

Retained EU Law (Revocation and Reform) Bill

Equality and Human Rights Commission briefing for House of Lords Second Reading

Summary

1. The Equality and Human Rights Commission (the Commission) is a statutory body established by the Equality Act 2006. We are an independent UN-accredited National Human Rights Institution, and Britain's equality regulator. Parliament gave us powers to advise on the equality and human rights implications of laws and proposed laws, and to publish information and advice, including to Parliament, on any matter related to equality and human rights.
2. The Retained European Union Law (Revocation and Reform) Bill ('the Bill') would overhaul a body of UK domestic law, known as 'retained EU law' (REUL), created by the EU (Withdrawal) Act 2018 (EUWA 2018) as amended by the EU (Withdrawal Agreement) Act 2020, and which came into existence at the end of 2020. The Bill allows for the revocation of certain REUL and gives ministers the power to replace, restate or update certain REUL. An estimated 3,800 pieces of legislation have been identified as being within scope of the Bill, of which the UK Government has so far added around 2,400 to its ['Retained EU Law Dashboard'](#).
3. The Commission's concerns about the Bill fall into five categories:
 - a) Uncertainty about the Government's policy intentions and potential effects on equality and human rights protections
 - b) The lack of parliamentary scrutiny of potential changes
 - c) The limited time available before the proposed 'sunset' date
 - d) Legal uncertainty resulting from the Bill

- e) The implications for devolution and the Union
4. Overall, the breadth of law within the scope of the Bill has considerable implications for equality and human rights. These include, but are not limited to, legislation on parental leave, paid annual leave, rights for part-time workers, maximum hours for HGV drivers, and other employment rights. The Bill could also impact on laws on minimum rights for refugees, and disabled people's access to rail and air transport.
 5. The Bill gives the Government broad powers in relation to REUL with little opportunity for parliamentary oversight. It is unclear how the Government intends to exercise the powers contained in the Bill.
 6. The proposed REUL 'sunset' date of December 2023 provides insufficient parliamentary time to scrutinise the statutory instruments which could have a significant impact on equality and human rights law. There is also likely to be insufficient time for the UK Government to comply with its legal obligations in respect of each item of REUL under the Public Sector Equality Duty of the Equality Act.
 7. The Bill risks creating legal uncertainty by altering the way in which the courts can consider retained EU and domestic case law.
 8. The Bill also has implications for devolution, including by giving UK Government ministers powers to make decisions on devolved matters.

Policy uncertainty and potential equality and human rights impacts

9. The Bill covers at least 3,800 pieces of legislation, which broadly fall into 300 separate policy areas.
10. Clause 15 of the Bill creates a power to revoke REUL without replacing it, or to replace it with alternative provision. Replacement regulations may achieve similar policy objectives, but there is no requirement for them to do so. Clause 15 states that the overall effect of replacement provisions must not increase the regulatory burden, suggesting that the Government's intention is to reduce rather than strengthen or update UK regulation. The Government has given

little indication of the policy objectives that will guide its decisions on revoking or replacing REUL, nor how decisions will be made consistent across Government departments. This will limit Parliament's ability to safeguard important business and civil society interests, including on equality and human rights laws.

11. The Bill does not apply to financial issues, which are instead covered by the Financial Services and Markets Bill. This follows a positive proposal process, rather than through 'sunsetting', thereby offering opportunities for strengthened parliamentary scrutiny. This approach would be preferable to REUL too.
12. The Bill covers legislation on limits on working time, the right to paid holiday, rights for temporary and agency workers, and parental leave. These are important legal protections for all UK workers which have specific impacts for people with certain protected characteristics under the Equality Act, such as sex and pregnancy and maternity. Any negative impacts on people sharing protected characteristics must be identified and mitigated by Government.
13. We are concerned at the potential impact of the Bill on workers with the protected characteristics of sex and pregnancy and maternity. This is because the workers' rights at risk, such as maternity and equal pay, and parental leave, disproportionately affect women. There may also be negative economic impacts if the ability of women to participate in the labour market is eroded.
14. Other REUL with implications for equality and human rights include protections for child witnesses in sexual offence cases, standards for the treatment of refugees, asylum seekers and displaced persons, and measures to support disabled people's access to rail and air travel. We urge the Government to provide assurances that these protections will be retained.
15. We also urge the Government to assess REUL policy by policy, or sector by sector, including by setting out its policy objectives, to allow for full parliamentary scrutiny and ensure compliance with the PSED. This should include engagement with those with protected characteristics, employees, employers and service providers, and their representatives.

Scrutiny

16. The Bill grants powers to UK Ministers, at departmental level, to revoke, amend or preserve REUL. Unless preserved or amended, all REUL will be revoked ('sunsetting') at the end of 2023. We are concerned at the lack of parliamentary scrutiny provided by this process.
17. Clause 11 revokes the parliamentary scrutiny safeguards in Schedule 8 to EUWA 2018, which apply to the amendment or revocation via secondary legislation of 'subordinate legislation made under section 2(2) of the European Communities Act 1972', which is a category of REUL. These safeguards include the provision of explanatory statements, a 28-day consultation period for parliamentary committees to comment on the proposed amendment or revocation of a statutory instrument, and the use of the affirmative rather than the negative scrutiny procedure to ensure that a vote takes place in Parliament prior to the modification or revocation of a REUL statutory instrument.
18. Such scrutiny does not apply to any statutory instruments that revoke, restate or replace REUL or assimilated law (any REUL in existence after the end of 2023), even if the statutory instruments implement substantive changes in the law or weaken parliamentary safeguards.
19. Clauses 12-14 give UK Ministers powers to restate or reproduce REUL or assimilated law. Ministers can thereby make changes to legislation to resolve ambiguities, doubts or anomalies or to improve clarity or accessibility. Any such restatement may re-apply EU interpretive principles, such as the supremacy of EU law, if considered appropriate. These powers are subject to the affirmative procedure if the regulations amend primary legislation. Ministers can otherwise choose to use the negative or affirmative procedure.
20. Clause 15 enables the revocation and replacement of REUL through secondary legislation. Ministers have broad powers under this Clause. They can choose to make alternative provision, with no requirement for the new regulations to pursue the same or similar objectives. Where such alternative provision is made, regulations will be subject to the affirmative procedure. The affirmative procedure must also be used if the regulations confer a power to make subordinate legislation or create a criminal offence. Otherwise, ministers

can choose the negative or affirmative procedure. Further, Clause 16 outlines that ministers can change secondary REUL as they consider appropriate 'to take account of changes in technology or developments in scientific understanding', which is within to individual ministers' power to determine. Clause 16 also applies indefinitely to REUL and to the new regulations that replace REUL, so ministers could change this legislation in perpetuity. We are concerned that Clause 16 is only subject to negative scrutiny procedure, which offers little opportunity for parliamentary scrutiny.

21. Schedule 4 applies a sifting system for Statutory Instruments in relation to Clauses 12 (power to restate REUL), 13 (power to restate assimilated law or sunsetted EU rights) and 15(2) and (3) (power to replace secondary REUL). The sifting procedure allows a parliamentary committee to recommend that a piece of secondary legislation be upgraded from the negative procedure to the affirmative procedure. However, the Government is not obliged to accept such a recommendation if it publishes a statement explaining why it does not.
22. Although parliamentary committees will be able to sift negative procedure Statutory Instruments made under the Bill, their ability to do so in practice may be limited by the large number of policy areas within the Bill's scope, again restricting adequate debate and scrutiny. Furthermore, if legislation is sunsetted, which is the default position if no action is taken, then there will be no opportunity for parliamentary scrutiny at all.
23. Given the potential impacts of the Bill on equality and human rights, we consider the scrutiny provisions in the Bill to be inadequate. The Bill should be amended to ensure the effective scrutiny of any regulations which could result in changes to equality and human rights protections. This could include reinstating the provisions in the EUWA 2018 that act as scrutiny safeguards, such as the provision of explanatory statements, a 28-day consultation period for parliamentary committees to comment on the proposed amendment or revocation of a statutory instrument, and the use of the affirmative rather than the negative scrutiny procedure.

24. We also ask that the Bill be amended to require ministers to lay before Parliament a list of legislation to be revoked, in advance of the sunset deadline, to enable Parliament to consider and, if necessary, amend the list.

Sunset provisions

25. The Bill contains a provision that will revoke or ‘sunset’ any REUL by default by 31 December 2023, unless ministers actively decide to save it (Clause 1) or extend the date of revocation (Clause 2).
26. Clause 3 provides that any retained rights, powers and liabilities that are part of REUL because of section 4 of the EUWA 2018 will also be revoked by 31 December 2023. This includes treaty rights including Article 157 of the Treaty on the Functioning of the European Union, which covers equal pay for equal work. There is no extension of time available for the sunseting of these rights.
27. Given the volume of REUL, with ongoing uncertainty about the exact legislation within scope and the range of policy areas affected, we consider that there is insufficient time for the Government or Parliament to consider each item adequately. Indeed, it is likely that some REUL will not appear on the ‘dashboard’ and may therefore fall away without any analysis or scrutiny.
28. Nor is there likely to be sufficient time for the Government fully to comply with its obligations under the Public Sector Equality Duty of the Equality Act. This requires departments, when considering changes to the law, to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, to advance equality of opportunity between people who share a protected characteristic and those who do not, and to foster good relations between groups of people.
29. No section of the Bill allows for the reinstatement of revoked law. Thus, if significant legislation were sunseting by accident or omission, it could not be reinstated without primary legislation.
30. The 2023 sunset deadline should be extended significantly. This could be done using powers set out in Clause 2 of the Bill, to June 2026. The power to extend the sunset under Clause 2 should also be extended so it applies to the sunset deadline in Clause 3. However, this may still not provide adequate

time for all policy areas to be considered and scrutinised so there should be sufficient flexibility to extend the deadline further until thorough analysis of all in-scope legislation has been carried out by Departments, and subject to the parliamentary scrutiny mentioned previously in this briefing.

Legal uncertainty

31. Clause 7 relaxes the current rules that apply to courts and tribunals when considering retained EU and domestic case law. It requires higher courts¹ to have regard to certain factors in considering whether to depart from retained EU case law or retained domestic case law, including that decisions of a foreign court are not (unless otherwise provided) binding, and whether the retained case law restricts the development of domestic law. First instance courts² will be able to refer points of retained case law to an appellate court, which can then issue a binding decision on whether the lower court should depart from the retained case law.
32. These provisions create uncertainty about how cases relating to retained case law will be decided. Cases in the lower courts may take longer while complex questions about the status of retained case law are considered and referred to higher courts. Retained case law is regularly considered by the courts and tribunals when interpreting provisions of the Equality Act 2010. We are concerned at how the Bill will affect the interpretation of the Equality Act, and therefore the rights of people with protected characteristics.
33. We therefore urge the Government to publish an assessment of the potential impact of this change on the courts and on litigants, with steps taken to mitigate any risk of increases in the time and cost of litigation, particularly in relation to equality law.

Devolution and the Union

34. The Bill creates new powers under which UK Government ministers will not be required to seek consent from the devolved governments of Scotland and

¹ Such as the Court of Appeal in England and Wales or the Inner House of the Court of Session in Scotland.

² Such as the High Court, Tribunals or the Outer House of the Court of Session in Scotland.

Wales when making decisions about REUL. Indeed, the Bill allows for anything previously regulated by REUL to be amended, changed, or replaced, across the entirety of the UK.

35. This means the UK Government may exercise new powers in areas of devolved competence. Many of these areas, such as transport, health, housing, and education, have implications for equality and human rights. The Commission is the statutory regulator of the Equality Act across Britain and has the role of the UN-accredited National Human Rights Institution for England and Wales, and for Scotland in respect of matters reserved to the UK.
36. It is important that the devolved administrations should be able to consider all REUL relevant to their jurisdictions. They should be allowed sufficient time to do so. Clause 2 of the Bill gives Crown ministers the ability to extend the sunset clause for REUL until 23 June 2026, but this power does not apply to ministers in the devolved governments. We noted that, at Commons Second Reading of the Bill, the UK Government refused a Welsh Government request for the REUL dashboard to be updated to identify which legislation is reserved and which is devolved, and how Welsh legislation might be affected.
37. Public authorities in Wales and Scotland have specific duties under the Equality Act to help them to comply with the Public Sector Equality Duty. We are concerned that the volume and speed of changes required by the Bill will make it hard for devolved governments and public bodies in Wales and Scotland to comply with the law such as by publishing equality impact assessments. This risks regression in equality and human rights standards.
38. We urge the UK Government to develop a more detailed dashboard indicating whether legislation is devolved or has devolved implications. This would help devolved governments to determine the implications for equality and human rights in Scotland and Wales of changes to UK legislation.
39. We also suggest that devolved governments are allowed sufficient time to consider equality and human rights implications of the revocation of REUL by also giving ministers in devolved governments the power to extend the sunset deadline in respect of REUL with devolved implications.