



Law Society
of Scotland

Law Society Scotland

Submission to the Constitution, Europe, External
Affairs and Culture Committee on Retained EU Law

June 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Law Society Scotland welcomes the opportunity to consider and respond to the Submission to the Constitution, Europe, External Affairs and Culture Committee on Retained EU Law.

General Comments

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

In the foreword to *Legislating for the United Kingdom's withdrawal from the European Union* (CM 9446, 2017) the Prime Minister, Teresa May MP, stated “Our decision to convert the ‘acquis – ‘the body of European legislation – into UK law at the moment we repeal the European Communities Act is an essential part of this plan.

This approach will provide maximum certainty as we leave the EU. The same rules and laws will apply on the day after exit as on the day before. It will then be for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate”.

If we accept the premise that retaining EU law in UK law provided “the maximum certainty” as the UK left the EU, then subject to any particular amendments which are necessary to keep the body of law up to date and functioning there is no reason why retained EU law cannot be considered a sustainable concept. On the other hand, it would be equally possible following a thorough review and relevant amendments that the incorporation into domestic law in the four UK jurisdictions could be completed.

Transposing law from a pre-existing constitutional structure to a new one is not a new idea especially when reordering the legal system after a significant constitutional change. It happened after the Reformation in Scotland in 1560 and in the departure of colonies from the British Empire. For example, the Nigeria Independence Act 1960 states in section 1:

(1) On the first day of October, nineteen hundred and sixty (in this Act referred to as “the appointed day”), the Colony and the Protectorate as respectively defined by the Nigeria (Constitution) Orders in Council, 1954 to 1960, shall together constitute part of Her Majesty’s dominions under the name of Nigeria.

(2) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Nigeria or any part thereof as part of the law thereof, and as from that day—

(a) Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Nigeria or any part thereof; and

(b) the provisions of the First Schedule to this Act shall have effect with respect to legislative powers in Nigeria.

(3) Without prejudice to subsection (2) of this section, nothing in subsection (1) thereof shall affect the operation in Nigeria or any part thereof on and after the appointed day of any enactment, or any other instrument having the effect of law, passed or made with respect thereto before that day.

[legislation.gov.uk](https://www.legislation.gov.uk) explains that “EU legislation which applied directly or indirectly to the UK before 11.00 p.m. on 31 December 2020 has been retained in UK law as a form of domestic legislation known as ‘retained EU legislation’” <https://www.legislation.gov.uk/eu-legislation-and-uk-law> .

Retained EU law is a new and unique concept (see *Retained EU Law; A Practical Guide*, Eleonor Dubs and Indira Rao) in domestic law created by the European Union Withdrawal Act 2018 (EUWA) sections 2–4. Section 6 of the EUWA defines retained EU law:

“Retained EU law” means anything which on or after IP completion day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time).

There are three categories of retained EU law:

- i. EU derived domestic legislation, e.g., regulations and statutory instruments which implemented EU law when the UK was a member of the EU preserved in UK law by section 2 EUWA,
- ii. Direct EU legislation which was directly applicable in the UK incorporated into UK law by section 2 EUWA; and
- iii. Other EU rights and obligations under section 4 EUWA.

In addition, there are the categories of retained EU case law (comprising retained EU case law and retained domestic case law) and retained general principles under section 6 EUWA.

The issue of clarity is a key one. [legislation.gov.uk](https://www.legislation.gov.uk) maintains a searchable database of “All Legislation originating from the EU”. This body of law comprises the legislation required to be published under schedule 5 EUWA. It contains 124854 Regulations, 30737 Decisions, 4168 Directives originating from the EU and 5 EU treaties. But as the website explains whilst it is the most comprehensive and official UK reference point for EU law as it stood at 11pm on 31 December 2020 (IP completion day) there are exemptions provided for under Schedule 6 EUWA and in schedule 5 EUWA Ministers have the power to create an exception from the duty to publish.

[legislation.gov.uk https://www.legislation.gov.uk/primary+secondary?title=Eu%20exit](https://www.legislation.gov.uk/primary+secondary?title=Eu%20exit) states that there are 908 UK Statutory Instruments, 92 Scottish Statutory Instruments, 86 Welsh Statutory Instruments and 32 Northern Ireland Statutory Rules categorised as “EU exit” regulations currently in force.

Pinsent Masons 'blog on the topic of EU exit regulations states, “For the most part, these were technical, to ensure that the retained EU law would be clear and operable when applied purely in a UK domestic context. However, there were also substantive changes, and some pieces of EU legislation were revoked entirely: [Retained EU law in the UK after Brexit \(pinsentmasons.com\)](https://pinsentmasons.com).”

There are therefore issues about clarity and accessibility of retained EU law. The significant number of statutory instruments which amended retained EU law and changes to those instruments create a complex body of law which is difficult to determine and apply. We agree with the Bar Council of England and Wales that a consolidation of retained EU law would be useful to those to whom such laws apply and those who advise them.

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

Section 7 EUWA provides for the status of retained EU law – that has an impact on how it can be amended, scrutinised, judicially reviewed, interpreted and struck down.

There are specific provisions for retained direct principal EU legislation, retained direct minor EU legislation, retained EU law by virtue of section 4.

Retained direct principal EU legislation can only be amended by an Act of Parliament, other primary legislation such as an Act of the Scottish Parliament or by subordinate legislation under specific powers.

Section 8 EUWA provides UK Ministers with wide ranging powers to amend retained EU law to remove “deficiencies”. Similar powers can be exercised by Scottish Ministers (acting alone or jointly with UK Ministers) under Schedule 2 which provides in paragraph 2(1) that “*No provision may be made by a devolved authority acting alone in regulations under this Part unless the provision is within the devolved competence of the devolved authority*”.

The Scotland Act 1998 section 29 provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the competence of the Scottish Parliament. When such an Act was passed any provision which was incompatible with EU law was outside competence and therefore “not law”.

The original version of the EUWA contained provisions in clause 11 dealing with retained EU law. These provisions allowed the UK Government to take the powers to change Retained EU law and in the words of Professor Michael Keating “release them where centralisation was not necessary”. Such provisions were controversial and resulted in amendments to the bill during its passage which resulted in section 12 of the EUWA.

Notwithstanding the repeal of most of Section 12 it is worthwhile setting out how it did affect devolved competence by removing the restriction on the legislative competence of the Scottish Parliament (and the other devolved legislatures) not to legislate in a manner incompatible with EU law.

The EUWA provided that the power to make law where EU and devolved law intersected passed by default to the devolved institutions on IP completion day, 31 December 2020. Analogous provisions applying to the other devolved legislatures were contained in section 12. Similar provisions affecting executive competence were to be found in Schedule 3 EUWA.

Section 12 inserted a new Section 30A Legislative competence: restriction relating to retained EU law into the Scotland Act which provided:

(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

(2) But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Parliament.

These provisions created a legislative framework which ensured that, subject to regulations under subsection (1) being in force the Scottish Parliament could modify retained EU law. Section 12 further provided that a Minister of the Crown was obliged not lay a draft statutory instrument containing regulations under section 12 for approval before both Houses of Parliament unless the Scottish Parliament had made a consent decision (the definition of “consent” created significant issues) in relation to the laying of the draft, or the 40-day period has ended without the Parliament having granted consent. The Minister of the Crown who was proposing to lay the draft was obliged to provide a copy of the draft to the Scottish Ministers and inform the Presiding Officer that a copy had been so provided.

Schedule 7 EUWA (duty to make explanatory statement about regulations under this section including a duty to explain any decision to lay a draft without the consent of the Parliament) applied to the Minister of the Crown.

The European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022 <https://www.legislation.gov.uk/uksi/2022/357/regulation/6/made> repealed most of section 12 of the EUWA. Accordingly, the restrictions on Scottish Ministers making changes to retained EU law have been removed although most aspects are covered by Common Frameworks. Furthermore, the UK Government had a statutory requirement under Schedule 3, Part 2 to the European Union (Withdrawal) Act 2018 to report to the UK Parliament every three months in connection with retained EU law restrictions.

The UK Government now only has to report on the progress made on the development of UK Common Frameworks. The fourteenth *European Union Withdrawal and Common Frameworks* report covers the period from 26 September to 25 December 2021 <https://www.gov.uk/government/publications/the-european-union-withdrawal-act-and-common-frameworks-26-september-to-25-december-2021/the-european-union-withdrawal-act-and-common-frameworks-26-september-to-25-december-2021> . The report

details that the Government did not make use of powers under section 12 of the EUWA to limit devolved competence in any policy areas.

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

It is important in any review of retained EU Law for the UK Government to bear in mind the legislative and executive competencies of the devolved legislatures and administrations.

In respect of retained EU law these will relate to a variety of policy areas which may differ between the respective devolved arrangements. In relation to Scotland those policy areas will likely cover agriculture and rural affairs, fisheries, forestry and the protection of the environment. Many areas are subject to Common Frameworks such as a. agricultural support, b. animal health and welfare, c. plant varieties and seeds, d. fertilisers, e. plant health, f. organics, g. chemicals and pesticides, h. food compositional standards and labelling, i. air quality, j. ozone depleting substances and fluorinated greenhouse gases, k. integrated pollution prevention and control best available techniques and l. fisheries management and support.

The principles relating to Common Frameworks agreed by all parties included enabling the functioning of the UK internal market, while acknowledging policy divergence, compliance with international obligations and that the UK can negotiate, enter into and implement new trade agreements and international treaties.

4. 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;

The specific issues lie in the area of the roles of UK Ministers and the UK Parliament in relation to retained EU law instruments which may affect law in the devolved sphere. This raises questions about how this interacts with the legislative consent convention declared in the Scotland Act 1998 section 28 (8):

But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

Unless provided for in the parent act *regulations* under such an act which may affect devolved legislative or executive competence or amend devolved law do not require the consent of the Scottish Parliament or the agreement of Scottish Ministers. There are provisions in the UK Internal Market Act 2020 and the Professional Qualifications Act 2022 which are specifically designed to involve consultation between the UK Government and the devolved administrations but these do not require the consent of the devolved administrations.

5. The interaction of retained EU law and the mechanisms for changing it with other constitutional arrangements such as common frameworks.

In September 2021, Lord Frost announced the review into the substance of retained EU law (REUL) to determine which departments, policy areas and sectors of the economy contain the most REUL.

On 22 June, the Cabinet Office, published the outcome of this review. The Government announced its intention to update REUL by “amending, repealing or replacing REUL that is no longer fit for the UK”. The Government states this will “create a new pro-growth, high standards regulatory framework”.

The Government will shortly introduce the Brexit Freedoms Bill to amend, repeal or replace REUL.

The answer to this question depends on the terms of the Brexit Freedoms Bill. The Scottish Government have indicated that the UK Government has not shared the Brexit Freedoms Bill instructions with the Scottish Government or provided any settled certainty of its policy intentions.

The Scottish Government understand that the Bill will end the supremacy of European law and repeal or reform regulations on business. These changes are to be completed by 2026 or 2030,

The bill could contain provisions which may impact on devolved competencies and the Scottish Government’s policy of aligning with EU standards.

The Common Frameworks process, which is designed to manage divergence and alignment needs to be taken into account in relation to the bill. Common Frameworks often have provisions which allow for modification of the Framework. We have consistently commented throughout the Brexit process that the whole of governance needs to be involved in the unprecedented policy and legal changes which are the result of withdrawal from the EU. The UK Government and the Devolved Administrations should make sure that they uphold the principles set out in the Review of Intergovernmental Relations when approaching this issue.

The UK Government has recently published a catalogue of REUL (2,400 pieces of legislation) which can be accessed through an interactive dashboard: [Retained EU Law Dashboard](#). This exercise identified that retained EU law is concentrated in over 300 policy areas across 21 sectors of the UK economy. The dashboard will be updated on a quarterly basis, as REUL is repealed and replaced, or more REUL is identified.

It is acknowledged that the dashboard does not provide a comprehensive account of REUL within the devolved competence but may contain individual pieces of REUL which do sit in devolved areas.



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