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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Retained EU Law (Revocation and Reform) Bill

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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 29 November, 13 December and 20 December 2022, the Delegated Powers and Law Reform Committee considered the delegated powers that are exercisable within devolved competence in the [Retained EU Law \(Revocation and Reform\) Bill](#) (“the Bill”).
2. The Scottish Government lodged a [Legislative Consent Memorandum](#) (“LCM”) in relation to the Bill on 8 November 2022.
3. The Bill is a UK Government Bill, introduced in the House of Commons on 22 September 2022. It is currently at the report stage in the House of Commons. As the Bill is still progressing through the UK Parliament it is still subject to amendment. The Committee may therefore need to consider a supplementary LCM in due course. The Committee's consideration of the Bill and resulting recommendations are set out below.
4. Under Rule 6.11.1(b) and (c) of Standing Orders, the Committee submits this report to the lead Committee for the LCM, the Constitution, Europe, External Affairs and Culture Committee.
5. Oliver Mundell MSP and Jeremy Balfour MSP dissented from all recommendations in this report.

Overview of the Bill

6. According to the Explanatory Notes, the purpose of the Bill is to “provide the Government with all the required provisions that allow for the amendment of retained EU law (REUL) and remove the special features it has in the UK legal system.”ⁱ
7. Retained EU law is a form of UK domestic law. It was created to preserve the EU law and rights which applied in the UK immediately before the UK left the EU. The purpose of doing this was to provide legal continuity and certainty following the UK’s withdrawal from the European Union.
8. The Bill will give effect to policies that were set out in the Benefits of Brexit Report published in January 2022 and the UK Government’s announcement of the review into the substance and status of REUL in September 2021.
9. The Bill completely overhauls the constitutional architecture of REUL, making it, overall, much easier to revoke, modify or replace through secondary legislation.
10. To achieve this, the Bill does four key things:
 1. It provides a “sunset” on REUL, meaning that most REUL which is not specifically kept (by Ministers actively taking steps to keep a piece of legislation on the statute book) will be automatically repealed at the end of 2023 (i.e., on 31 December 2023).
 2. It gives powers to UK Ministers and Ministers of the devolved authorities in Scotland, Wales, and Northern Ireland to amend, revoke or retain pieces of REUL. Powers in other legislation are modified to enable them to be used to amend most REUL by secondary legislation.
 3. It changes the rules on how REUL is to be interpreted, by removing the principle of supremacy of EU law and other retained general principles of EU law by the end of December 2023, allowing UK courts to depart from retained case law, and requiring retained direct EU legislation to be interpreted and applied consistently with domestic legislation.
 4. It renames REUL which remains on the statute book after 31 December 2023 as “assimilated law”.

ⁱ Explanatory Notes, paragraph 1.

Legislative Consent

11. All clauses of the Bill extend and apply to the whole of the UK. The UK Government indicates in its [Explanatory Notes](#) that it is seeking the Scottish Parliament's legislative consent for clauses 1, 2, 7, 8, 10, 12-14, 15, 16 and for Schedules 2 and 3.
12. The Scottish Government agrees that these clauses require consent. In addition, it considers that clauses 3, 4, 5, 6, 19, 20, 21, and Schedule 1 also require consent.
13. The Scottish Government does not support the Bill and states in its LCM that it believes "the Parliament should not give consent to the Bill for three reasons: its deregulatory agenda; its undermining of devolution; and the risk posed by the sunset provision to automatically repeal this body of law unless Ministers take legislative action and the date of sunset which will disrupt Scottish Government work, including the legislative programme."ⁱⁱ

ⁱⁱ LCM, paragraph 51

Delegated powers - overview

14. The UK Government has published a [Delegated Powers Memorandum](#) to accompany the Bill (the “UK DPM”). As is normal for UK bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government’s view on the relevant clauses is set out in the LCM.
15. There is no requirement in the Bill that UK Ministers obtain or seek the consent of the Scottish Parliament or Scottish Government before exercising the powers in devolved areas.

Questions asked of the Scottish and UK Governments

16. The Committee wrote to the Secretary of State for Business, Energy, and Industrial Strategyⁱⁱⁱ and to the Cabinet Secretary for the Constitution, External Affairs and Culture^{iv} on 30 November requesting further explanation in relation to powers that are exercisable by UK Ministers within devolved competence.
17. The Committee received a [response](#) from the Cabinet Secretary for the Constitution, External Affairs and Culture on 12 December 2022. A [response](#) from the Secretary of State was received on 15 December.

ⁱⁱⁱ <https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/sos-for-business-energy-and-industrial-strategy-on-retained-eu-law-revocation-and-reform-bill.pdf>

^{iv} <https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/sg-on-retained-eu-law-revocation-and-reform-bill.pdf>

Evidence session

18. The Committee held an evidence session at its meeting on 13 December 2022, where it heard from, Morag Ross KC, Member of the Faculty of Advocates, Sir Jonathan Jones KC, senior consultant at Linklaters LLP, and Dr Adam Tucker, constitutional lawyer, University of Liverpool. The Official Report can be found [here](#).

Committee consideration

19. The Committee's consideration of the delegated powers in the Bill is set out below in two parts. Part 1 makes recommendations which are applicable to all regulation making powers conferred on UK Ministers in devolved areas. Part 2 makes recommendations that relate to individual relevant powers.

Part 1: Recommendations applicable to all regulation making powers conferred on UK Ministers in devolved areas

Powers for UK Ministers within devolved competence

20. The powers in clause 2 (power to extend the sunset) and clause 19 (power to make consequential provision) of the Bill are capable of being exercised within devolved competence but are exercisable only by UK Ministers. There is no concurrent power for Scottish Ministers and there is no requirement to obtain the consent of the Scottish Ministers before UK Ministers exercise these powers within devolved competence. The regulations would be laid in the UK Parliament only, giving no opportunity for scrutiny by the Scottish Parliament.
21. Most of the remaining powers (in clauses 1, 8, 12, 13, 15 and 16) can be used either by UK Ministers or by Scottish Ministers in devolved areas, or they can act jointly.
22. Where a power is exercised jointly, the statutory instruments will be laid in, and subject to approval/annulment by, both the UK Parliament and the Scottish Parliament.^v However, while the joint procedure is also available for making the "EU Exit" SSIs under the deficiency-correcting power in the EU (Withdrawal) Act 2018, the joint procedure was never in fact used for regulations making provision within Scottish devolved competence. That power has only ever been exercised by Scottish Ministers and UK Ministers separately.
23. Where the power is exercised by UK Ministers alone, the statutory instruments will not be laid in, nor subject to any procedure in, the Scottish Parliament. In such cases there is also no requirement in the Bill that UK Ministers obtain the consent of the Scottish Ministers before exercising the power within devolved competence. There does not appear to be any political commitment in the accompanying documents that UK Ministers will seek/obtain the consent of the devolved authorities when exercising the delegated powers within devolved competence. This contrasts with the position in relation to the EU Exit SSIs, where a political commitment to this effect was given and honoured. [SI Protocol 2](#), which can give the Scottish Parliament a scrutiny role, will not operate effectively in relation to these powers because of the absence of a consent requirement.
24. The Committee [wrote](#) to the UK Government on 12 July 2022 regarding the scrutiny of delegated powers in UK Parliament bills conferred on UK Ministers in devolved areas and the application or otherwise of SI Protocol 2. The Secretary of State for Levelling Up, Housing and Communities [responded](#) on 14 August indicating that the

^v The parliamentary procedure for joint exercise of the powers is set out in Schedule 3, Part 4 of the Bill.

“UK Government takes into account a variety of factors when seeking delegated powers in devolved areas.” He also indicated that “[w]hether or not to include statutory consent requirements is considered on a case-by-case basis as each policy area has a different legislative context.”

25. The Committee drew this correspondence to the attention of the Minister responsible for the present Bill in its letter of 30 November, and asked for an explanation, in relation to each relevant power in the Bill, as to:
- why the UK Government considers it appropriate that the power is exercisable by UK Ministers in relation to devolved matters;
 - why the UK Government considers it appropriate that when the power is exercised by UK Ministers in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers; and
 - whether the UK Government intends to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to Scotland, or to require UK Ministers, when exercising the power in relation to devolved matters, to obtain the consent of the Scottish Ministers.
26. The Secretary of State responded:

” The UK Government takes into account a variety of factors when seeking delegated powers in devolved areas. Each Bill is drafted according to its specific policy intent and the most appropriate way to affect those policy changes.

Powers for the UK Government to make statutory instruments in devolved areas are not new and have been used across a wide range of policy areas since the advent of devolution. It is often appropriate for the UK Government to amend existing or introduce new regulations UK-wide, including in devolved areas. The UK Government would generally take this approach where the devolved governments agree, as it is more efficient and ensures greater coherence across the UK as well as making it easier for stakeholders.

The majority of the powers have been conferred concurrently on the devolved governments. This is in line with previous EU Exit related legislation and will give the devolved governments greater flexibility to decide how they regulate those areas currently governed by retained EU law in the future.

The concurrent nature of the powers is not intended to influence decision-making on devolved legislation. Rather, we assess that this would serve to reduce the additional resource pressure that the devolved governments may experience, by enabling the UK Government to act on a devolved government's behalf where they have confirmed they do not intend to take a different position to the UK Government. This will ensure that the most efficient and appropriate approach to REUL reform can be taken in every situation as well as providing greater legal certainty UK-wide.

We note the Committee's position in relation to the requirement for Scottish Ministers' consent for the use of delegated powers when exercised by UK Ministers in areas of devolved competence. We remain committed to continuing discussions with the devolved governments throughout Bill passage over the use of concurrent powers in the Bill to ensure they work for all parts of the UK.

27. Where powers have been conferred jointly (clauses 1, 8, 12, 13, 15, and 16), the Committee asked whether the UK Government could provide examples of circumstances in which it anticipates that the power would be exercised jointly by UK and Scottish Ministers, considering that the “deficiency-correcting” power, which is also capable of being exercised jointly, has never been used in that way.

28. The Secretary of State responded:

” We recognise that there may be policy areas where there is an agreed approach between the UK Government and Scottish Government, as well as other devolved governments. In such instances, a single joint exercise of the power would reduce the legislative time and ensure consistency and coherence across the relevant parts of the UK. Given the scale of the REUL reform programme and likely number of SIs, we assess that it is appropriate to have the option of joint exercise where the same effect is desired across all the relevant parts of the UK.

29. The Committee's general position in relation to powers in UK bills conferred on UK Ministers in devolved areas, is that it:

- considers that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence;
- notes that where such powers are exercised by the Secretary of State in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament; and
- notes that if such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

30. **C clauses 1, 2, 8, 12, 13, 15, 16 and 19**

In relation to the delegated powers in this Bill, the Committee^{vi}:

- **calls on both the Scottish and UK Governments, in their discussions on the potential use of the delegated powers within devolved competence, to be mindful of the importance of the Scottish Parliament having an effective scrutiny role in relation to the exercise of these powers, and to facilitate that role;**
- **considers that, as a minimum, there should be a statutory requirement for the Scottish Ministers' consent when the powers are exercised within devolved competence by the Secretary of State. This recommendation applies to the power conferred solely on the Secretary of State in clause 2, and to the concurrent powers in clauses 1, 8, 12, 13, 15 and 16;**
- **recommends that consideration be given to use of the joint procedure for any proposed statutory instrument which contains devolved provision; and**
- **expects that where a concurrent power is exercised to make provision wholly within devolved competence, that power will be exercised in a Scottish statutory instrument made by the Scottish Ministers.**

Part 2 – Individual powers

Clause 1 - Sunset of EU-derived subordinate legislation and retained direct EU legislation - power to preserve

Power conferred on: Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with one or more devolved authorities

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

^{vi} Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendations in this paragraph.

31. Clause 1 is a “sunset clause”. It provides that most (though not all) REUL will be repealed automatically at the end of December 2023 if steps are not taken to save it. REUL which takes the form of primary legislation is not subject to the sunset. That includes Acts of the UK Parliament, Acts of the Scottish Parliament, Acts of the Welsh Senedd and Northern Ireland legislation.
32. Clause 1(2) contains a “power to preserve” which enables UK Ministers and devolved authorities to preserve any REUL that would otherwise be subject to the sunset, so that it is not automatically repealed. The power will be available until the end of 2023, unless it is extended, to 23 June 2026 at the latest, under the extension mechanism provided for in clause 2 (which is discussed below).
33. A devolved authority means Scottish Ministers, Welsh Ministers, or a Northern Ireland department. As such, Scottish Ministers are given a power to exempt REUL from the sunset provision. Regulations to preserve REUL are subject to the negative procedure. UK Ministers could use the power to preserve REUL in devolved areas, and there is no consent or consultation requirement in such circumstances. From 1 January 2024 retained EU law which has been “preserved” in this way will be part of the category of domestic law that is renamed “assimilated law” (clause 6).
34. Clause 1(1) provides that the majority of retained EU law will be revoked at the end of 2023, removing its effect in domestic law. The Bill therefore creates a “cliff edge” whereby all REUL will be revoked automatically unless Ministers take legislative action to retain it. The sunset clause is subject to the “power to preserve” in clause 1(2), which provides that the blanket revocation does not apply to “an instrument, or a provision of an instrument, that is specified in regulations made by a relevant national authority”. This allows REUL to be preserved and so remain in force after the end of 2023.
35. The power can be used either by UK Ministers, or by Scottish Ministers in devolved areas, or they can act jointly. It follows that UK Ministers are given power to preserve legislation that is within devolved competence. Further, the Bill is silent on what should happen in cases where UK Ministers seek to make regulations in areas of devolved competence.
36. The deadline of December 2023 leaves very little time to make decisions about which parts of REUL should be retained and which should fall away. This carries significant risk of errors being made. In his letter of 12 December 2022, the Cabinet Secretary explained that the Scottish Government is “working at pace to identify devolved REUL” and seeking to ensure that law is not lost accidentally, however, he warns that “it will be very difficult to identify all devolved REUL given the way that it has been embedded in the legal system since 1972.” The Cabinet Secretary also expressed concern that the “arbitrary and truncated timetable to do so – the UK Govt’s approach ignores usual processes for law-making and also ignores the different nature and processes for the Scottish Parliament as compared to Westminster.”
37. The Committee heard that this automatic expiry has the potential to undermine Parliament’s scrutiny and oversight role in relation to a significant segment of the statute book because everything that is not actively saved by Ministers will fall on expiry of the sunset deadline. The decision to do nothing and let the REUL provisions fall away is for Ministers only, and it will not be subject to parliamentary

scrutiny. In reserved areas, Westminster will have no say in whether a piece of REUL is repealed, and in devolved areas, the Scottish Parliament will have no oversight either; what is ultimately repealed will be a matter solely of Ministerial discretion. As Dr Tucker explained,

” the reality is that Parliament will have minimal influence” over what the statute book will look like as a result of the Bill because the “nature and the practices of scrutiny of delegated legislation in the UK are such that, once the power is delegated...Parliament will have minimal levels of impact over how that power is ultimately used.

38. Furthermore, this approach creates legal uncertainty and risk. The powers in the Bill, including the power to preserve at clause 1, are broadly drawn making it difficult to say, other than in the abstract, what the implications of the Bill will be. It will depend on how and how extensively Ministers choose to use the powers. As Sir Jonathan Jones explained to the Committee, without knowing how the powers will be exercised, one cannot know what the effect of the bill will be or what the law will be by, say, the end of 2023. The whole effect of the Bill is dependent on the exercise of the powers, so if none of the powers is exercised, virtually all retained EU law will fall away. That is an extraordinary proposition.” Many of the policy areas affected fall within devolved competence, including agriculture, culture, education, environment, fisheries, health, housing, rural development, tourism, and transport.
39. Morag Ross KC stated that the Bill cannot really be compared with other primary legislation because there is nothing quite like it. She explained that “its whole purpose is to give the Government the power to introduce legislation that is extremely wide ranging.”
40. Dr Tucker explained that the “creation of these powers, with a cliff edge on either side of them “imposes quite a remarkable legislative burden, which is worth noting.” Furthermore, because the Bill allocates the powers to the UK Government and the devolved governments, “part of the uncertainty is about how the division of labour will unfold in the exercise of the powers.” He went on to state that “it is an absolute certainty that a significant amount of the burden will fall on the institutions of devolved government.”
41. As to the scale of the task, the Committee heard from Dr Tucker that the number of pieces of REUL potentially affected is uncertain but is,

” potentially in the thousands. The significance of the number is that every single one of those pieces of legislation has to be engaged with in some way, so that regulations persist in whatever area they cover.

Risk of gaps arising at the sunset

42. In its letter of 30 November, the Committee asked the UK Government what steps it is taking to mitigate against the risk of unintended or undesirable regulatory gaps emerging due to the blanket application of the sunset provision.
43. The Secretary of State responded:

” A sunset will accelerate reform and regulatory change by a specific date in the near future. This will incentivise genuine reform of retained EU laws in a way that works best for the UK. The Department for Business, Energy and Industrial Strategy will be working closely with other government departments to ensure appropriate actions are taken by the sunset date.

In order to mitigate risk in the process of reforming and preserving retained EU law, the UK Government has been cataloguing where retained EU law sits across government. This information has been collated as part of the cross-Government substance review of retained EU law into a dashboard that was published on 22 June 2022. We have also been working closely with The National Archives in developing the dashboard and asked them to search their archive for retained EU law that may have been orphaned by Machinery of Government changes.

In addition to this, departments continue to engage with their devolved government counterparts to determine the overall catalogue of retained EU law in their areas and how each piece of retained EU law relates to devolved governments. This work will continue across all departments to ensure no mistakes are made and retained EU law is preserved where needed by the sunset date. Changes to the overall retained EU law catalogue will be published quarterly via the REUL dashboard.

Alongside the work on the catalogue of retained EU law, the delegated powers in the Bill provide the tools to ensure there are no unintended gaps or legal vacuums. The preservation power will enable UK Ministers and devolved authorities to keep specific pieces of legislation that would otherwise be sunset, where the legislation meets the desired policy effects without having to fully restate or otherwise amend the legislation. The Bill also includes an extension mechanism for the sunset of specified pieces of retained EU law until 2026. Should it be required, this will provide additional time where necessary to implement more complex reforms to specific pieces of retained EU law, including any necessary legislation.

Additionally, the powers to restate will enable departments to restate or codify the effects of retained case law and other interpretive effects into legislation if they consider it appropriate to do so. The power to restate under clause 13 will be capable of acting on assimilated law after the sunset up to 23 June 2026 and will allow UK Ministers and devolved governments to reproduce the effects of things such as supremacy, general principles, and directly effective rights that will be repealed on 31 December 2023 and will not apply to assimilated law.

44. **The Committee^{vii} :**

- **considers that the power to preserve is necessary in consequence of the Bill imposing a sunset by which time most REUL will fall unless explicitly saved;**
- **considers that the negative procedure would appear to be appropriate**

as regulations made under clause 1 may preserve specified provisions of REUL but may not modify them;

- **expresses concern, however, at the “cliff edge” created by the Bill, the short timeframes within which officials have to identify and decide which REUL to retain and which should fall away, and the significant uncertainty and risk inherent in this approach;**
- **expresses its concern that while there is provision for parliamentary scrutiny under clause 1 in relation to which pieces of REUL will be preserved, there is no provision for parliamentary scrutiny in relation to which pieces of REUL will be revoked at the sunset; and**
- **invites the lead committee to consider calling on the Scottish Government to facilitate a role for the Scottish Parliament in any decisions not to exercise this power, the consequences of which will be to allow particular pieces of devolved REUL to sunset.**

Clause 2 – Extension of sunset under section 1

Power conferred on: A Minister of the Crown

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

45. Under clause 2, UK Ministers would have the power to specify that one or more pieces or types of REUL will not expire on 31 December 2023 and will instead expire on any specified date after that, but not later than 23 June 2026. The power in clause 2 is exercisable by regulations under the negative resolution procedure. Unlike the exemption provision in clause 1(2) or other delegated powers in the Bill, it is not exercisable by devolved authorities.
46. UK Ministers can extend the sunset through regulations. This power is a Henry VIII power (which enables secondary legislation to amend primary legislation). Regulations which extend the sunset are subject to the negative procedure in the UK Parliament. UK Government Ministers can extend the sunset "as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b)". To extend the sunset, UK Ministers would need to specify the individual pieces or categories of legislation for which the extension is to apply; a blanket extension of the sunset date is not envisaged.
47. The power to extend is provided to UK Government Ministers only. No equivalent power is given to Scottish Ministers or Ministers of other devolved governments. Further, there is no process provided for in the Bill for devolved governments to request an extension to the sunset provision. There is neither a consent nor consultation requirement where UK Government Ministers wish to exercise the power in devolved areas. The Committee enquired as to why the Scottish Ministers

vii Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendations in this paragraph.

have not been given their own power to extend the sunset in devolved areas.

48. In his letter of 12 December 2022, the Cabinet Secretary explained that the Scottish Government has requested that the power to extend be conferred upon devolved Ministers as the Scottish Government does not consider it appropriate that only UK Ministers have power to extend the sunset. However, a proposed amendment to that effect was not taken up by the UK Government during Committee stage in the House of Commons. The Cabinet Secretary described the position as “wholly unacceptable” and one which “could have consequences for the workload of the Parliament” as well as that of Scottish Government.

49. However, Morag Ross KC advised that it would not necessarily be straightforward for the sunset to be exercisable as a blanket over all devolved areas because that would lead to questions of interpretation regarding what is devolved:

” If there were different powers to extend the sunset provisions, and if those powers were exercised at a high level to extend all regulations that fall within devolved competence, that would leave open the question of interpretation as to what exactly was covered. If a legislature is able, as Westminster is, to say, ‘This is the sunset provision for absolutely everything’—albeit that some things might get lost, because they have not been identified—that is one thing. However, if the sunset provisions are extended as a block, the burden of construing that may fall on other people down the line. That may just increase the uncertainty. I mention that as a possible outcome of choosing to regulate in such a way.

50. During the evidence session, the Committee heard that the power to extend had to be seen in the context of the tight timeframes imposed by the Bill and the scale of the task. Sir Jonathan Jones remarked that the task ahead would be a “huge challenge for the civil service.” He explained that whilst some preparatory work will have been done, the scale of the process will be hugely challenging. He drew the comparison with the process that was gone through under the EU (Withdrawal) Act 2018 (“EUWA”) to cure “deficiencies” in retained EU law. That process took around two years and many thousands of statutory instruments were produced. It was a far more technical exercise than what is being proposed under the Bill, which will be “much more difficult,” but which will have to be achieved in half the time.

51. Dr Tucker explained that the Bill creates potential for multiple sunset dates and speculated that this is a likely outcome rather than a mere possibility because of how the extension power is structured.

” The sunset is very short – too short – so a sensible prediction is that the extension power will be exercised in some fashion. As soon as it is exercised, it will create a situation where different sunset dates exist for different regulations, unless some way can be found to use the extension power to cover everything.

52. Sir Jonathan Jones described the imposition of a sunset clause as,

” a pretty appalling way to legislate. It sets an artificially tight timescale and, as we have described, it risks either system overload or laws just being missed and therefore falling away by accident. It is a very poor way to legislate. If I could make one change to the bill, it would be to remove the sunset.

53. In its letter of 30 November 2022, the Committee asked the UK Government what the procedure would be for the Scottish Ministers to request that the UK Minister exercises this power to extend the sunset in relation to specified devolved legislation.
54. The Secretary of State responded:
- ” UK Ministers will be able to legislate to extend pieces or descriptions of retained EU law in areas of devolved competence on behalf of Scottish Ministers. Policy officials are still developing the process for exercising the extension power and we remain committed to working collaboratively with devolved government counterparts as we develop this process in order to ensure that it runs smoothly and efficiently and the power works for all parts of the UK.

55. **The Committee^{viii}:**

- **expresses its concern at the short time frame before the sunset provision applies, which means that it is likely that there will be a need for the power to extend to be used, and increases the potential for uncertainty; and**
- **given that there is no equivalent power for Scottish Ministers, the Committee considers it inappropriate that there is no formal mechanism on the face of the Bill whereby the Scottish Ministers can request that the UK Government exercises this power to extend the sunset in relation to specified devolved legislation.**

Clause 8 – Compatibility

Power conferred on: Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with one or more devolved authorities

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure unless the power is exercised to amend primary legislation, in which case it is subject to the draft affirmative procedure

56. Clause 8 relates to the removal of the principle of the supremacy of EU law. Clause 4 of the Bill reverses the principle that REUL takes precedence over incompatible domestic law. The power in Clause 8 enables Ministers to specify that the reversal of the principle does not apply to specific pieces of domestic law and REUL, and therefore that REUL continues to take precedence. This will allow Ministers to retain the existing hierarchy where this is desirable to avoid unintended consequences or to ensure continuity of policy.
57. To be clear, EU law itself has not applied in the UK since the end of the transition period, on 31 December 2020. The references in the Bill to the supremacy of EU

^{viii} **Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendations in this paragraph.**

law relate to the principle of the supremacy of REUL (which is a form of domestic law) over other domestic law. This principle was put in place by the EU (Withdrawal) Act 2018 to maintain consistency of interpretation, and therefore legal certainty, after the UK left the EU. EUWA retained the principle only in relation to domestic law which was passed before 31 December 2020. Domestic law which was passed since that date is not in any event subject to the principle.

58. The power is exercisable by both Scottish Ministers and UK Ministers in areas of devolved competence. UK Ministers are therefore given the power to set the “interpretative hierarchy” that applies to legislation in devolved areas. There is no consent or consultation requirement where they decide to do so.

59. In the evidence session Dr Tucker expressed doubt that UK Government will be enthusiastic about using the power which, he explained, is

” intended to be a safety net in situations in which there is interaction between different enactments—between domestic enactments and enactments that are made under the bill.

60. Dr Tucker continued,

” On the one hand, it is an eye-catching provision because it is about supremacy and changing hierarchies. On the other hand, the effect of exercising the power under the clause would be only to maintain the status quo before the bill was enacted.

61. Sir Jonathan Jones explained that, like other provisions of the Bill, clause 8 has the potential to create uncertainty because the abolition of supremacy is being done in the abstract:

” That creates uncertainty, because if you deliberately change the way in which the law is to be interpreted, it is open to people to argue that settled interpretations from the past should now be changed and that previous court decisions should be reopened and so on. We have no idea what will happen as a result of any of that. That is the big uncertainty point.... The end result is that we simply do not know what the effect will be in any particular area of law. It may take litigation...to work out whether, and if so how, the law has changed as a result of the reversal of the hierarchy. On top of that, we have the question of whether the Government will exercise the power to restore the status quo. We simply do not know whether it will.

62. In its letter of 30 November 2022, the Committee asked the UK Government which are the areas where the supremacy of REUL currently applies where the UK Government wishes to reverse that position.

63. The Secretary of State responded:

” The cross-Government REUL Reform Programme is underway to review all retained EU law on the statute book. Departments and the devolved governments will make decisions on which provisions in the Bill to exercise to ensure their policy goals, including through exercising the compatibility power in clause 8 to maintain the legislative hierarchy of specified instruments.

64. **The Committee^{ix}:**

- **considers that the delegation of this power is acceptable in principle because it may be in the interests of legal certainty in some areas of law for the hierarchy of interpretation to remain the same;**
- **observes that it is not possible to predict what the policy consequences will be of the choice to exercise or not to exercise this power in absence of information regarding the policy areas in which the Scottish and UK Government would, and would not, intend to exercise the power; and**
- **considers that the negative procedure is acceptable where the effect is to maintain the status quo.**

Clause 10 – Scope of powers**Power conferred on: Not applicable****Power exercisable by: Not applicable****Parliamentary procedure: Not applicable**

65. Clause 10 of the Bill does not itself introduce new powers but rather amends EUWA (Schedule 8, paragraph 3) to make it easier to amend retained direct EU legislation (“RDEUL”) by secondary legislation. At present, RDEUL has the status, broadly, of primary legislation. The provision in EUWA means, broadly, that RDEUL can only be amended by new primary legislation or by secondary legislation made under a Henry VIII power (if one exists). The effect of clause 10 is that the legislative status of RDEUL is downgraded from equivalent to domestic primary to equivalent to domestic secondary legislation as regards how it can be amended. This means that the Bill would allow for RDEUL to be amended by secondary legislation as a matter of course.

66. The Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee notes that: “Overall, the change in status will make it possible to amend or repeal a greater amount of RDEUL using secondary legislation”, and

” Clause 10 ‘downgrades’ retained direct principal EU legislation and any directly effective rights etc. applying under section 4 EUWA 2018, so that they are treated as equivalent to domestic secondary legislation for the purpose of determining whether powers under other statutes may be exercised to amend them. This means that powers under other statutes will be capable of amending retained direct principal EU legislation or section 4 EUWA rights, whether or not those powers are also capable of amending domestic primary legislation, provided the proposed amendments are within the scope of the enabling powers in question.

67. The Hansard Society has explained the effect of clause 10 as follows:

^{ix} **Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendations in this paragraph.**

” As a consequence, any power to make delegated legislation conferred prior to the EU (Withdrawal) Act 2018 may be used to amend REUL in future. This is a significant change to the scope of delegated powers...FOOTNOTE IN PAPER BUT NO LINK

68. During its evidence session, Morag Ross KC was asked, albeit in the context of discussion on clause 15, whether she would regard the use of secondary legislation for the purpose of the revocation and replacement of REUL as completely inappropriate, and whether the general presumption should be for using primary rather than secondary legislation. She explained that:

” On one end of the spectrum, it would be legitimate to say that modest levels of replacement and making minor changes are clearly appropriate for secondary legislation. However, if a change would ordinarily require proper consultation, consideration, and opportunities for scrutiny at primary legislation level, it seems extraordinary that it should happen at a level where it would not receive the same level of scrutiny than if it were properly the subject of primary legislation, whether that situation happened repeatedly or once.

The Committee ^x considers that:

- **it may be appropriate to make it easier to amend some retained direct EU law by secondary legislation, but that this does not apply across the board; and**
- **there should be an opportunity for parliamentary scrutiny in relation to specific policy areas and specific pieces of retained EU law of the appropriateness of making it easier to amend those areas of law by secondary legislation.**

Clause 12 – Power to restate retained EU law

Power conferred on: Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with one or more devolved authorities

Power exercisable by: Regulations

Parliamentary procedure:

(i) Choice of negative or draft affirmative procedure, but

(ii) must be affirmative if amending primary legislation

69. Clause 12 contains the “power to restate”. It gives UK Ministers and Scottish Ministers (in addition to Welsh Ministers and Northern Ireland departments) the power to restate REUL (except that which is enshrined in primary legislation) by regulations. The power is available until the sunset date which is 31 December 2023. This is a Henry VIII power. If REUL is restated in this way, it is not subject to the sunset. The power “cannot make substantive change to the policy effect of

x Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendations in this paragraph.

legislation.” FOOTNOTE IN PAPER BUT NO LINK - UK Ministers could use the power to restate REUL in devolved areas – there is no consent or consultation requirement in such circumstances.

70. It is the potential width of the power that is of concern here. Whilst the Delegated Powers Memorandum asserts that these powers “cannot substantively change the policy effect of legislation,” FOOTNOTE IN PAPER BUT NO LINK - the Bill is potentially quite permissive as to what counts as a “restatement” of REUL or assimilated law. Several specific provisions are relevant. Firstly, subsection 14(2) provides that the restatement can use different “words or concepts” from the original instrument(s) or law. Secondly, subsections 12(8) and 13(10) indicate that restatement can potentially include “codification” of aspects of retained EU law that are not contained in legislative instruments (including direct effect, supremacy, general principles and retained case law). Thirdly, subsection 14(3) allows a relevant national authority to make changes they consider “appropriate” as part of a restatement, to:
 - resolve ambiguities;
 - remove doubts or anomalies; and
 - facilitate improvement in the clarity or accessibility of the law (including by omitting anything which is legally unnecessary).
71. Furthermore, section 14(5) stipulates that the restatement power in clause 12 is a Henry VIII power, as it can modify any enactment. The UK Government has explained that this flexibility exists to enable restated law to be consolidated or codified in primary legislation, where appropriate. FOOTNOTE IN PAPER BUT NO LINK
72. The power can be used either by UK Ministers or by Scottish Ministers in devolved areas, or they can act jointly. UK Ministers are therefore given power to restate REUL or assimilated law in devolved areas, and without a requirement to consult or obtain the consent of the devolved authorities. The Committee asked why the UK Government should be able to exercise this power in devolved areas.
73. In its DPM, the UK Government explains that “the purposes of this power should be viewed with the overarching aim of the Bill to end REUL as a legal category in mind. This power enables the UK to clarify, consolidate and restate legislation that is secondary REUL to preserve the effect of the current law whilst removing it from the category of REUL.” The resulting legislation will no longer be retained EU law, it will be ordinary domestic UK legislation that is subject to traditional domestic rules of interpretation. In particular, the supremacy of EU law will no longer apply.
74. Clause 12 is about the mechanism that will allow UK Government Ministers, or Ministers in the devolved administrations, to restate or protect current retained EU law so that it does not fall away automatically at the end of 2023. However, questions arise regarding at what point a restatement of a piece of legislation becomes either an amendment or a completely new piece of legislation and who will be the arbiter of that.
75. In its evidence session, the Committee asked the members of the panel about their understanding of the threshold of “substantive change” and whether the exercise of this power might lead to unintended policy effects. Morag Ross KC said that it was

almost impossible to answer in the abstract but explained that:

” it is not unknown to find that one word of difference in a section of an act makes a substantive difference. Similarly, one can use an awful lot of words to say more or less exactly the same thing in different legislative contexts.

76. Morag Ross KC went on to warn that disagreement on whether a change is substantive might present a challenge because,

” if there is disagreement or if it is unclear as to what legislation means—if substantive changes are made that are untested and have not received adequate scrutiny—those changes can cause uncertainty because people are unclear about the extent to which regulations apply to them. Those are more likely to have more lasting consequences.

77. On the matter of what might constitute “substantive change”, Sir Jonathan Jones drew an analogy with the curing deficiencies exercise under EUWA. Whilst that exercise was relatively technical because the aim was to ensure that the law worked, some of those changes were more substantial than others. He advised that even relatively technical changes can involve policy choices and that “even something that may look like a relatively minor piece of updating can be significant.”

78. In its letter of 30 November 2022, the Committee asked the UK Government for further explanation regarding where the outer limits of what constitutes a “restatement” lie.

79. The Secretary of State responded:

” The power under clause 12 is limited to “restatements” of retained EU law. The power allows for a limited number of authorised changes, limited to resolving ambiguities or doubts, or to provide greater clarity to the law. Therefore, while different words or concepts may be used to bring greater clarity to the law or to use more traditional domestic drafting language, the policy effect of any restatement must be substantially the same as the policy effect of the retained EU law being restated. It also allows for the codification of the effects of retained case law and EU-derived principles of interpretation where necessary to maintain the existing policy effect. Notably the power does not allow for the principle of supremacy or a retained general principle of EU law to be resurrected after the sunset date.

Sifting mechanism

80. The Committee heard evidence that in relation to regulations made under several of the powers (those in clauses 12, 13 and 15), the Bill proposes a sifting mechanism in the UK Parliament and the Welsh Senedd: “That gives the Westminster Parliament and the Senedd the opportunity to say that something should not be done by using negative procedure but should be done through the affirmative procedure.” The sifting mechanism does not exist for regulations which come before the Scottish Parliament.

81. Decisions on laying an instrument subject to the negative or the affirmative procedure may be less significant in the Scottish Parliament than they might be in other UK legislatures. In the Scottish Parliament, each instrument laid subject to the negative procedure is considered by a subject committee of the Parliament, and

there is an opportunity to take evidence on negative instruments, in the same way that there is for affirmative instruments.

82. While there was a non-statutory sifting mechanism for deficiency-correcting instruments under the [SSI Protocol](#), that Protocol was discontinued earlier this year. This Committee, the Constitution, Europe, External Affairs and Culture Committee and the Conveners' Group agreed that the SSI Protocol should be discontinued as it no longer facilitated proportionate or effective scrutiny. Instead, lead committees should be freed up to target their scrutiny effort on the policy changes proposed in an instrument. The same principles apply in respect of instruments under the current Bill to restate, revoke or replace retained EU law.

83. **The Committee^{xi}:**

- **considers that the delegation of the power is acceptable in principle, but has concerns that even minor changes can have a significant policy impact;**
- **notes the UK Government's position that these powers "cannot substantively change the policy effect of legislation" and considers that, in line with the intention, the limits of what constitutes a "restatement" should be further circumscribed on the face of the Bill, by an express requirement that the policy effect must be the same, rather than substantially the same, as the policy effect of the law being restated;**
- **notes that Scottish Ministers have a choice of the negative or affirmative procedure for instruments made under this power which do not amend primary legislation. The Committee expects Ministers to exercise this discretion in each case with care. The Committee will monitor how this discretion is exercised to ensure that the appropriate level of parliamentary scrutiny is provided; and**
- **considered whether a sifting mechanism in the Scottish Parliament would be appropriate. However, for the reasons above, the Committee recommends that a sifting mechanism is not appropriate here.**

Clause 13 – Power to restate assimilated law or reproduce sunsetted retained EU rights

Power conferred on: Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with one or more devolved authorities

Power exercisable by: Regulations

Parliamentary procedure:

(i) Choice of negative or draft affirmative procedure, but

^{xi} **Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendations in this paragraph.**

(ii) must be affirmative if amending primary legislation

84. Clause 13 gives UK Ministers and Ministers of a devolved government a power to restate provisions of secondary assimilated law. This means that the process of clarifying, consolidating and restating legislation which is derived from the UK's membership of the EU can continue after 31 December 2023 if provision has been made to exclude it from the sunset provision.
85. The power is available until the 23 June 2026 (the tenth anniversary of the referendum on the UK's membership of the EU). Secondary assimilated law is defined as:
- any assimilated law which is not primary legislation;
 - any assimilated law that is primary legislation the text of which was inserted by subordinate legislation.
86. If secondary assimilated law is restated it is no longer categorised as assimilated law. The power is similar to the power to restate retained EU law (clause 12) but relates to assimilated law and is therefore available only after 31 December 2023. It is also a Henry VIII power.
87. The issues here are the same as those arising in relation to the power to restate retained EU law (clause 12). UK Ministers could use the power to restate assimilated law in devolved areas, and there is no consent or consultation requirement in such circumstances. The same points also arise in relation to the choice of procedure and the question of a sifting mechanism.

88. The Committee ^{xii}:

- **considers that the delegation of the power is acceptable in principle, but has concerns that even minor changes can have a significant policy impact;**
- **notes the UK Government's position that these powers "cannot substantively change the policy effect of legislation" and considers that, in line with the intention, the limits of what constitutes a "restatement" should be further circumscribed on the face of the Bill, by an express requirement that the policy effect must be the same, rather than substantially the same, as the policy effect of the law being restated;**
- **notes that Scottish Ministers have a choice of the negative or affirmative procedure for instruments made under this power which do not amend primary legislation. The Committee expects Ministers to exercise this discretion in each case with care. The Committee will monitor how this discretion is exercised to ensure that the appropriate level of parliamentary scrutiny is provided; and**
- **considered whether a sifting mechanism in the Scottish Parliament would be appropriate. However, for the reasons above, the Committee recommends that a sifting mechanism is not appropriate here.**

Clause 15 – Powers to revoke or replace

Power conferred on: Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with one or more devolved authorities

Power exercisable by: Regulations

Parliamentary procedure:

(i) Power to revoke (and not replace): choice between negative and affirmative procedure;


(ii) Power to revoke and replace: choice between negative and affirmative procedure, unless a delegated power or criminal offence is being created, in which case the affirmative procedure applies;

(iii) Power to revoke and make alternative provision: affirmative.

89. This power gives the UK Government and the devolved authorities the ability to revoke REUL or assimilated law, and to replace it if they wish to do so. The replacement provision can either achieve the same or similar objectives (under subsection 2) or implement new provisions with different objectives as the Minister (or devolved authority) considers appropriate (under subsection 3). The power can be exercised on whole instruments or provisions within instruments, as necessary to achieve policy objectives. The power will be available for use on “assimilated” secondary REUL following the sunset at the end of 2023. The power itself expires on 23 June 2026.
90. If the clause 15 power is used to create a new regulation-making power or to create a criminal offence, the draft affirmative procedure must be used for the proposed regulations. The same is also true if “alternative provision” is being made at the same time as revocation of the REUL/assimilated law (see Part 3 of Schedule 3). Otherwise, regulations can be made either by the draft affirmative procedure or the negative resolution procedure. The power to make regulations under clause 15 would expire on 23 June 2026.
91. Whereas clauses 12-14 are concerned with preserving secondary retained EU law and its effects after the 2023 sunset, clause 15 is concerned with its removal or replacement. It also makes equivalent provision for secondary assimilated law from 2024 onwards. “Secondary” retained/assimilated EU law is defined in the Bill to mean any retained EU law that is not contained in UK primary legislation, although provisions of UK primary legislation that were inserted by subordinate legislation are also “secondary” for this purpose. The vast majority of retained EU law is therefore in the category of “secondary” law for this purpose.
92. As with clauses 12 and 13, the powers are exercisable by a relevant national authority, which, in Scotland, is the Scottish Ministers. Subsection 15(1) would allow any secondary retained EU law to be revoked and not replaced. This would enable secondary retained EU law to be revoked before the sunset provision comes into effect at the end of 2023. If the relevant national authority wishes to replace the REUL or assimilated law they are revoking, they could do so using either of two

xii **Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendations in this paragraph.**

other powers in clause 15.

93. Subsection 15(2) would allow secondary REUL to be revoked, and then replaced with new domestic secondary legislation. It is for the relevant national authority to determine what “appropriate” provision should be included, but it must “achieve the same or similar objectives” as the measures being revoked.
94. More broadly still, subsection 15(3) would allow a relevant national authority to make “alternative provision” having revoked a piece of secondary REUL. This means that the legislation replacing the REUL need not pursue the “same or similar objectives”. The Delegated Powers Memorandum recognises that “alternative provision” could be made where the “overarching objective of a policy” is not the same as it was before.
95. The concern here lies in the breadth of the power. The power permits UK Ministers and devolved Ministers in areas of devolved competence to replace a piece of REUL with provisions that they consider “to achieve the same or similar objectives”, or to go further and “make such alternative provisions” as they consider appropriate. When doing so, Ministers do not have to observe the same oversight provisions, for example, a requirement to consult, that were required with respect to the piece of REUL that is being replaced.
96. The clause also permits sub-delegation (i.e., the creation of new regulation-making powers), creation of criminal offences and the imposition of monetary penalties, provided that any new regulations “correspond” or are “similar to” the original REUL provisions. The use of terms such as “appropriate”, “correspond” and “similar” give Ministers a great deal of discretion.
97. There is one caveat: clause 15 cannot be used to increase regulatory burdens, impose obstacles to trade or innovation, financial costs and administrative inconveniences, and obstacles to efficiency, productivity or profitability, or sanctions that affect the carrying on of lawful activity. The Hansard Society has stated that this subsection “imposes what amounts to a regulatory ceiling. This is contrary to previous claims from UK Ministers that in some areas REUL might be amended to enhance regulatory requirements (e.g., in the field of animal welfare).” FOOTNOTE IN PAPER BUT NO LINK
98. Finally, as with many of the other powers in the Bill, the power in clause 15 can be used either by UK Ministers or by Scottish Ministers in devolved areas, or they can act jointly. UK Ministers are therefore given power to revoke or replace REUL or assimilated law in devolved areas. There is no consultation or consent requirement.
99. In its evidence session the Committee heard from Morag Ross KC that clause 15,
 is where one finds some of the most challenging provisions of the Bill. The clause deals with the extent to which ministers are enabled to innovate and introduce policy changes of quite a substantial kind using powers that they could normally only exercise by introducing primary legislation, and for that to be tested in the normal way. That is where you find the heart of the very broad powers to replace, develop and bring in new law.
100. Dr Tucker described clause 15 as “extremely constitutionally problematic” for two reasons. First, because it transfers legislative power to the executive at the same time as it sets up a process whereby things will not be scrutinised as well as they

normally would.” Second, “it removes policy areas from the protection of the Sewel convention, which means that those powers can be exercised in devolved matters without any consent from the devolved administrations.”

101. Sir Jonathan Jones explained that clause 15 contains broad powers which are not limited by reference to particular policy areas as a Bill normally would be:

” you would normally expect a Government that wants to reform the law in many of these areas - which it is entitled to do - will introduce bills on, for example, employment law, product safety or environmental protection. Those individual bills would set out some policy parameters, which Parliament could debate. Yes, there would be powers contained in those bills, but they would be set in the context of a particular policy direction that Parliament would have the opportunity to consider. That would take some time... that might involve consultation with the relevant sectors and so on. I would say that good legislation takes time. [Prioritising speed] limits the opportunity for consultation or scrutiny. It also means that the powers that are in the bill are inevitably very wide, and they are not constrained in the way that they would be in a normal bill that sets out a policy framework and all sorts of limitations and constraints on those powers, which this bill does not contain.

102. The Committee heard that there is one notable constraint on the power in that it cannot be used to increase regulatory burdens. The Committee asked the panel whether this would preclude ministers from improving the standards, rights and protections that are currently enshrined in retained EU law. Sir Jonathan Jones explained that this was difficult to answer in the abstract but commented that,

” I suppose that the overall intention is to be reassuring—the bill is not intended to increase regulatory burdens, but one person’s regulatory burden is another person’s protection. Therefore, if that means that we cannot increase protections, that is a political constraint on the power. It is difficult to predict what that adds up to in practice until we see a particular use of the power.

103. Dr Tucker stated that the limit on the power “gives it a clear deregulatory bias” and that it that it “probably contradicts previous promises to use the mechanism to increase regulatory protections in some circumstances”.
104. In its letter of 30 November 2022, the Committee asked the UK Government how it envisages this power will be used in practice, given the high level of Ministerial discretion afforded by the use of terms such as “appropriate”, “correspond” and “similar”.
105. The Secretary of State responded:

” The REUL Dashboard has identified over 2,500 pieces of retained EU law across 16 departments. Therefore, it is necessary to have a power capable of acting on a wide range of REUL covering a variety of different policy areas. The powers to revoke or replace are important, cross-cutting enablers of retained EU law reform in the Bill. The powers will provide the Government with the opportunity to amend retained EU law and will be limited to those reforms that do not add to the overall regulatory burden. Our intention is for these powers to be used to revoke any retained EU law that is not fit for purpose and to replace it with laws that are more tailored to the UK and reflect our new regulatory freedoms.

The Committee^{xiii}:

- considers that the power in clause 15 is an inappropriate delegation of power in that it permits far-reaching policy changes of a significance that would normally be appropriate for primary legislation to be made instead by Ministers. The Committee considers that changes of this nature should be contained in a Bill, considered in the context of a specific policy area and subject to full parliamentary scrutiny (enabling Parliament to amend the proposal);
- considers that the conferral of delegated powers to replace REUL should be considered in the policy context of a particular subject area, which would enable Parliament to scrutinise how it is anticipated that they will be used in the relevant context, rather than conferred without distinction across all subject areas;
- notes that a consequence of permitting provision that would normally be contained in a Bill to be made instead in secondary legislation is that where this is done by UK Ministers (acting alone), the legislative consent process will not apply and therefore the Scottish Parliament’s consent will not be sought; and
- considers that its recommendations above in relation to (a) how the choice of procedure should be exercised and (b) that a sifting mechanism is not recommended for the Scottish Parliament also apply here (that is, the final two bullet points in paragraph 88),

Clause 16 – Power to update

Power conferred on: Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with one or more devolved authorities

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

106. This power enables UK Ministers and devolved authorities to amend any

^{xiii} Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendations in this paragraph.

“secondary retained EU law” and regulations made under the restatement powers (clause 12 & 13) and revocation or replacement powers (clause 15) in the Bill, to take account of changes in technology or developments in scientific understanding. This power enables UK Ministers and devolved authorities to amend the body of law remaining after the sunset date of 2023, as well as regulations made under the restatement and revoke or replace powers in this Bill.

107. The UK Government has identified “a number of areas” where it is desirable “to update REUL on a regular basis” to maintain its effectiveness. To this end, clause 16 would allow a relevant national authority to “update”:

- secondary retained EU law (before 2024);
- secondary assimilated law (thereafter); and
- regulations made under clauses 12, 13 or 15 of the Bill,

to “take account of changes in technology or developments in scientific understanding.”

108. The Delegated Powers Memorandum sets out the rationale for this new delegated power:

” The Retained EU Law substance review showed a lack of subordinate legislation making powers with the scope to make technical amendments to REUL for these purposes. This is because while the UK was an EU member, departments had previously relied upon section 2(2) European Communities Act 1972 for implementation or on the direct effect of UK law. The power conferred by section 8 of EUWA, used in some instances by the government to make these kinds of changes, is due to expire on 31 December 2022 (and was, in any case, limited to remedying specified deficiencies in REUL). In the absence of these, departments have been left without the ability to update these technical standards and regulations. This power seeks to address this.

PAPER HAS FOOTNOTE BUT NO LINK

109. Clause 16 allows Ministers to modify secondary REUL as they consider ‘appropriate to take account of changes in technology or developments in scientific understanding’. This is a very open-ended power which gives Ministers broad discretion to decide whether a change in technology or a development in scientific understanding has occurred and whether changes via delegated legislation (rather than primary) are merited by those developments.
110. Clause 16 can also be exercised indefinitely on REUL and any new regulations that replace it because, unlike other powers in the Bill, it is not sunsetted. The use of this power is subject only to the negative scrutiny procedure and so changes made under it will not require active parliamentary approval.
111. Clause 16 allows a relevant national authority to make modifications to secondary legislation that it considers appropriate, taking into account “changes in technology, or...scientific understanding.” However, there is no definition in the Bill of what those terms mean. As currently drafted the ambiguity in the clause leaves significant discretion to the relevant Minister, with approval made under the negative procedure. As it is for the Minister to decide what “changes” and “developments” are and therefore, when the clause operates. Furthermore, under this clause,

Ministers will have the power to make changes to retained and assimilated legislation indefinitely, in contrast to the powers available under rest of the Bill.

112. In his evidence to the Committee Sir Jonathan Jones said of clause 16,

” it is a very broad power that spans a huge range of existing law and there is no certainty about how it will be exercised; it could be exercised for minor things or for much bigger ones.”

113. Morag Ross KC stated that clause 16 was an example of “quite broad drafting” that could cover “at the entirely mundane level something relatively straightforward” but which might also be used to introduce “something rather more significant”. She added, “there is a breadth built into that power, and all will depend on how it is exercised.”

114. In its letter of 30 November 2022, the Committee asked the UK Government why, given that the power is so open-ended and affords Ministers such broad discretion, it considers delegated legislation (rather than primary) is appropriate.

115. The Secretary of State responded:

” The power to update is intended to facilitate technical updates rather than provide for fundamental policy changes. This power can only be used on secondary retained EU law or on secondary “assimilated law” and provisions made under clauses 12, 13 and 15 in the REUL Bill. This power is an ongoing power which is not intended to bring about significant policy change. It is instead designed to ensure that the UK keeps pace with advances in science and technology over time. This power has been designed to make it easier for Ministers to amend relevant legislation to take account of developments in scientific understanding or changes in technology without the need for sector-specific powers or primary legislation.

116. **The Committee considers that ^{xiv}:**

- **the power should be circumscribed by defining more narrowly “technical changes” and “developments in scientific understanding,” to align with the UK Government’s intention that the power is to be used only to facilitate technical updates; and**
- **depending on the nature of a particular change in technology or development in scientific understanding, the “updating” of retained/assimilated EU legislation could involve significant policy change for which the affirmative procedure (or indeed primary legislation) would be more appropriate. In the absence of a policy context in which to consider how this power could be used, the Committee considers that the power should be subject to a choice of the negative or affirmative procedure.**

Clause 19 – Consequential provision

^{xiv} **Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendations in this paragraph.**

Power conferred on: Minister of the Crown

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure except where amending primary legislation in which case the draft affirmative procedure will apply

117. This clause enables a Minister of the Crown to make regulations as he or she considers ‘appropriate’ as a consequence of the Bill. Clause 6 clarifies that the power to make provision under clause 19 also includes the ability to amend EUWA in consequence of retained EU law being renamed “assimilated law”.
118. This clause confers a power on UK Ministers to make such provision as is considered appropriate in consequence of the Bill. Subsection (2) provides that the power includes the ability to modify any enactment, which would include Acts of the Scottish Parliament and Scottish Statutory Instruments.
119. The power is conferred upon UK Ministers only. It therefore gives UK Ministers to power to make consequential provision in devolved areas. It is not subject to a requirement to consult or obtain the consent of the Scottish Ministers when exercised within devolved competence.
120. In its letter of 30 November, the Committee asked why the power is not available to Scottish Ministers to exercise within devolved competence; and why the UK Government considers it appropriate that the power is exercisable by UK Ministers in relation to devolved matters, and so exercisable without the consent of, or consulting, the Scottish Ministers.
121. The Secretary of State responded:

” The power under clause 19 is a standard consequential power. This is to ensure the UK statute book continues to function effectively as a result of the provisions in the Bill. This power is not conferred on the devolved governments as this power is normally exercised by UK Ministers. We therefore do not consider it appropriate to extend this power to devolved governments. However, the Scottish Ministers will have the power to make consequential provision as a result of exercising the powers conferred on the devolved governments.

In relation to consent, as outlined in our response to question 1, the UK Government takes into account a variety of factors when seeking delegated powers in devolved areas. Each bill is drafted according to its specific policy intent and the most appropriate way to affect those policy changes.

122. **The Committee^{xv} observes that the clause is broad for a consequential power because it allows the Act resulting from the Bill to be amended, however, on balance, it considers the power to be acceptable in principle and the choice of procedure appropriate.**

^{xv} Jeremy Balfour MSP and Oliver Mundell MSP dissented from the recommendation in this paragraph.

