



Public
Law
Project

Public Law Project Senedd Briefing

Retained EU Law (Revocation and Reform) Bill

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Contents

1. Summary and Recommendations	3
2. Taking Control from Parliament	5
Problem 1.1: Handing a Blank Cheque to Ministers	5
Problem 1.2: Lack of Scrutiny and Consultation	6
Recommendations	7
3. Cliff-Edge for Rights and Protections	11
Problem 2.1: State Capacity	11
Problem 2.2: Risk of Mistakes	11
Problem 2.3: Limited Power to Delay the Sunset	11
Recommendations	12
4. Legal uncertainty	17
Recommendations	18
Contact Information	19
About PLP	19

1. Summary and Recommendations

1. This is a Bill about a particular category of UK law that covers a vast range of everyday topics. The Government is seeking broad powers to amend laws falling within the category of 'retained EU law', and to allow currently unidentified swathes of these laws to disappear at the end of 2023 unless specifically 'saved' by a minister. We consider this constitutionally inappropriate, practically unfeasible, and potentially deeply harmful.
2. The Bill's complex and opaque provisions would:
 - i. Undermine parliamentary sovereignty by transferring vast legislative powers to ministers to exercise with minimal parliamentary oversight or control;
 - ii. Place vitally important and valued rights on a cliff-edge. There is a very real risk, given the tight time constraints, of important rights and protections being overlooked or otherwise falling foul of the tight deadlines set by the Bill, and so disappearing from the statute book;
 - iii. Create large quantities of otherwise unnecessary work for UK ministers, devolved ministers, and civil servants, without a clear case for why this should be prioritised over other acutely pressing issues;
 - iv. Create considerable legal uncertainty, which will put individuals' rights at risk and make it more difficult to enforce those rights.
3. The European Union (Withdrawal) Act 2018 (EUWA) is, broadly speaking, operating satisfactorily. EUWA creates the space for Parliament to legislate as it wishes, whilst also maintaining certainty for individuals and businesses. It is our view that EUWA works; for now, there is no clear reason why this arrangement should be altered so dramatically.
4. PLP's primary recommendation is that this Bill should be scrapped in its entirety. However, should the Bill proceed, PLP makes the following recommendations:
 - i. Remove clauses 10 to 16;
 - ii. Include provision for meaningful consultation and debate on the proposed exercises of ministerial powers.
 - iii. Amend the condition for the exercise of delegated powers.
 - iv. Limit the power of UK ministers to legislate in areas of devolved competence without the consent of devolved authorities.
 - v. Prevent EU-derived legislation that is equivalent to Acts of Parliament in substantive content and importance, such as the GDPR, from being amended as if it were a technical statutory instrument.
 - vi. Remove clause 12(2)(b) of the Bill, since it allows the amendment of primary legislation by secondary legislation.
 - vii. Insert a power to extend all the sunset provisions in the Bill.
 - viii. Insert clear limits on the types of provisions that can disappear at the sunset.
 - ix. Reverse the operation of the sunset.

- x. Provide that nothing shall be allowed to disappear at the sunset without consultations, impact reports, and parliamentary approval.
 - xi. Insert a reporting and consultation requirement.
 - xii. Amend clause 7 to protect legal certainty.
 - xiii. Amend the new subsection (A2) to be inserted into section 5 of the EU (Withdrawal) Act 2018 by clause 4 of the Bill. This should be done in the interests of legal certainty. Consequentially, remove clause 8.
5. The following sections contain indicative samples of the kinds of amendments that could be made to the Bill. Committee members are welcome to use them, with the caveat that members may wish to refine the text and consider the amendments' mutual compatibility.

2. Taking Control from Parliament

6. The Bill contains a suite of broad delegated powers to change UK domestic law that has an EU link (known as EU-derived legislation). The most notable, in terms of their breadth, can be found in clause 15. These powers would expire on 23 June 2026.
 - i. Clause 15(1): the power to revoke any secondary retained EU law (this term is described below) without a replacement provision.
 - ii. Clause 15(2): the power to revoke any secondary retained EU law and replace it with an ‘appropriate’ provision that ‘achieve[s] the same or similar objectives’ as the provisions being revoked.
 - iii. Clause 15(3): the power to revoke any secondary retained EU law and make ‘alternative provision’ for the revoked retained EU law. The replacement could pursue different objectives to the revoked law.
7. The clause 15 powers may not increase the overall ‘regulatory burden’. Accordingly, these powers may only be used for a deregulatory purpose. They are not capable of being used to enhance rights and protections enjoyed by individuals; they are only capable of being used to reduce or remove rights and protections.
8. There are at least two major problems with these powers.

Problem 1.1: Handing a Blank Cheque to Ministers

9. These powers would confer on ministers a blank cheque to rewrite or repeal valued rights and protections.¹
10. Below is a table of provisions of retained EU law that would (a) disappear at the sunset unless ‘saved’ and ‘restated’ by a minister, and (b) be vulnerable to modification, revocation, or replacement by ministers.

Retained EU Law	Description
General Data Protection Regulation (GDPR)	The source of important data protection rights, such as the right to be informed, the right of access, the right to rectification, and the right to erasure
Working Time Regulations 1998 (SI 198/1833)	Maximum weekly working time and right to holiday pay (including case law on

¹ Lord Anderson of Ipswich KBE KC, Notes for Remarks on the Retained EU Law (Revocation and Reform) Bill at the Bar Europe Group – Matrix Chambers (19 October 2022), paragraph 3 (<https://www.daqc.co.uk/wp-content/uploads/sites/22/2022/10/RETAINED-EU-LAW.pdf> [Accessed 20/10/2022]).

	formula for calculating holiday pay)
Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE)	Protects the rights of workers whose jobs are outsourced or transferred to another business
Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551)	Protects part-time workers from being treated less favourably than full-time workers just because they are part-time
Information and Consultation of Employees Regulations 2004 (SI 2004/3426)	Require employers to establish arrangements for informing and consulting their employees
Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513)	Employers have a duty to consult with their employees, or their representatives, on health and safety matters
Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034)	Protects fixed-term workers from being treated less favourably than full-time workers just because they're part-time
Agency Workers Regulations 2010 (SI 2010/93)	Agency workers are entitled to the same or no less favourable treatment for basic employment/working conditions
Habitats Directive 92/43/EEC (& implementing regulations)	Protects special habitats and/or species, e.g. through the designation of Special Areas of Conservation
Environmental Impact Assessment Directive 2011/92/EU (& implementing regulations)	Development projects that are likely to have a significant environmental impact must be identified and have their environmental impact assessed
Strategic Environmental Assessment Directive 2001/42/EC (& implementing regulations)	Public plans and projects are subject to an assessment of their environmental impact

11. The UK's system of scrutiny of delegated legislation does not have the capacity to provide proper parliamentary oversight for powers of wide breadth and scope. Delegated legislation in the UK is 'virtually invulnerable to defeat'.² Only 17 statutory instruments (SI) have been voted down in the last 65 years and the House of Commons has not rejected a SI since 1979.⁵ Not a single SI was defeated during the process of legislating for Brexit and Covid-19. Since SIs are unamendable, MPs and peers feel they cannot vote down an SI with problematic provisions because the instrument in its entirety will be lost.

12. If Parliament enacts clause 15, it will be giving away control over rights and protections that MPs' constituents value and rely upon every day.³

Problem 1.2: Lack of Scrutiny and Consultation

13. As the Bill stands, there is no requirement for ministers to consult on proposed changes to retained EU law. EU-derived legislation continues to regulate complex areas of the economy and society. Consultation is vital to ensure mistakes are not made and unintended consequences not brought

² Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (Hart Publishing, 2018).

³ According to polling conducted by Opinium for the TUC, 71% of voters support retained EU-derived workers' rights like holiday pay, safe limits on working times, and rest breaks. See <https://www.tuc.org.uk/news/government-risks-voter-backlash-if-it-follows-through-plans-rip-key-workers-rights-tuc-warns> [Accessed 20/10/2022].

about.

14. Part of the difficulty of understanding the breadth of the blank cheque being handed to ministers is the terminology of retained EU law. The Bill labels the laws subject to clause 15 ‘secondary’ and ‘subordinate’ legislation. This implies that there are of a technical nature, rather than the basis for important rights and protections. The difficulty with this terminology is that EU-derived legislation does not neatly slot into UK categories of law. In the EU, the treaties are primary legislation, and ‘legislative acts’ are secondary legislation. Despite being ‘secondary legislation’ in the EU legal order, legislative acts are the equivalent of UK acts of Parliament in substantive content and importance. It is therefore a category error to treat ‘EU secondary legislation’ (legislative acts) in the same way as ‘UK secondary legislation (statutory instruments).
15. The GDPR is an example of a piece of retained EU secondary legislation. This Bill would treat the GDPR and other EU legislative acts as if they were technical UK statutory instruments in terms of the ease with which ministers will be able to amend them. The GDPR took several years of consultation and gestation before being implemented, time in which businesses and stakeholders were able to provide their views. Businesses and civil society had two years of lead-in time to prepare for its coming into force. The GDPR is a detailed piece of substantive legislation, on par with the Data Protection Act 2018 in importance, and a source of important data protection rights. Clause 15 would allow ministers to tweak, substantially change, or even completely rewrite GDPR with no consultation, very little parliamentary debate, and no opportunity for amendment.⁴

Recommendations

16. We recommend that the Senedd and Welsh Ministers call for the following changes to the Bill:

- i. **Remove clauses 10-16, page 10, line 5 to page 18, line 27.** The point of this change is to prevent the transfer broad and unconstrained legislative powers to ministers. The clauses that would transfer such powers should be removed.

If these clauses are not removed, they should be significantly tightened along the following lines.

- ii. **Include provision for meaningful consultation and debate on the proposed exercises of ministerial powers.** Meaningful sectoral consultation should be a condition for the exercise of the delegated powers in the Bill. Parliament should be guaranteed an adequate amount of time to consider and debate proposed exercises of said powers (clauses 10-16):
 - a. Insert a new clause between clauses 17 and 18, between page 18, line 38, and page

⁴ The maximum time for debates on statutory instruments is 90 minutes. In practice, debates rarely last this long. See: Alexandra Sinclair and Joe Tomlinson, ‘*Plus ça change?* Brexit and the flaws of the delegated legislation system’ (Public Law Project, 2020), p. 8 (<https://publiclawproject.org.uk/content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf> [Accessed: 20/10/2022]).

19, line 1, entitled 'Requirement of Consultation and Debate';

b. Under this heading, insert the following text or some equivalent:

(1) Any regulations made under sections 12 to 16, or made under powers and procedures amended by sections 12 to 16, shall not come into effect until:

(a) a consultation paper has been laid by the relevant national authority in the relevant national legislature;

(b) the consultation paper states the relevant national authority's intention to proceed with the making of the regulations subject to the consultation;

(c) the relevant national legislature has had reasonable time to debate a motion on the consultation paper; and

(d) the relevant national legislature has, in the course of the debate under section 18(a)(ii), voted to approve the relevant national authority's decision to proceed with the making of the regulations subject to the consultation.

(2) The relevant national authority shall publish a call for evidence and conduct an analysis of the evidence submitted to the relevant national authority in response to the call for evidence. The relevant national authority shall provide a reasonable time to respond in any calls for evidence.

(3) In the consultation paper, the relevant national authority shall provide a reasonable analysis of the outcome of any consultation process conducted and shall provide reasons for the relevant national authority's decision to proceed or cease to proceed, as the case may be, with the proposed exercise of the powers under clauses 12 to 16.

(4) 'The relevant national authority may only lay a consultation paper in the relevant national legislature after three months from the date on which the relevant national authority published a call for evidence from relevant stakeholders.

(5) 'The relevant national authority shall set aside reasonable time for the relevant national legislature to debate a motion on the consultation paper.

(6) 'For the purposes of this section, the "relevant national legislature" is:

(a) The UK Parliament where the relevant national authority is UK ministers;

(b) The Scottish Parliament where the relevant national authority is Scottish ministers;

(c) The Senedd Cymru where the relevant national authority is Welsh ministers;

(d) The Northern Ireland Assembly where the relevant national authority is Northern Irish ministers.';

iii. Amend the condition for the exercise of delegated powers. The test for the exercise of these powers should be one of necessity, not the less onerous test of appropriateness. In the following clauses, the word 'appropriate' should be removed and replaced with the word 'necessary'.

a. See clause 12(6); clause 13(5)-(6); clause 14(3); clause 15(2); clause 15(3); clause 16(1); clause 19(1); clause 22(4).

b. In clause 15(1), substitute for the current wording: '(1) A relevant national authority may by regulations revoke any secondary retained EU law without replacing it where it considers it necessary and proportionate to do so.'

iv. Limit the power of UK ministers to legislate in areas of devolved competence without the consent of devolved authorities. The Bill should limit the power of UK ministers to legislate in areas of devolved competence without the explicit consent of devolved authorities;

a. Insert a new clause between the new clause 18 (see above) and the current clause 18 (Abolition of business impact target), between page 18, line 38, and page 19, line 1, entitled '**Consent Mechanism**':

(1) Where UK ministers make regulations under any power contained in this Act where the regulations fall within the scope of devolved competences, the regulations have effect only to the extent that they do not fall within the scope of a devolved competences unless the

“Condition” is satisfied.

(2) The “Condition” is defined as follows:

The relevant devolved authority expressly communicates to the UK ministers its consent to the UK ministers making the specific regulations in question to the extent that the regulations in question would have effect, but for subsection (a) above, in relevant devolved areas of competence.

(3) For the purpose of subsection (2), the “relevant devolved authority” and the “relevant devolved areas of competence” are:

(i) Scottish ministers for Scottish devolved competences;

(ii) Welsh ministers for Welsh devolved competences; and

(iii) Northern Irish ministers for Northern Irish devolved competences.’

v. **Prevent EU-derived legislation that is equivalent to Acts of Parliament in substantive content and importance – such as GDPR – from being amended as if it were a statutory instrument.** In other words, limit the power of relevant national authorities to exercise the clause 15 powers in relation to EU-derived ‘legislative acts’.

a. Insert into clause 15 a new subsection (12) at page 18, between lines 18 and 19:

(12) Regulations made under this section shall not have any effect in relation to secondary retained EU law that was classified as, or derived from, EU legislative acts, as defined under the Treaty on European Union and the Treaty on the Functioning of the European Union before IP Completion Day.

vi. **Remove clause 12(2)(b) at page 14, lines 42 and 43.** This provision allows ministers to use clause 15 to rewrite certain provisions of primary legislation.

3. Cliff-Edge for Rights and Protections

17. Clauses 1, 3, 4, and 5 place important rights and protections on a cliff-edge. If Parliament enacts these provisions, it will be entirely powerless to prevent the disappearance of rights at the end of 2023, even if it wishes to ensure that this does not happen. The Bill makes no provision for a confirmatory parliamentary vote, provides no constraints on the types of rights that could disappear, and gives ministers complete discretion over whether to extend the 'sunset' period to 23 June 2026.

Problem 2.1: State Capacity and Encroaching on Devolution

18. The sunset provisions in clauses 1, 3, 4, and 5 will create a very considerable amount of work for ministers and civil servants. Ministers and their civil servants will need to find the time to carefully review and consider over 2,000⁵ pieces of retained EU law to decide which of their many different powers under this or other legislation to use in relation to each. It is important to note that ministers and civil servants will be forced to go through this process even for provisions of retained EU law that they deem to work satisfactorily, because without action they would simply disappear. The Government has not made a clear case for why this massive bureaucratic exercise is necessary.

19. Clause 2 empowers UK ministers to delay the sunset in clause 1. **It does not empower devolved ministers to delay the sunset in clause 1.** This asymmetry is an unnecessary encroachment on the autonomy of devolved institutions to control the status of retained EU law within their areas of competence. **The clause should be amended to enable devolved ministers to delay the sunset in clause 1** (see recommendation (i) below at pages 12 and 13).

Problem 2.2: Risk of Mistakes

20. There is a real risk of mistakes being made given the tight turn-around required by the sunset provisions and the amount of preparatory paperwork necessitated by the Bill. For example, when the Government had two years to prepare the statute book for Brexit, there was a significant increase in mistakes in SIs. Ninety-seven 'wash-up' SIs (SIs that correct mistakes in other SIs) were laid up until Exit Day. This amounts to 16% of the total number of Brexit SIs laid in this time. This should be compared to the figure for the 2015-2016 parliamentary session: 4.6% of all SIs were wash-up SIs. This increase in mistakes, produced in haste, occurred against the backdrop of the Article 50 two-year timer. This Bill would give ministers even less time than they had to prepare the UK for Exit Day.

Problem 2.3: Limited Power to Delay the Sunset

21. These mistakes, even if just the result of oversight, could have serious consequences. For example, the Bill would place important rights retained by section 4 of EUWA at risk of intended or unintended repeal.

⁵ Graeme Cowie, Research Briefing: Retained EU Law (Revocation and Reform) Bill 2022-23 (House of Commons Library, 2022), paragraph 2.4, p. 20.

22. There is a crucial difference between the sunset of EU-derived legislation (clause 1) and the sunset of section 4 rights (clause 3). Clause 2 of the Bill would empower ministers to delay the former sunset. If ministers get to the end of 2023 and find they have not been able to restate enough pieces of retained EU legislation, they can delay the sunset.
23. By contrast, there is no power to delay the sunset for section 4 rights. This is all the more concerning given the nature of rights retained under section 4 of EUWA. By their nature, these rights are not contained in pieces of legislation, but are derived from case law. There is a real risk of certain section 4 rights being missed and allowed to lapse.

Case Study: Article 157 TFEU (right to equal pay for equal work and work of equal value)

Section 4 of EUWA retains the directly effective right to equal pay for equal work and work of equal value. This free-standing right is derived from Article 157 of the Treaty on the Functioning of the European Union (TFEU).

This right is more powerful than the right to equal pay under the Equality Act 2010, since it does not entail the Equality Act's more restrictive approach to comparators. The Article 157 right allows women to compare themselves to men with respect to pay if their pay is determined by the same single source (*K v Tesco Stores* [2021] IRLR 699). This is particularly useful for supermarket workers, since under this retained EU rule supermarket shop workers (mostly female) can compare themselves to distribution staff (mostly male).

Unless specifically 'reproduced' (i.e., codified) by a minister before the end of 2023 using the power contained in clause 13(8), the Article 157 right to equal pay will disappear at the end of 2023. The minister may choose to make any change they consider appropriate for 'resolving ambiguities' or 'removing doubts or anomalies' (clause 14(3)(a)-(b)). This power may allow ministers to choose between different interpretations of the right, narrowing the right in question.

Recommendations

24. The following changes should be made to the Bill:

- i. **There should be a power to extend all the sunset provisions in the Bill.** Clause 2 allows for the extension of the sunset in clause 1, but not the sunsets in clauses 3-5. The same arguments for allowing the extension of the sunset in clause 1 (time constraints, legal certainty, risk of unintended consequences) apply to clauses 3-5. **Another issue with clause 2 is the exclusion of devolved ministers from the decision to delay the sunset.** This proposed amendment would enable all of the sunsets in the Bill to be delayed and confer on devolved ministers the power to extend the sunsets to the extent that they apply to retained EU law within devolved competences.
 - a. Amend clause 2 to enable the extension of the sunsets in clauses 3-5. A suggested amendment is below.
 - b. Remove the current clause 2 and replace it with the following new clause 2 with the following heading: 'Extension of sunset provisions'

(1) A relevant national authority may by regulations provide that section 1, section 3, section 4 and section 5 have effect from a later specified time.

(2) The reference to the end of 2023 in section 1(1) is subject to regulations made under section 2(1).

ii. **There should be clear limits to the types of provisions that can disappear at the sunset.** EU-derived subordinate legislation implementing EU legislative acts (e.g. the Working Time Regulations) should be shielded from the sunset. Retained direct EU legislation of equal importance to statutes in substantive importance should also be shielded (for example, the GDPR).

a. Insert into clause 1 a new subsection (6) at page 2, between lines 3 and 4:

(6) Subsection (1) shall not have any effect in relation to EU-derived subordinate legislation and retained direct EU legislation that was classified as, or derived from or implementing, EU legislative acts, as defined under the Treaty on European Union and the Treaty on the Functioning of the European Union before IP Completion Day.

iii. **Reverse the operation of the sunset.** The purpose of this proposed amendment is to reverse the operation of the sunset, so that only identified legislation is revoked at the end of 2023. This would ameliorate one of the current problems with the Bill, which is that no one knows what exactly will be revoked at the end of 2023. It is highly unsatisfactory that the Bill would have such an uncertain and unascertained effect on so many regulatory regimes. Accordingly, in the interests of parliamentary sovereignty, transparency, and certainty, the sunset should only apply to a list of legislation approved by Parliament. This new sunset clause should operate subject to the requirements set out in recommendation (iv) below.

a. Remove clause 1, from page 1, line 1, to page 2, line 3, and replace with the following new clause 1:

(1) A Minister of the Crown may lay in the House of Commons a “Revocation List”.

(2) In the Revocation List, a Minister of the Crown may list:

(a) specific provisions of EU-derived subordinate legislation; and

(b) specific provisions of

retained direct EU legislation.

(3) In this section, “EU-derived subordinate legislation” means any domestic subordinate legislation so far as--

(a) it was made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972 or

(b) it was made, or operated immediately before IP completion day, for a purpose mentioned in section 2(2)(a) of that Act (implementation of EU obligations etc),

and as modified by any enactment.

(4) In subsection (3), “domestic subordinate legislation” means any instrument (other than an instrument that is Northern Ireland legislation) that is made under primary legislation.

(5) The provisions listed in the Revocation List under subsection (2) are revoked at the end of 2023, subject to subsection (6).

(6) The revocation under subsection (5) of legislation listed under subsection (5) shall not have effect until—

(a) four months have elapsed since the Revocation List was laid in the House of Commons,

(b) the House of Commons has voted to approve the Revocation List; and

(c) the House of Lords has voted to approve the Revocation List.

(7) The revocation of an instrument by subsection (5) does not affect an amendment made by the instrument to any other enactment.

iv. **Nothing should be allowed to disappear at the sunset without consultations, impact reports, and either a parliamentary vote in favour or the opportunity for Parliament to remove items from a list of what the Government wishes to repeal.** Parliamentary oversight should be guaranteed. A practical example of this would be a provision that clauses 1-5 will only come into force following a parliamentary vote.

a. Insert into clause 3, page 2, line 12, the following new subsection (3):

(3) Subsections (1) and
(2) shall not have effect until:

(a) the House of
Commons has voted to approve the coming into effect of the sunset in
section 3; and

(b) the House of Lords
has voted to approve the coming into effect of the sunset in section 3.
b.

b. Insert into clause 4, at page 3, line 10, the following new subsection (4):

(4) Subsections (1), (2),
and (3) shall not have effect until:

(a) the House of
Commons has voted to approve the coming into effect of subsections (1),
(2) and (3); and

(b) the House of Lords
has voted to approve the coming into effect of subsections (1), (2) and (3).

c. Insert into clause 5, at page 3, line 36, insert the following new subsection (8):

(8) Subsections (1), (2),
(3), (4), (5), (6) and (7) shall not have effect until:

(a) the House of
Commons has voted to approve the coming into effect of subsections (1),
(2), (3), (4), (5), (6) and (7); and

(b) the House of Lords

has voted to approve the coming into effect of subsections (1), (2), (3), (4), (5), (6) and (7).

- v. **Insert a reporting and consultation requirement.** Amend the sunset clauses (clauses 1 and 3-5) such that they only come into force following:
- a. The carrying out and reporting of proper analysis of the effect of the sunset provisions and the effect of the revocation of individual measures and principles subject to the sunset provisions;
 - b. The laying of an impact report of the effect of the coming into force of the sunset provisions and the effect of the revocation of individual measures and principles subject to the sunset provisions; and
 - c. The carrying out of meaningful consultation on the laws that ministers propose to allow to lapse.

4. Legal Uncertainty

25. The Bill contains many provisions with uncertain effects, which will probably need to be litigated to determine what they mean and what they do. These include:
- i. Clause 4 (abolition of supremacy and the creation of a new rule of interpretation that goes beyond the orthodox UK constitutional rule of later laws repeal earlier laws (see new subsection (A2));
 - ii. Clause 5 (abolition of general principles, which are used as a tool for interpreting retained EU law);
 - iii. Clause 7 (which seeks to lower the threshold for departing from precedent, creates a novel EU-style system for references on points of law to higher courts, and creates a mechanism for government law officers to intervene in private disputes relating to retained EU law);
 - iv. Clause 14(2) (which provides that restatements may 'use words or concepts that are different from those used in the law being restated'; this could, presumably, have the effect of changing the meaning of the restated law).
26. Where parties have, in the past, lost cases on points of retained EU law, the Bill might allow them to re-open settled matters to seek their desired outcome. This is undesirable for two reasons:
- i. **Firstly**, where the courts depart from precedent, this has retrospective as well as prospective effect. If courts depart from precedent too liberally, this can have the effect of unsettling contracts, employment arrangements, and regulatory arrangements.
 - ii. **Secondly**, the unsettling of the law will increase costs for individuals and businesses.
 - a. Legal advice will need to be sought where before the law was certain. Settled matters may need to be litigated.
 - b. Where there has been some dispute over the proper interpretation of retained EU law (for example, with respect to holiday pay), individuals and businesses will need to anticipate the re-litigation and potential reversal of the interpretations under which they have been operating.⁶
 - c. The effect of this uncertainty will be increased costs, which will impact growth and the attractiveness of the UK as a location for investment. It will also mean greater stress, anxiety, and expense for individuals who will not be clear where they stand in

⁶ E.g. see *British Gas Trading Ltd v Lock & Anor* [2016] EWCA Civ 983.

relation to their retained EU rights.

Recommendations

27. We recommend the following changes to the Bill:

- i. **Amend clause 7, page 4, in particular lines 24 to 32 and lines 34 to 41.** Insert a provision requiring that courts must have regard to legal certainty and the principle that significant changes to the law should be made by Parliament before departing from retained EU case law;
- ii. **Amend the new subsection (A2) of section 5 of the EUWA 2018, inserted by clause 4 of this Bill, at page 2, lines 27 to 31.** Amend this new subsection such that the phrase ‘all domestic enactments’ is changed to ‘domestic enactments enacted after the enactment of the relevant provision of retained direct EU legislation’.
- iii. **As a consequence of recommendation (iii) (and only if that recommendation is adopted), remove clause 8 at pages 9, lines 34 to 38, and page 10, lines 1 to 13.**

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