



## **Retained EU Law (Revocation and Reform) Bill**

### **House of Commons – Consideration of Lords' amendments**

#### **Briefing**

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**For further information contact:**

Ellen Lefley, Lawyer  
email: [elefley@justice.org.uk](mailto:elefley@justice.org.uk)

JUSTICE, 2<sup>nd</sup> Floor Lincoln House, 296-302 High Holborn, London, WC1V 7JH  
email: [admin@justice.org.uk](mailto:admin@justice.org.uk) website: [www.justice.org.uk](http://www.justice.org.uk)

## 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. Our previous briefings<sup>1</sup> on the Retained EU Law (Revocation and Reform) Bill (“the Bill”) have highlighted our significant concerns with the Bill’s approach to the huge task of reviewing Retained EU Law (“**REUL**”), the amount of which has vastly increased since the Bill was first laid before Parliament.
2. The Government’s concessions on the sunset clause in the House of Lords are a sizable improvement. There will no longer be an automatic point at the end of the year whereby unknown numbers of legislative instruments will be automatically deleted. The Government has now proposed to list all the laws which will be deleted, which ensures no REUL instruments will be accidentally deleted and improves transparency and due process, albeit the list has been disclosed at a very late stage in the legislative process.
3. However, further concerns with the Bill remain, pursuant to which there were several cross-party Lords’ amendments. **JUSTICE in particular urges Members of Parliament to accept amendments 1, 6 and 42.** These amendments have one key theme: they preserve the role of Parliament in scrutinising how REUL is being deleted and amended. JUSTICE stresses the constitutional importance of Parliament in this exercise of REUL reform. Without these amendments, JUSTICE is concerned that the Bill delegates excessive powers in the executive with minimal scrutiny.

### Amendment 1 at Clause 1 of the Bill

4. This amendment was tabled by Lord Hope of Craighead, Lord Hamilton of Epsom and Lord Hodgson of Astley Abbots. It creates a sifting process, whereby a Joint Committee would consider the schedule of REUL legislation which is proposed to be revoked. That Committee would be able to identify any REUL revocation which would cause “substantial change” to the

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<sup>1</sup> Available at <https://files.justice.org.uk/wp-content/uploads/2023/02/03144428/JUSTICE-Retained-EU-Law-Revocation-and-Reform-Bill-HoL-second-reading-briefing.pdf>

current law. Once identified, the Committee could refer it for debate and voting before each House. Only if revocation is approved by each House would the REUL be revoked.

5. JUSTICE has repeatedly stressed its concern with the lack of Parliamentary scrutiny in the Bill as previously drafted. Whilst the Government amendments allow for a degree of transparency which did not exist with the previous sunset clause, there is still a lack of any meaningful opportunity for Parliament to scrutinise the changes being made as a result of REUL revocations, and the impact they will have. JUSTICE considers this amendment strikes a balance, between allowing the Government to proceed with their suggested revocation list, but also allowing Parliament a meaningful opportunity to scrutinise said list. **JUSTICE therefore urges Members of Parliament to accept this amendment.**

### **Amendment 6 at Clause 2 of the Bill**

6. This amendment was tabled by Lord Anderson of Ipswich, Lord McLoughlin, Lord Hamilton of Epsom and Lord Hope of Craighead. The amendment secures scrutiny of any EU rights powers, liabilities, obligations, restrictions, remedies and procedures that are proposed to be revoked in a similar way to the first amendment.
7. **The amendment is absolutely crucial**, since the Government's concessions on the sunset clause have only been partial. **The Government's concession to provide a revocation list is limited to the REUL *legislation* it wishes to revoke.**<sup>2</sup> However, not all REUL is contained within legislation. Other directly enforceable EU rights powers, liabilities, obligations, restrictions, remedies and procedures also make up the body of REUL which currently makes up our law.<sup>3</sup>
8. The Government position found in the previous Clause 3 of the Bill was to simply delete all such REUL by default, without identifying it, with only those rights, liabilities etc. which are codified in any Government regulations to be kept. JUSTICE considers such an approach to

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<sup>2</sup> I.e. EU-derived domestic secondary legislation and directly effective EU legislation (mostly EU regulations) retained by ss 2 and 3 of the European Union (Withdrawal) Act 2018.

<sup>3</sup> Retained by section 4 of the EU Withdrawal Act 2018

be not only unnecessary but also reckless, since it risks deleting unidentified law, unintentionally. This would be an undemocratic way of repealing law which would cause significant legal uncertainty, impacting individuals, local Government and Governmental agencies, organisations and businesses. JUSTICE stresses the importance of legal certainty to the rule of law, as explained by Lord Bingham: “the law must be accessible and so far as possible intelligible, clear and predictable”.<sup>4</sup>

9. Amendment 6 would not prevent the revocation of this REUL, but it would require the Government to proactively state it wished to revoke it to Parliament, rather than allowing it to be revoked by default. This would make sure it was not revoked by mistake, and would also give both Houses an opportunity to prevent revocation. **JUSTICE therefore urges Members of Parliament to accept this amendment.**

### **Amendment 42 at Schedule 5 Part 2 paragraph 7 of the Bill**

10. This amendment was tabled by Lord Hope of Craighead, Lord Anderson of Ipswich, Lord McCloughlin and Lord Hamilton of Epsom. It secures a Joint Committee process, similar to that in Clause 1. The difference is that this process will allow for Parliamentary oversight of the way the Government seeks to *amend* REUL, rather than delete it. The Bill currently provides for extremely broad powers to do so in Clauses 11, 12 and 14 at any time between the Bill’s assent and 23 June 2026.
11. The proposed process will ensure any amending regulations that the Joint Committee consider represent “substantial change” to the law, or on which the Government has not consulted sufficiently, will be referred to the floor of each House. Critically, the amendment proposes a process through which both Houses could not only debate and vote on the regulations, but also make amendments.
12. JUSTICE has repeatedly expressed concern about the breadth of the Government’s powers to amend REUL in this Bill, the worst of which can be found at Clause 14. That power allows

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<sup>4</sup> Tom Bingham, *The Rule of Law* (2010)

ministers to make changes to REUL with minimal restrictions. In terms of the nexus between the old law and the new, the minister does not have to show that the policy purpose or impact of the changes will be the same, only that he considers the change to be “appropriate”. In JUSTICE’s view, this power is overly broad and could lead to substantial policy changes being implemented through these delegated powers, none of which are clear to Parliament during the passing of this current Bill. JUSTICE therefore considers Amendment 42 to be a proportionate constitutional protection for Parliament, and **JUSTICE urges Members of Parliament to accept this amendment.**

## Examples of impact

### Amendment 42

13. The right to parental leave is contained within REUL.<sup>5</sup> It is different from maternity or paternity leave: it entitles parents, after they have been in their job for one year, to be absent from work for a set period to care for a child.<sup>6</sup> Employers can only postpone it narrow circumstances: when the operation of their business is “unduly disrupted”.<sup>7</sup> If the above amendments are not accepted, the Bill could be used to change parental leave substantially, with minimal Parliamentary scrutiny.
14. Restatement regulations under clause 11 or 12 could purport to “clarify” the test using different words and concepts, which in practice would weaken the test, e.g. replacing the test with simply “disrupted” or even “caused inconvenience”. This could all be done using the negative resolution procedure.
15. Regulations under clause 14 could go further. Ministers could decide to radically overhaul the right to parental leave simply if they “*conside[r it] to be appropriate*”. They could impose limits,

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<sup>5</sup> The Maternity and Parental Leave etc Regulations 1999 implement the EU Council Directive 96/34/EC (OJ No.L145, 19.6.96, p.4).

<sup>6</sup> Reg 13 of the Maternity and Parental Leave etc Regulations 1999 (MPLR 1999); for up to 4 weeks per year per child, and up to a total of 18 weeks per child, reg 14.

<sup>7</sup> Schedule 2 MPLR 1999

restrictions and exemptions, all permissible as long as they reduce the burdens on employers. Without amendment 42, this would leave Parliament only with their very limited tools even within the affirmative procedure, with no power to amend the regulations.

## Amendment 6

16. The EU's "Habitats Directive" contains a series of obligations regarding the conservation of natural habitats and of wild fauna and flora.<sup>8</sup> One has been found to be directly enforceable: the obligation of the competent authority, eg the Environment Agency, in special areas of conservation to "take appropriate steps to avoid [...] the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated."<sup>9</sup> This is a proactive and preventative obligation: it is not enough to react to deterioration once it has happened.<sup>10</sup>
17. This obligation has not been fully transposed into our domestic legislation:<sup>11</sup> there remains only a weaker duty on the Environment Agency to have "regard" to the Habitats Directive<sup>12</sup> which has been found not to impose a direct obligation as Article 6 does.<sup>13</sup>
18. Amendment 6 would not prevent the revocation of this REUL, but it would require the Government to proactively state it wished to revoke it to Parliament, rather than allowing it to be revoked by default. This would make sure it was not revoked by mistake, and would also give both Houses an opportunity to prevent revocation. Without amendment 6, this obligation would be revoked at the end of the year, and the requirements on competent authorities to protect special areas of conservation will be weakened.

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<sup>8</sup> Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora, Article 6.

<sup>9</sup> 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/>

<sup>10</sup> Case C-418/04 Commission v Ireland [2007] ECR I-10997 at [207]-[208].

<sup>11</sup> 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

<sup>12</sup> 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 changed under the powers in the Bill.

<sup>13</sup> In *Harris*, see fn 9.