European Scrutiny Committee
Inquiry into Retained EU Law: the progress and mechanics of reform
Bar Council written evidence

About Us

The Bar Council represents approximately 17,500 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of response

This submission addresses the questions on which the Committee has sought evidence.

Preliminary observations

1. The Bar Council expressed its serious concerns about many aspects of the Retained EU Law (Revocation and Reform) Act 2023 ("**REULA23**") during its passage through Parliament: our overarching concerns were:

    a. the anti-democratic nature of the very wide powers given to Ministers under the Act, particularly in section 14(3)[1], to replace or revoke legal provisions that are frequently of great importance to individuals and businesses with limited Parliamentary scrutiny, and

    b. the legal uncertainty and regulatory instability that the legislation was likely to generate. Those concerns were set out in the Bar Council's briefing to members of the House of Lords on the Bill, to which we refer members of the Committee[2].

2. Our concerns as to legal uncertainty were to some extent – but only to some extent – removed by the Government's decision not to proceed with what we regarded as the arbitrary and impractical "sunset clause" of the Bill in its original form, but rather to use the Bill to revoke a list of particular named items of retained EU law. That clause aside, our concerns centred on sections 2 to 4 of REULA23, which abolished general principles

[1] That section gives Ministers power to replace assimilated law with "such alternative provision as [they] consider appropriate", subject only to limited constraints set out in subsection (4).
[2] https://www.barcouncil.org.uk/static/26e58174-6785-4bdf-94da497d9980f3be/Bar-Council-Briefing-for-Peers-Retained-EU-Law-Revocation-and-Reform-Bill-Feb-2023.pdf

of EU law as a guide to interpretation of retained EU law (now assimilated law). As we said in our briefing to members of the House of Lords: -

> *'[..] the principles of interpretation of EU law, with which UK lawyers and courts are familiar, are well-settled as principles of interpretation of UK statutes. Removing those principles is likely to generate both uncertainty and unintended consequences, particularly when it is remembered that many of the instruments that will be affected have been the subject of considerable case-law at EU level in which those principles have been applied, the removal of which will generate uncertainty. Indeed, the Government has not explained what the consequences of the removal of those principles will be on the various rules and protections concerned. It is not a good idea to legislate when you have no idea what the consequence of that legislation will be.'*

3. We would add that one further source of uncertainty is that it is entirely unclear (and will remain unclear until decided by the higher courts) how the abolition of general principles relates to the decision in REULA23 to retain assimilated case-law (i.e. case-law of the Court of Justice of the EU interpreting what is now assimilated law) – a decision implicit in the section 6 of REULA23 dealing with cases where the courts may depart from that case law. The lack of clarity arises from the straightforward point that Court of Justice of the European Union case-law (which, on the one hand, the courts are, subject to sections 6 and 7, still bound by) is in turn frequently based on the application of those same general principles (which, on the other hand, REULA23 instructs the courts to ignore)[3].

4. In any event, REULA23 is now law, and has been fully in force since the beginning of this year. To what extent have our concerns been borne out?

5. Ministers' use of their powers under REULA23 to date can be seen from the relevant Government website[4]: although the power in section 14(3) has been used to a limited extent, it is fair to say that, as yet, no major changes have been made using that power. It may be that use of that power, and the other powers in section 14, to make major legislative changes is now unlikely before the general election. Nonetheless, we remain seriously concerned about the potential for major legislative changes to be made in this way and note that whatever complexion of Government may emerge after the general election, it will have full access to this power.

6. As to our concerns about uncertainty, it is not possible to say, only one month after the relevant provisions of REULA23 came into force, to what extent our concerns about unpredictability (which of course, when they relate to regulation of business, are in themselves harmful to business confidence and investment) have been borne out.

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[3] See for example, in a case interpreting the General Data Protection Regulation, Case C-311/18 *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems*, where the CJEU at [168 - 176] drew upon fundamental principles of EU law. In that case, the government has sought to address, by use of s.14 REULA23 powers, concerns that the effect of REULA23 is to reduce the rights of data subjects by legislation so as to replace references to those fundamental principles with references to the European Convention on Human Rights (the Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023): but it is by no means clear that Art.8 of the ECHR provides anything like as robust a right to privacy in relation to data as does EU law.

[4] https://www.gov.uk/government/collections/reul-revocation-and-reform-act-2023-statutory-instruments

Uncertainty is likely to emerge only as and when lawyers are called to advise on situations that have arisen since the beginning of 2024 and as and when legal disputes about matters that have arisen since then begin to come before regulators and courts – a process that will take some time.

7. However, a vivid illustration of the reality of those concerns is provided by Clause 27 of the current Finance Bill[5], which systematically disapplies sections 2 to 4 of REULA23 from VAT legislation. That no doubt reflects the Government's concern as to the impact on tax revenues and tax collection, and on the litigation burden on His Majesty's Revenue and Customs, of the uncertainty as to the meaning and effect of VAT legislation[6] that would be generated by applying those sections of REULA23 in the area of VAT. However, what is true for that area (with its direct impact on Government revenues) is equally likely to be true for others, where the burden of uncertainty does not fall so immediately on Government.

8. It is also notable that many of the statutory instruments that have been made under REULA23 are wholly or partly attempts to restate the effect of the application of general principles of EU law in areas where Government departments have identified a risk that the effect of disapplying general principles of EU law would result in unwelcome policy consequences: examples include the regulations made in relation to data protection mentioned in footnote 3 above, regulations to protect consumers' rights when flights are delayed or cancelled[7]; and regulations preventing the removal of employees' rights to carry over holiday entitlement unused due to sickness or failure to inform employees of their entitlement[8].

9. It is impossible to say to what extent Government departments have succeeded in identifying such risks: as we noted above, one problem is that cases where the abolition of general principles leads to new interpretations of assimilated law that have unwelcome policy consequences may well only emerge when lawyers are called to advise on particular situations or disputes reach regulators or courts.

Question 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?

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

10. It is often, and accurately, observed that the relationship between EU law and the law of its Member States, is *sui generis*, and that there are no parallels either in international law

[5] https://publications.parliament.uk/pa/bills/cbill/58-04/0014/230014.pdf

[6] Principally, the VAT Act 1994, which has always been interpreted in line with EU VAT directives and CJEU case-law, often based on general principles of EU law.

[7] The Aviation (Consumers) (Amendment) Regulations 2023

[8] A number of the provisions of the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

or in the law of federal or confederal systems. Parallels with cases where a jurisdiction has seceded, or been given independence, from another jurisdiction are therefore uninformative in dealing with the particular legal problems that arose as a result of the UK's departure from the EU.

Question 2: What progress has the Government made towards the reform of retained EU 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?

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

(c) Is the current pace of reform appropriate?

11. The gov.uk website to which we referred above provides the answer to the second part of that question. As to Schedule 1 to REULA23, it lists the instruments that have been revoked (many of which were, in any event, effectively redundant).

12. As the Committee will be aware, many other Acts passed since Brexit have given Ministers power to revoke or replace retained EU law: examples include the Medicines and Medical Devices Act 2021 and the Agriculture Act 2020. A full answer to question (b) would be beyond the scope of this short submission.

13. It is not for the Bar Council to take a position on whether the current pace of reform is "appropriate". What we would say is that the important question is not whether the pace of reform is meeting some arbitrary standard of speed, particularly one set with an eye on the electoral timetable, but whether the process of reform contains the necessary safeguards to ensure that replacement legislation is clear, effective, and avoids unintended consequences, and whether changes needed to improve and clarify the law are being made and whether the changes that are being made succeed in improving and clarifying the law.

Question 3: How should the Government approach the 'mechanics' of reforming retained EU law? 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?**
- **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?**
- **Working with the Devolved Administrations and structures for managing policy divergence, such as UK Common Frameworks?**

- **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?**
- **Structures for intra-and inter-departmental working?**
- **Engagement with experts external to Government e.g. scientists with expertise in reforming technical regulation?**
- **Engagement with businesses and people affected by possible reforms?**
- **Parliamentary scrutiny?**
- **The accessibility and clarity of the statute book?**

Question 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?

14. We take Questions 3 and 4 together.
15. It is not for the Bar Council to comment on the appropriate administrative and political processes for driving a regulatory reform programme.
16. We would however note, given the point we have made above as to the likely emergence over time of problems arising from the abolition of general principles of EU law, that the UK Government needs to devote resource to anticipating, identifying and dealing with those problems as they emerge: it might, for example, be sensible for each department to have a public contact point on its website to which those who come across those problems on the ground can address their concerns.
17. Further, as the representative of barristers in England and Wales, we should note that it is plainly important, in areas where the Welsh Government has devolved responsibility, for UK and Welsh Ministers to liaise closely in identifying areas where it is necessary to use REULA23 powers and as to how those powers should be exercised.
18. We would also emphasise, as we have in the past, the importance in areas of highly complex technical regulation (which much assimilated law is) of careful and thorough engagement and consultation with business and outside experts before reform is implemented. We note that such engagement and consultation is desirable even in cases where it is not intended to make any significant substantive change, such as "restatement" legislation made under section 13 of REULA23: outside legal, and frequently other technical, expertise is likely to be valuable in ensuring that the restatement does actually restate what it is intended to preserve. Where it is intended to make substantive changes, and section 14 powers are used, the need for proper consultation, and parliamentary scrutiny to a level commensurate with the importance of what is being done (which may well be at least as significant as many Bills to which considerable time is given for scrutiny), is even greater.

19. Further, although we express no general view as to its size or direction, we note that there is very frequently a trade-off between the potential gains from regulating better than the EU (however "better" is to be judged) and the potential disadvantages to business operating in both the UK and EU (or, in cases covered by the Windsor Framework, in both Great Britain and Northern Ireland) of having to deal with two sets of rules rather than one. In our view, it is important that policy-makers are at least aware of the extent to which proposed changes to UK law (or, indeed, failure to make changes) may result in costs and burdens resulting from divergence. Moreover, in some instances that divergence could seriously undermine the UK's existing relationship with the EU in a way that would be detrimental for UK citizens and businesses, for example, in matters relating to data protection, were the EU to reverse its decisions on data adequacy in light of a reduction in protections afforded by UK law. In that regard, we regret that Whitehall's considerable pre-Brexit expertise in EU law and regulation has been and is being lost, and that there are insufficient resources in both Whitehall and in the UK Mission to the EU to allow for fully informed decision-making on this point.

The Bar Council
February 2024