



Retained EU Law (Revocation and Reform) Bill

House of Lords

Consideration of Commons amendments and reasons

Briefing

June 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. Our previous briefings on the Retained EU Law (Revocation and Reform) Bill (“the Bill”)¹ have highlighted our significant concerns with the Bill’s approach to the huge task of reviewing, revoking, amending and retaining Retained EU Law (“REUL”), the amount of which has more than doubled since the Bill was first laid before Parliament.²
2. Whilst the Government’s concessions mark a sizeable improvement, JUSTICE considers further improvement to the Bill could better secure Parliamentary scrutiny and transparency of REUL revocation and reform.
3. In advance of the Lords’ consideration on 6 June 2023 of the Commons amendments and reasons, JUSTICE supports the two motions of Lord Anderson of Ipswich with respect to Lords Amendments 6 and 42.

Motion with respect to Lords amendment 6

4. JUSTICE’s primary position was to support Amendment 6 and its Joint Committee scrutiny provisions, which ensured transparency and provided Parliament with a say over EU rights, powers, liabilities etc to be revoked. JUSTICE notes the Commons disagreement; whilst we disagree with the reasoning with respect to EU Supremacy, we support Lord Anderson’s motion for an amendment in lieu, inserting the following into the new Clause (*Retained EU law dashboard and report*):

¹ 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>

² The Explanatory Notes originally referred to “Over 2,400” pieces of REUL. The dashboard currently states the total as “4,917”, of which 3,198 remain unchanged.

“(1A) The retained EU law dashboard must specify the retained EU rights, powers, liabilities etc referred to in section 3 of this Act (sunset of retained EU rights, powers, liabilities etc).”

5. The amendment ensures this type of REUL is included in the Bill’s new reporting duties, on the progress and the future plans for REUL revocation and reform between the Act passing and 23 June 2023. Without this amendment in lieu, the reporting duty in the Bill risks ignoring this type of REUL, retained by s.4 EUWA 2018, and focusing only on REUL contained in legislative instruments, retained by ss. 2 and 3 EUWA 2018. Indeed, this has been the case so far: whilst the number of REUL instruments on the current REUL dashboard is in the thousands, the last time retained EU rights, powers, liabilities etc were searchable on their own (they no longer are on the new version of the dashboard) there existed only 28 identified EU rights, powers, liabilities, etc. This did not, and still does not, include for example:
- a. TFEU 157: the right to equal pay for male and female workers for equal work or work of equal value, which goes further than the right to equal pay under the Equality Act 2010 because it is less restrictive with regards to comparators.³
 - b. Article 6(2) of the Habitats Directive: the obligation of the competent authority, 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 species as well as disturbance of the species for which the areas have been designated.”⁴ This obligation has been transposed only into our *offshore domestic*

³ 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. This type of comparison is not possible under the Equality Act 2010. ³ 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>

⁴ Confirmed to be directly effective and saved by s.4 EUWA 2018 in *Harris v Environment Agency* [2022] EWHC 2264 (Admin).

legislation;⁵ for terrestrial sites, there remains only a weaker duty to have “regard” to the Habitats Directive which has been found not to impose a direct obligation.

6. JUSTICE is concerned by the lack of proactive identification of EU rights, powers, liabilities etc thus far. This approach means rights, powers, obligations etc will be left to be opaquely repealed and/or reformed, without any transparency or Parliamentary oversight. JUSTICE considers this to be an undemocratic approach, risking legal uncertainty for individuals, Government (including 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”.⁶
7. By securing the reporting duty, the amendment in lieu provides a different safeguard, but a safeguard nonetheless, to ensure transparency and some Parliamentary oversight over the revocation and reform of this kind of REUL, albeit it falls short of the Parliamentary power to prevent revocation which was originally proposed in Amendment 6.
8. **JUSTICE urges Lords to vote in favour of this motion and approve this amendment in lieu.**

Motion with respect to Lords amendment 42

9. Originally, Amendment 42 proposed a sifting process for future REUL-amending regulations under the powers in Clauses 12, 13 and 15 of the Bill. It provided that a Joint Committee could refer regulations which represented a “substantial change” to the law, or on which the Government had not consulted sufficiently, to the floor of each House. Critically, the amendment proposed a process through which both Houses could not only debate and vote on the regulations, but also make amendments.

⁵ Conservation of Offshore Marine Habitats and Species Regulations 2017, reg 26

⁶ Tom Bingham, *The Rule of Law* (2010)

10. 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 15. That power allows ministers to make changes to REUL with minimal restrictions. The minister does not have to show that the policy purpose or impact of the changes will be the same or even similar, 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. This has throughout the debates given rise to criticism of the Bill being "*hyper-skeletal*".

11. JUSTICE disagrees with the Commons reasons that such a Committee process is "inappropriate". Indeed, given the extremely broad delegated powers in the Bill, JUSTICE considers such Parliamentary sifting and, where appropriate, amendment of regulations, to be entirely appropriate. The process:

- a. Recognises the potential for significant policy changes to be implemented through regulations, which could in effect be the functional equivalent of primary legislation.
- b. In response to this extraordinarily broad power, provides for an amending power, which is rare but not novel, see s.27 Civil Contingencies Act 2004. JUSTICE considers introducing an amending power in these circumstances is proportionate to the breath and impact of the changes possible through these delegated powers.

12. Lord Anderson's amendment in lieu is as follows:

(1) A Minister of the Crown may not make regulations under section 15 unless—

(a) a document containing a proposal for those regulations has been laid before each House of Parliament,

(b) the document has been referred to, and considered by, a Committee of the House of Commons ('the Committee'), and

(c) a period of at least 30 days has elapsed after that referral, not including any period during which Parliament is dissolved or prorogued or either House is adjourned for more than four days.

(2) If the Committee determines that special attention should be drawn to the regulations in question, a Minister of the Crown must arrange for the instrument to be debated on the floor of each House and voted on before the period in subsection (1)(c) elapses.

(3) If any amendments to the regulations, whether or not proposed by the Committee, are agreed by both Houses of Parliament, the regulations must be made in the form so amended.

(4) If one House agrees amendments to the regulations under subsection (3), the regulations may not be made until the other House has debated and voted on a motion to agree or disagree with those amendments.

13. The amendment in lieu specifies the sifting Committee is a Committee of the House of Commons, not a Joint Committee. It further restricts the role of the Committee to considering replacement regulations under Clause 15 only, which as the broadest of the powers JUSTICE considers to be appropriate. Importantly, the amendment in lieu insists on the amending power, which JUSTICE supports.

14. **In conclusion, JUSTICE urges Lords to vote in favour of this motion and approve this amendment in lieu.**