



Retained EU Law (Revocation and Reform) Bill

House of Lords

**Response to marshalled list of amendments
at Committee Stage**

Amendments 1-63

22 February 2023

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Introduction

1. JUSTICE is an all-party law reform, rule of law and human rights organisation. It is the UK section of the International Commission of Jurists.
2. **JUSTICE has already produced a briefing on the Retained EU Law Bill (“the Bill”) as a whole, which can be found [here](#).** It provides case studies and highlights 3 key issues:
 - a. First, the Bill’s sunset clauses will rush the huge task of reviewing retained EU law (“**REUL**”). The Bill imposes unnecessary deadlines, placing an unnecessary strain on Government resources and posing an unnecessary risk to individuals and businesses.
 - b. Second, the Bill is a “Skeleton Bill” which:
 - i. gives insufficient information to the public about the policy which will guide decisions to keep or delete law in different areas (e.g. employment law, environmental law), with no obligation to consult the public; and meanwhile
 - ii. gives the Government excessive power to significantly change the objective, substance and impact of the law, with very little Parliamentary scrutiny.
 - c. Third, the Bill seeks to give courts mandatory factors to consider when determining whether to overturn retained case law. These factors are unnecessary and neglect the importance of legal coherence, clarity and certainty.
3. **JUSTICE’s recommendations for amendments are in three corresponding categories:**
 - a. First, the sunset clauses should be removed from the Bill. At a minimum, we support amendments to clauses 1-3 of the Bill which could minimise the impact of the sunset clauses on Parliamentary scrutiny, legal uncertainty and the inadvertent deletion of law (including of law in areas of devolved competence).
 - b. Second, the use of a “Skeleton Bill” to reform so much law with executive powers should be reconsidered. At a minimum, the powers in clause 15 and 16 must be limited.
 - c. Third, the mandatory factors in clause 7 for courts considering whether to overturn case law should be deleted, or at a minimum legal certainty should be included as a factor.
4. This briefing highlights amendments in the [marshalled list](#) supported by JUSTICE **in the first category – the sunset clauses** – ahead of the first day of Committee on 23rd February 2023. An additional briefing to follow will address amendments to the second and third categories – i.e to clause 7 and 12-16 – in the week commencing 27th February 2023.

5. Both Clauses 1 and 3 impose sunsets on retained EU law (“REUL”). Clause 1 affects legislation, both EU-derived domestic secondary legislation and direct EU legislation (mostly EU regulations).¹ Clause 3 affects the directly enforceable EU rights, powers, liabilities, obligations, restrictions, remedies and procedures available in our domestic law.²
6. In JUSTICE’s view the sunset provisions should be removed alongside a wholesale reconsideration of the Bill’s approach to reviewing and reforming REUL. The amendments for the Committee stage offer a substantial opportunity for peers to probe their use:
 - a. Is the task feasible within the current deadlines, taking its scale and Government’s capacity into consideration?
 - b. Will the approach impact areas of devolved competence? With what results and with what impact on the Sewel Convention?
 - c. Will the law that remains after the sunset be clear, accessible and therefore be reasonably capable of being understood by the public, i.e. will there be a sufficient degree of legal certainty?
 - d. Is it constitutionally right for the entire task to be vested in the executive, without consultation requirements with the public and without Parliamentary involvement?
 - e. And following on from this, will the law that remains after the sunset be a *good* result? I.e. what safeguards in the Bill ensure the Government will make the right decisions to save and delete the right law, so that the result is a new legal landscape which works in the best interests of the UK: its individuals, businesses, and environment?
7. JUSTICE has set out below the types of amendments tabled which may assist in probing for answers to the above questions, with a focus on the amendments which fundamentally challenge the sunset approach.

A. Carve outs for specified areas

8. **Amendments 1 to 25, 29, 30, 33-40** seek to “carve out” exceptions to the sunset to save particular pieces or areas of REUL. These exceptions are broad in scope, ranging from employment and health and safety provisions to consumer protection and environmental

¹ Retained by sections 2 and 3 respectively of the EU Withdrawal Act 2018.

² These were originally recognised domestically by section 2(1) of the European Communities Act 1972 and were thereafter retained by section 4 of the EU Withdrawal Act 2018.

regulations. Other specialist organisations are best placed to brief on the individual merits of these carve outs; for example, on the environmental carve out amendments we would refer peers to the Green Alliance's briefing [here](#).

9. Whilst JUSTICE does not think these carve outs on their own are a satisfactory solution to the issues posed by the sunset approach, they are useful at this stage of the Bill for four reasons:
 - a. They probe further the Government's thinking and any (lack of) clarity on different areas to be retained or lost.
 - b. In their totality they also have the effect of underlining the sheer breadth of REUL on the chopping block and the extensive industries and sectors it impacts.
 - c. There is no role for Parliament in scrutinising what REUL is deleted by the sunsets, since all the power to keep or delete is vested by the Bill in ministers. As such, these carve out amendments are clunky but inevitable, as the only way of Parliament being heard in what it wants to save from sunset.
 - d. Finally, further carve outs highlight the risk of the sunsets undermining the UK's Common Framework Agreements (**amendments 34-36**) and the UK's international legal obligations under the Trade and Cooperation Agreement ("TCA") (**amendment 30**). Furthermore, on devolution carve outs, see below.

B. Extending the deadline

10. **Amendments 27 and 28** seek to extend the Clause 1 sunset deadline to 2028. **Amendment 56** removes the longstop date to which the Clause 1 deadline can be pushed back, currently 2026. **Amendment 59** extends the Clause 3 sunset deadline to 2028, and **amendment 61** provides the power to push it back, which is currently a power in the Bill only available to the Clause 1 sunset deadline, not Clause 3.
11. Again, whilst such amendments alone are not a satisfactory solution to the issues posed by the sunset clauses, JUSTICE considers they will be useful at this stage to probe the Bill's current deadlines. The following points are relevant:
 - a. **There is no evidence that the 31 December 2023 deadline is derived from any time estimate of how long the exercise will take**, taking Government capacity and the size of the task into account.

- b. **The size of the task is ever-growing.** The online REUL Dashboard, created to provide a central resource for the public of REUL, originally catalogued a total of 2,417 pieces of REUL. However, this was recognised as being far from comprehensive during the Commons stages, and the total now stands at 3,745.
- c. **Ministers cannot push back the sunset clause to make more time to identify REUL instruments.** The Clause 2 power to elongate the period before sunset (up to 23 June 2026) requires that the instrument or legislation be specified or described. If an instrument has not yet been identified, it cannot be exempted. Therefore there is “a significant risk,” as identified by the Secondary Legislation Scrutiny Committee, “of inadvertent omission and that some pieces of REUL will fall by accident.”³
- d. **The Government is particularly unprepared for the Clause 3 sunset.** There is no power at all in the Bill to delay clause 3,⁴ as there is for clause 1. Despite this the identification REUL which falls under Clause 3 has hardly begun: of the 3,745 pieces of REUL identified so far on the REUL Dashboard, **concerningly only 28 rights, powers etc caught by the Clause 3 sunset have been identified.**
- e. **Extensions to 2026 may prove difficult** since the elections of both the Scottish and Welsh Parliaments are due in 2026.

C. Devolved impacts

12. **JUSTICE has significant concerns about the impact of the Bill on devolved competencies for the following four reasons:**

- a. The central Government created the REUL Dashboard and it is not being updated in partnership with devolved governments.⁵

³ [Losing Control?: The Implications for Parliament of the Retained EU Law \(Revocation and Reform\) Bill](#), 2 Feb 2023, HL Paper 145

⁴ Clause 3 deletes all **directly enforceable EU rights, powers, liabilities, obligations, restrictions, remedies and procedures available in our domestic law.** These were originally recognised domestically by section 2(1) of the European Communities Act 1972 and were thereafter retained by section 4 of the EU Withdrawal Act 2018.

⁵ The REUL Dashboard explicitly states it is “not intended to provide an authoritative account of REUL that sits with the Competence of the Devolved Administrations.”

- b. The sunset clause is being imposed unilaterally on devolved administrations, regardless of their capacity to identify, consider and decide what should be revoked, restated or amended.⁶
- c. Devolved authorities cannot extend the sunset up to 23 June 2026; this power in clause 2 is only open to a “Minister of the Crown”.
- d. There is no limitation on the powers of central government ministers to revoke, restate or amend legislation in areas of devolved competence.

13. As a result, both the Scottish and Welsh Governments have recommended consent is withheld.⁷ The Senedd’s Legislation, Justice and Constitution Committee has just published its report on the Legislative Consent Memoranda, echoing the Welsh Government’s view that consent be withheld.⁸

14. Angus Robertson MSP, Counsel General and the Scottish Government’s Cabinet Secretary for Constitution, External Affairs and Culture, has stated the Bill is “*a direct assault on devolution*”,⁹ whilst Mick Antoniw MS, General Counsel for Wales and Minister for the Constitution, described the Bill as giving UK government ministers “*unfettered authority to legislate*”.¹⁰

15. Meanwhile, Northern Ireland’s position is extremely unclear: the impact on the NI Protocol requires careful and separate consideration¹¹ and the absence of a sitting executive poses a fundamental question to who and how REUL affecting NI’s devolved competence will be done by the deadline. The Northern Ireland (Executive Formation) Bill currently before Parliament will extend the period for Executive formation by a year to 18 January 2024, after the current sunset.

16. As such JUSTICE supports the following amendments which seek to safeguard the devolved competencies and which probe further into the Government’s thinking on the

⁶ Mick Antoniw MS, ‘[Written Statement: The Retained EU Law \(Revocation and Reform\) Bill](#)’ (Wales Government, 3 November 2022)

⁷ Letter from Angus Robertson to Grant Shapps (8 November 2022); Mick Antoniw MS, ‘Written Statement: The Retained EU Law (Revocation and Reform) Bill’ (Wales Government, 3 November 2022)

⁸ Available here: <https://senedd.wales/media/3fcc3eks/cr-ld15687-e.pdf>

⁹ PBC Deb (Bill 156) 8 November 2022, col 77

¹⁰ Written statement, 3 November 2022

¹¹ Not limited to the sunset clause. See Dr Viviane Gravey’s concern that the Bill’s removal of the supremacy of EU law in fact contradicts the Northern Ireland Protocol Bill. PBC Deb (Bill 156) 8 November 2022, col 83

impact of the sunset clause on the competencies, the Sewel Convention, and on the NI Protocol.

- a. **Amendment 29** which exempts any legislation within the devolved competences from being subject to the Clause 1 sunset.
- b. **Amendment 33** which exempts any legislation which relates to human rights, equality, and environmental protection in Northern Ireland, including all such legislation that falls within the scope of Protocol Article 2, from being subject to the Clause 1 sunset.
- c. **Amendment 49** which provides a new power to request and publish a list from devolved authorities of all the REUL instruments caught by Clause 1, with the purpose of “prob[ing] the progress being made in identifying [REUL] by the devolved administrations.
- d. **Amendments 51, 57 and 58** which extends the power to extend the sunset to devolved authorities, rather than it being solely a central UK Government power.
- e. **Amendment 54** which clarifies what provisions would be devolved and therefore under the competence of Scottish Ministers, the Welsh Ministers or the Ministers of the Northern Ireland Executive for decision, rather than a Secretary of State.

D. Alternative approaches to review and reform

17. JUSTICE principally supports amendments which fundamentally challenge the sunset approach to reforming REUL, which as the Bill stands consists of:

- a. deleting unsaved law automatically through inaction, without there being any explicit list or statement of what REUL has been deleted; and
- b. vesting the task of deciding what law should be saved solely in ministers, with no Parliamentary scrutiny and no requirement to consult the wider public.

18. Therefore JUSTICE supports the following amendments:

- a. **Amendment 32** which inserts within Clause 1 a requirement for the Government to tell Parliament what REUL instruments are being replaced and what is being deleted by the sunset in Clause 1. It further provides Parliament with the opportunity to block any changes and deletion of REUL instruments if both Houses agree.

- b. **Amendment 42** which leaves out Clause 1 and provides 4 “objectives” for reviewing REUL *legislation*: (i) is it fit for purpose? (ii) would an alternative achieve preferable goals? (iii) would an alternative provide greater benefits to consumers, workers, businesses, environment, animal welfare public safety? and (iv) would an alternative provide greater legal certainty?
- c. **Amendment 43** which leaves out Clause 1 and requires a revocation list to be laid and then to be subject to the affirmative procedure. This is similar in some ways to the amendment moved in the Commons by Stella Creasy MP and supported by David Davis MP, which required a “revocation list” to be laid before Parliament. Such amendments are critical to legal certainty, so the public have an explicit list of what law has been deleted, particularly in light of the ever-growing amount of REUL being discovered and the risk therefore of inadvertent deletion of law. The difference is that this amendment does not keep the sunset provision – it completely replaces it with a proactive option: if ministers wish to delete REUL, they must include it in a list to be thereafter considered by Parliament.
- d. **Amendment 44** provides for a judge-led independent commission to take on the role of reviewing REUL, rather than ministers. Their recommendations would inform what REUL is kept, changed or lost by ministers under the Bill, which would then be placed before Parliament and subject to the affirmative procedure. The explanatory statement further suggests “*the Commission’s existence would remove the probability of multiple actions for judicial review of decisions of Ministers.*” Regardless of any Commission being established, JUSTICE considers the potential for judicial review in general to be worthy of consideration. In the event that an instruments of REUL is not identified on the Dashboard and is not subject to any consultation by ministers, but then goes unsaved and therefore is automatically deleted by sunset, the lawfulness of the ministerial inaction is arguable.
- e. **Amendment 48** qualifies the clause 1 sunset clause with “consultation and reporting” requirements. These are requirements with respect to each instrument, not general consultation requirements before triggering the sunset in clause 1 *en masse*. If the requirements are not met with respect to an individual instrument, it is not revoked by the sunset. The requirements are: (i) consultation with those substantially affected of at least 12 weeks; and (ii) a report to parliament/devolved legislature thereafter on a list of the impacts, benefits and objectives of revocation.

- f. **Amendment 50** proposes the super-affirmative procedure is used to revoke REUL under Clause 1, which provides increased parliamentary scrutiny and allows for representations, resolutions of Parliament and recommendations of an appropriate committee to be taken into account.
 - g. **Amendment 60** deletes the second subsection in Clause 3, which could be read to have retrospective effect, to ensure the Bill does not have any impact on actionable cases which may accrue before the deadline but be considered by the courts after it passes.¹²
 - h. **Amendment 63** requires health and safety impact assessments to be published for all REUL instruments to be revoked under Clause 1's sunset.
19. Finally, JUSTICE wishes to draw specific attention to **amendment 62** to Clause 3, which the rest of this briefing discusses. **Amendment 62** replaces Clause 3 and requires any deletion of REUL which would be caught under Clause 3 to instead only be deleted once it has been identified, consulted on and reported on to Parliament.
20. It is important to distinguish Clause 1 and Clause 3: whilst Clause 1 affects legislative instruments of REUL, Clause 3 affects the directly enforceable EU rights, powers, liabilities, obligations, restrictions, remedies and procedures available in our domestic law. Its impact is different to Clause 1 as follows:
- a. **Identifying REUL which will be deleted by Clause 3 is more difficult than Clause 1.** It is not a cataloguing of legal instruments, but rather requires legal research into the case law of the UK and EU courts to identify which EU Treaty or Directive Articles have been found to contain directly enforceable EU rights, obligations, etc. There may be further rights etc which are so obviously directly effective that they have never been litigated, providing a further challenge to identifying them exhaustively before the deadline.¹³
 - b. **The Government has hardly started** – of the 3,745 pieces of REUL identified so far on the REUL Dashboard, concerning only **28** rights, powers etc caught by the Clause 3 sunset have been identified.

¹² For example a female worker may be paid less than a male worker now or at some point in the next 9 months. Any equal pay claim which may accrue and which may be in litigation after the sunset deadline passes could be estopped from relying on TFEU 157 (the right to equal pay for equal work or work of equal value) if clause 3(2) retrospectively extinguishes it.

¹³ As observed by Jack Williams of Monckton Chambers, see <https://eurelationslaw.com/blog/when-do-directives-form-part-of-retained-eu-law-case-comment>

- c. **There is no power to extend the Clause 3 deadline if ministers run out of time:** the Bill only provides the power to extend the sunset date for Clause 1 to identify legislation (see Clause 1(2) and Clause 2).
21. There well may be some EU rights, powers, liabilities, obligations, restrictions, remedies and procedures which the UK could do better without. However, that analysis has not been done; indeed the first step of identifying them all has hardly begun. **To delete all those which are not “saved” by ministers by the end of this year is reckless and unnecessary.** Annexed to this briefing are two examples which have not been identified on the Government’s REUL Dashboard thus far; have not been subject to any consultation with affected individuals, organisations or businesses; and could impact individuals and the environment if they were deleted by the Clause 3 sunset.
22. It is important to say that **amendment 62** does not stop any EU rights, obligations etc being deleted. It in fact provides this power. But it challenges the sunset approach, by keeping rights by default, and then if ministers want to delete them, requires them to identify them, consult and report to Parliament. This mimics the consultation and reporting requirements in **Amendment 48** with respect to Clause 1.

E. Conclusion

23. In conclusion, the purpose of creating REUL was to avoid a cliff edge whilst the UK considers what it wants to keep and lose. JUSTICE suggests that exercise must take place in a transparent and considered way before large swathes of law are deleted. JUSTICE urges peers to consider the above amendments and challenge the central UK Government’s imposition of sunset clauses to rush such an important task.

Annex: case studies of REUL within the scope of Clause 3

1) The right to equal pay for male and female workers for equal work or work of equal value

24. This directly enforceable EU right is derived from Article 157 of the Treaty on the Functioning of the European Union (TFEU).¹⁴ This right goes further than the right to equal pay under the Equality Act 2010 because it is less restrictive with regards to comparators. Whilst under the Equality Act, a woman would have to have the same employer as a man to compare their work as being of equal value, under TFEU Article 157 the same employment is not necessary, as long as the pay is attributable to a single source capable of remedying the difference in pay. For example, under Article 157 TFEU, a woman teacher can compare herself to a man employed by a different education authority where the difference in their pay is due to terms and conditions set by a national scheme and can be remedied by a national negotiating body.¹⁵ This type of comparison is not possible under the Equality Act 2010.

25. Despite the above, TFEU Article 157 does not have an entry on the REUL Dashboard as a directly effective right under s.4 EUWA 2018.¹⁶ Nor has there been any consultation or clear policy statement from the Government about equal pay and closing the gap between the comparisons available under TFEU and those available in domestic law. Notwithstanding, as things currently stand, it would be repealed as a directly enforceable right by Clause 3 at the end of the year, and women's equal pay protections will be weakened as a result.

2) Obligations regarding the conservation of natural habitats and of wild fauna and flora

26. Article 6 of the EU's "Habitats Directive" contains a series of obligations regarding the conservation of natural habitats and of wild fauna and flora. One has recently been found to be directly enforceable: the obligation of the competent authority, eg the Environment Agency, in special areas of conservation and sites of international importance for habitats and species, to "take appropriate steps to avoid [...] the deterioration of natural habitats and the habitats of

¹⁴ The direct effect of this right was confirmed by CJEU in case of *K v Tesco Stores* [2021] IRLR 699. Whilst the judgment was given in 2021 the facts of the case took place before the UK exited the EU.

¹⁵ Example taken from *Equal Pay: Statutory Code of Practice* issued by the Equality and Human Rights Commission under the Equality Act 2010, p23. Available at: <https://www.equalityhumanrights.com/sites/default/files/equalpaycode.pdf>

¹⁶ TFEU Article 157 is mentioned in the description of a pensions case (Barber C-262/88) on the Dashboard. However, that is a very specific entry related to pensions and the duty on the state to equalise pension scheme benefits for women.

species as well as disturbance of the species for which the areas have been designated.”¹⁷
This is a proactive and preventative obligation: it is not enough to react to deterioration once it has happened – anticipatory protections are required prevent deterioration and disturbance of habitats and species.¹⁸

27. This obligation has not been fully transposed into our domestic legislation:¹⁹ there remains only a weaker duty on the Environment Agency to have “regard” to the Habitats Directive²⁰ which has been found not to impose a direct obligation as Article 6 does.²¹

28. Neither the Habitats Directive nor the case law on it appear on the REUL Dashboard. Furthermore, there has been no consultation on changing this obligation to proactively prevent the deterioration and disturbance of habitats and species. Nevertheless, as things currently stand, the obligation will be repealed by Clause 3 at the end of the year, and the requirements on competent authorities to protect special areas of conservation proactively will be weakened.

¹⁷ Article 6(2) Confirmed to be directly effective and saved by s.4 EUWA 2018 in *Harris v Environment Agency* [2022] EWHC 2264 (Admin). See blog article by the claimant solicitors here <https://www.freeths.co.uk/2022/09/06/legal-article-landmark-environment-case-environment-agency/>

¹⁸ Case C-418/04 Commission v Ireland [2007] ECR I-10997 at [207]-[208].

¹⁹ There is an obligation to prevent deterioration of *offshore* sites only in the Conservation of Offshore Marine Habitats and Species Regulations 2017, at reg 26, but no such obligation in the terrestrial regulations, the Conservation of Habitats and Species Regulations 2017

²⁰ In Regulation 9(3) of the Conservation of Habitats and Species Regulations 2017, which themselves are REUL. It is therefore also unclear if even this weaker requirement will be kept, changed or lost under the powers over legislative REUL in the Bill.

²¹ In *Harris*, see above.