will provide maximum certainty as we leave the EU. The same rules and laws will apply on the day after exit as on the day before. It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate”.

If we accept the premise that retaining EU law in UK law provided “the maximum certainty” as the UK left the EU, then any particular reforms or revocations should ensure that the principle of “maximum certainty” along with clarity and accessibility should be foremost in the objectives of Government. This is clearly a matter of significant importance for those individuals and businesses affected by the new category of assimilated law and their advisers.

4. What broader principles of good governance and administration should the Government bear in mind when reforming retained EU law, including the Office for the Internal Market as outlined in section 46 of the UK Internal Market Act 2020?

We have no comment to make.

19 February 2024