

Hansard Society Submission to the Constitution, Europe, External Affairs and Culture Committee

22 June 2022

1. This submission focusses on the ways in which retained EU law (REUL) might be changed, and in particular how that might be done by Statutory Instrument (SI) under delegated powers. The main points it makes are:

- REUL is a diverse body of law and so may not be amenable to a ‘one-size-fits-all’ approach to its categorisation and modification.
- There are already a number of different ways in which REUL can be changed.
- Allowing for a broader range and greater volume of changes to be made to REUL under delegated powers carries democratic and constitutional risks unless appropriate scrutiny safeguards are in place.

2. The Hansard Society has longstanding and deep-rooted concerns relating to the use of delegated powers and delegated legislation at Westminster.¹ While Brexit and Covid have cast a spotlight on the use of delegated legislation, our view is that there are longstanding problems which pre-date these two events. We believe delegated legislation has an essential role to play in modern governance, but that the system needs wholesale reform to prevent further erosion of Parliament’s legislative authority. For this reason, the Society is currently undertaking a Delegated Legislation Review (with financial support from The Legal Education Foundation), to develop proposals for reform.²

3. The Society’s – and the Review’s – remit is focussed on the Westminster Parliament. However, many similar issues arise across different legislatures and the Review is also assessing what procedures are needed in relation to powers delegated to UK Ministers that permit SIs to be made that affect devolved matters.

How best to understand retained EU law as a category of domestic law and the significance of the status attached to it

4. Retained EU law (REUL) forms an integral part of domestic law that consists of a snapshot of the EU law that applied in the UK at the moment of IP completion date. However, REUL is not a uniform or homogeneous body of law. There are at least three reasons for this diversity:

- a. The different statuses it occupied in the hierarchy of EU law (there is primary, secondary and tertiary EU law);
- b. The various ways in which it has become part of UK law; and

¹ Fox, R. & Blackwell, J. (2014), *The Devil is in the Detail: Parliament and Delegated Legislation* (London: Hansard Society)

² <https://www.hansardsociety.org.uk/projects/delegated-legislation-review>

- c. The diverse policy areas it covers.

As a result, its categorisation and status as a matter of domestic law is neither singular nor straightforward. Different parts of REUL have different statuses. This issue may appear theoretical and/or abstract, but there are practical implications to the status attached to retained EU law.

5. One important implication of the status of particular provisions of REUL is in the way it can be changed in the future. In particular, it is easier to amend some provisions/instruments of REUL than others as a result of:

- a. The mechanism by which that law was first enacted into domestic law (via primary or delegated legislation), and
- b. The effect of section 7 of the European Union (Withdrawal) Act 2018 (EUWA).

6. During EU membership, some EU law needed to be transposed into domestic law in order to be effective. This was done either by primary legislation, or by delegated legislation made under section 2(2) of the European Communities Act 1972 and/or other relevant powers. For example, the Equality Act 2010, the Working Time Regulations 1998 and the Air Quality Standards (Scotland) Regulations 2010 all contain REUL. Other aspects of EU law were 'directly effective' and so did not appear on the domestic statute book until transferred over by EUWA.

7. Section 7 of EUWA leaves untouched the status of REUL that was already on the domestic statute books as either primary or delegated legislation, and establishes rules for the modification of REUL that was transferred onto the domestic statute book by EUWA (ie those provisions that had not previously been transposed into domestic law). Those rules take into account the status that that REUL had as a matter of EU law (ie by what procedure it came to form part of EU law: whether it was primary, secondary or tertiary EU law) and the nature of the change being made to REUL (eg if it is making transitional or saving provision).

8. The diversity of REUL and consequent complexity of its status means that a one-size-fits-all approach to REUL's future amendment may not be appropriate. Any alteration to the current position must take into account the diversity of REUL by not treating unlike cases alike. Both the policy content and the legal form matter when determining how law ought to be modified. Whether or not a policy area was previously an EU competence may be relevant to determining how law in that area should be made in the future (and what oversight should attach to that process) but it ought not be decisive on the matter.

What mechanisms exist for changing retained EU law in devolved areas and how these may change in the future

9. Before Brexit, what is now REUL could be changed in a number of ways (insofar as it was on the domestic statute book), including:

- a. By primary legislation;
 - b. By Statutory Instrument or Scottish Statutory Instrument made under the now repealed section 2(2) of the European Communities Act;
 - c. By Statutory Instrument or Scottish Statutory Instrument made under other delegated powers – though such changes had to be within the confines of EU law.
10. Post-Brexit, REUL may now be changed in a range of similar but not identical ways:
- a. By primary legislation;
 - b. By Statutory Instrument or Scottish Statutory Instrument made under delegated powers that existed pre-Brexit (ie those in 9(c) above) – though now without the confines of EU law;
 - c. By Statutory Instrument or Scottish Statutory Instrument made under powers in EUWA – though these powers are limited to correction of deficiencies and are sunsetted;
 - d. By delegated legislation made under powers in other Acts that are directly related to the *process* of Brexit. For example:
 - i. to implement the Trade and Cooperation Agreement under section 31 of the European Union (Future Relationship) Act 2020;
 - ii. to implement free trade agreements rolled-over from EU membership under section 2 of the Trade Act 2021;
 - e. By Scottish Statutory Instrument made under section 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 which allows provision to ‘keep pace’ with EU law;³
 - f. By Statutory Instrument or Scottish Statutory Instrument made under powers in other new Acts that permit changes to be made to REUL (including new policy changes which form part of how the UK and Scotland intend to govern post-Brexit). For example:
 - i. Section 6 of the Professional Qualifications Act 2022 allows the appropriate national authority (which can be the Scottish Ministers) to modify any retained EU recognition law so as to cause it to cease to have effect;
 - ii. Schedule 11(1) of the Building Safety Act 2022 allows the Secretary of State to make ‘construction products regulations’ in relation to

³ We are not aware of any use of this power to date.

the marketing and supply of construction products in the UK, which may modify REUL.

11. The legislatures of the UK may continue to both directly change REUL and to enact powers that permit REUL to be changed in the future. An Act of Parliament may grant powers to a UK Minister to change REUL in areas of devolved competence, though any such power may be subject to a requirement to consult with or secure the consent of the Scottish Ministers.
12. The planned UK Brexit Freedoms Bill seems likely to contain new powers to modify REUL which may be broad in terms of both what can be modified and for what reason or purpose it can be modified.
13. The effect of any changes made to REUL may be dependent on other factors such as the Northern Ireland Protocol and the UK Internal Market Act 2020.
14. The Scottish Parliament and Scottish Government have agreed a “Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit” (the Protocol) which applies to all delegated legislation made by UK Ministers that include provisions that are within devolved competence and relate to matters within the competence of the EU until immediately before IP completion date. The Protocol sets out the roles and responsibilities of the Scottish Ministers and the Scottish Parliament when the former wish to consent to the making of relevant SIs by the UK Ministers. The Protocol applies even where there is no statutory requirement on UK Ministers to obtain the consent of the Scottish Ministers before making an SI.

The impact on devolved policy areas of changing the current status of retained EU law and making it easier to amend

15. REUL covers a wide range of policy areas, such as working hours, air quality, data protection, cybersecurity, child benefits, agency workers, energy and renewables, clean water, copyright, chemicals, medicines authorisation and food safety. Each of these areas may consist of some combination of primary, secondary and tertiary EU law, ranging from overarching legal constructs to detailed technical updates. In many cases, there is an overlap with devolved policy areas.
16. Given the wide scope of REUL, modifications to it are likely to be of considerable interest to businesses, workers, consumers and other stakeholders across the UK. Amendment of REUL may also impact competitiveness, bureaucratic burdens and access to markets. Legal certainty is therefore crucial.
17. Many people and organisations are likely to both monitor and care about changes made to REUL. They will expect their elected representatives to have a say in how it is done.
18. Modification of REUL may also have important consequences for the UK’s international legal obligations and domestic constitutional arrangements. Elected

representatives may wish to have meaningful oversight of these matters, even if they do not receive the same degree of public interest as some policy decisions with a high media or campaign profile. For example, changes to REUL may impact:

- a. the operation of the Trade and Co-operation Agreement (TCA) with the EU, in particular the level playing field;
- b. other (current or prospective) international commitments of the UK;
- c. the operation of the UK Internal Market; and
- d. areas of devolved competence and relations between the nations of the UK (including with respect to the Northern Ireland Protocol).

19. Creating new powers to change REUL by Statutory Instrument or Scottish Statutory Instrument may mean that UK and/or Scottish Ministers will be able to make changes to law and policy in areas that were previously EU competences through mechanisms that do not provide for the appropriate degree of parliamentary oversight and scrutiny.

20. As noted above, the Hansard Society has longstanding concerns about the inadequacy of existing procedures for scrutinising delegated legislation at Westminster. In our view, this can result in Parliament being by-passed in important decision-making and being unable to effectively hold the Executive to account. This is because of the following reasons:

- a. There is no mechanism to ensure that the scrutiny of an SI is commensurate with its policy content or the level of political interest it attracts.
- b. Debate on affirmative instruments is normally cursory at best and frequently a poor use of MPs' and Ministers' time. There is no Commons Committee that has both the resources and the powers to meaningfully scrutinise and debate the policy content of SIs.
- c. There is no penalty for poor quality accompanying documentation, even where that documentation is essential to the understanding and/or operation of the Instrument in question.
- d. The absence of any power of amendment and the negligible risk of an Instrument being rejected by Parliament.
- e. Growing normalisation of use of the made affirmative and urgent procedure reducing Parliament's scope for scrutiny still further.

21. Granting new powers to the UK Ministers that allow for important or controversial policy changes to be made to REUL without overhaul of the current procedures for parliamentary scrutiny of Statutory Instruments would further increase the democratic deficit that currently exists with respect to delegated legislation. It would transfer more power from the legislative branches to the executive, a matter of considerable constitutional concern. The democratic deficit may be particularly acute in the devolved

nations, given the lack of formal guarantees for the devolved legislatures in scrutinising and approving SIs made by UK Ministers that engage devolved matters.

Whether, from a devolved perspective, there are specific issues which could arise from changing the status of and basis for amending retained EU law which should be taken into account in the future

22. So far as we are aware, there is no universal agreement in place that guarantees a role for either the Scottish Ministers or the Scottish Parliament in the making of SIs by UK Ministers in areas that engage devolved matters. As noted above, the Scottish Government and Scottish Parliament have agreed a Protocol that governs matters that were previously within EU competence (which is likely to be co-extensive with REUL), but not other matters. However, it is non-binding and limited in scope. The limited scope has been raised in recent Reports from the Delegated Powers and Law Reform Committee⁴ and correspondence between that Committee and the Minister.⁵ There may be a case for improving and solidifying the rules, principles and procedures in this area.

⁴ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2022/2/24/628f6953-bfc3-4241-8069-49a8cdd5c08a/DPLRS062022R14.pdf>, paras. 52-53.

⁵ <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee/correspondence/2021/legislative-consent-memorandum-police-crime-sentencing-courts-and-the-health-and-care-bills-response>