PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

RETAINED EU LAW (REVOCATION AND REFORM) BILL

First Sitting

Tuesday 8 November 2022

(Morning)

CONTENTS

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not later than

Saturday 12 November 2022

The Committee consisted of the following Members:

Chairs: Sir George Howarth, † Sir Gary Streeter

† Bacon, Gareth *(Orpington)* (Con)
† Bhatti, Saqib *(Meriden)* (Con)
Blomfield, Paul *(Sheffield Central)* (Lab)
† Creasy, Stella *(Walthamstow)* (Lab/Co-op)
† Evans, Dr Luke *(Bosworth)* (Con)
† Fysh, Mr Marcus *(Yeovil)* (Con)
† Ghani, Ms Nusrat *(Minister for Science and Investment Security)*
† Glindon, Mary *(North Tyneside)* (Lab)
† Grant, Peter *(Glenrothes)* (SNP)
† Jones, Mr David *(Clwyd West)* (Con)
† Madders, Justin *(Ellesmere Port and Neston)* (Lab)
† Morrissey, Joy *(Beaconsfield)* (Con)
† Nici, Lia *(Great Grimsby)* (Con)
O'Hara, Brendan *(Argyll and Bute)* (SNP)
† Randall, Tom *(Gedling)* (Con)
† Sobel, Alex *(Leeds North West)* (Lab/Co-op)
Stuart, Graham *(Minister for Climate)*

Huw Yardley, Sarah Thatcher, *Committee Clerks*

† attended the Committee

Witnesses

Sir Stephen Laws KCB KC, Former First Parliamentary Counsel

Professor Catherine Barnard, Professor of European & Employment Law, University of Cambridge

Professor Alison Young, Sir David Williams Professor of Public Law, University of Cambridge

Martin Howe KC, 8 New Square

Tom Sharpe KC, One Essex Court

Mark Fenhalls KC, Chair, Bar Council

George Peretz KC, Working Group on REUL, Bar Council

Eleonor Duhs, Partner, Head of Data Privacy, Bates Wells

Public Bill Committee

Tuesday 8 November 2022

(Morning)

[Sir Gary Streeter *in the Chair*]

Retained EU Law (Revocation and Reform) Bill

9.25 am

The Chair: Colleagues, welcome to this interesting Committee, as we get stuck into this important Bill. We are now sitting in public and the proceedings are being broadcast. I have taken my jacket off, so feel free to disrobe in any way that you feel is appropriate. I have a few preliminary announcements. *Hansard* colleagues would be grateful if Members could email their speaking notes, if they exist, to hansardnotes@parliament.uk. When I was first elected, we never had to say such things, as we did not have emails. Please switch electronic devices to silent. Tea and coffee are not allowed during sittings.

We will first consider the programme motion on the amendment paper. We will then consider a motion to enable the reporting of written evidence for publication and, if we need to, a motion to allow us to deliberate in private about our questions before the oral evidence session. In view of the time available, I hope that we can take those matters without debate. I call the Minister to move formally the programme motion in her name, which was discussed yesterday by the Programming Sub-Committee for the Bill.

Ordered,

That—

(1) the Committee shall (in addition to its first meeting at 9.25 am on Tuesday 8 November) meet—

(a) at 2.00 pm on Tuesday 8 November;

(b) at 9.25 am and 2.00 pm on Tuesday 22 November;

(c) at 11.30 am and 2.00 pm on Thursday 24 November;

(d) at 9.25 am and 2.00 pm on Tuesday 29 November;

(2) the Committee shall hear oral evidence in accordance with the following Table:

Date	Time	Witness
Tuesday 8 November	Until no later than 9.50 am	Sir Stephen Laws KCB KC
Tuesday 8 November	Until no later than 10.25 am	Professor Catherine Barnard, Professor of European & Employment Law, University of Cambridge; Professor Alison Young; Sir David Williams, Professor of Public Law, University of Cambridge
Tuesday 8 November	Until no later than 10.55 am	Tom Sharpe KC, One Essex Court; Martin Howe KC, 8 New Square
Tuesday 8 November	Until no later than 11.25 am	The Bar Council; Eleonor Duhs, Bates Wells
Tuesday 8 November	Until no later than 2.35 pm	Sir Richard Aikens, Brick Court Chambers; Barnabas Reynolds, Shearman and Sterling; Jack Williams, Monckton Chambers
Tuesday 8 November	Until no later than 3.05 pm	Sir Jonathan Jones KC, Linklaters; Hansard Society
Tuesday 8 November	Until no later than 3.35 pm	Trades Union Congress; Unison
Tuesday 8 November	Until no later than 4.20 pm	Green Alliance; Wildlife & Countryside Link; Unchecked UK; RSPCA
Tuesday 8 November	Until no later than 4.40 pm	The Scottish Government
Tuesday 8 November	Until no later than 5.10 pm	Law Society of Scotland; Charles Whitmore, Research Associate, Cardiff University; Dr Viviane Gravey, Senior Lecturer, Queen's University Belfast

(3) proceedings on consideration of the Bill in Committee shall be taken in the following order: Clauses 1 to 10, Schedule 1, Clauses 11 to 20, Schedules 2 and 3, Clauses 21 to 23, new Clauses, new Schedules, remaining proceedings on the Bill;

(4) the proceedings shall (so far as not previously concluded) be brought to a conclusion at 5.00 pm on Tuesday 29 November.—*(Ms Ghani.)*

The Chair: The Committee will therefore proceed to line-by-line consideration of the Bill on Tuesday 22 November at 9.25 am.

Resolved,

That, subject to the discretion of the Chair, any written evidence received by the Committee shall be reported to the House for publication.—*(Ms Ghani.)*

The Chair: Copies of written evidence that the Committee receive will be made available in the Committee Room and circulated to Members by email.

The next motion relates to deliberating in private. We may not need to move this motion, colleagues. My suggestion is that I will start every panel by turning to the Labour lead to ask the first questions. We will then go across the Committee. Indicate to me if you wish to ask a question to the particular witness, bearing in mind that the knives are absolute; we have 15 or 20 minutes, or whatever, with each group of witnesses, and we cannot go beyond that.

It would be helpful, if you are asking a question, and if there is more than one witness at the time—particularly if we have witnesses on Zoom and witnesses in person—to indicate who in particular you would like to answer the question, or whether you would like them all to answer. That would be quite helpful, but you will probably forget that after about 10 minutes. Are we happy to proceed on that basis without going into a private session to agree how we will ask the questions? If everyone is happy, that is that.

This is a serious moment, colleagues. Before we start hearing from the witnesses, do any Members wish to make a declaration of interests in connection with the Bill? No. In that case, we will now hear oral evidence from Sir Stephen Laws, former First Parliamentary Counsel, who is waiting patiently for us on Zoom. Before calling the first Member to ask a question, I

remind all Members that questions should be limited to matters within the scope of the Bill, and we must stick to the timings in the programme motion that the Committee has agreed. For the first witness, we have until 9.50 am.

Examination of Witness

Sir Stephen Laws KCB KC gave evidence.

9.29 am

The Chair: Will the witness please introduce himself for the record?

Sir Stephen Laws: My name is Stephen Laws. I was First Parliamentary Counsel from 2006 until 2012. Before that, I had been a career drafter and civil servant since 1975. I am now a senior research fellow at Policy Exchange.

Q1 Justin Madders (Ellesmere Port and Neston) (Lab): Good morning, Sir Stephen. My first question is quite overarching. The Bill is set up to remove EU law by omission, in essence, rather than by a positive decision to retain it; if there is not a decision by a Minister between now and the end of 2023, it automatically falls away. Do you think that is the most sensible way to proceed with more than 2,500 statutory instruments?

Sir Stephen Laws: Yes, I think it is. The ideal for the law is that all law can be found from easily accessible sources and relied on to mean what it says without being qualified by complex, obscure or general glosses, or involving complex historical research to find out whether it is valid. The Bill, by removing everything that is subject to those disadvantages—because the ideal is not the situation at the moment for retained EU law—is an important step towards securing that the ideal is achieved, by forcing the decisions to be made about how this law can be properly integrated into UK law quickly. Things will only get worse if that does not happen.

Retained EU law is imprecise because it has been removed from the context needed to make sense of it. That will get worse because the sources become of historical interest only, and the methodologies in the UK system for dealing with EU law will become lost knowledge and of historical interest only. The law will become obscure. The Bill is a useful way to force things to become better.

Q2 Justin Madders: Are there adequate safeguards for scrutiny of the way in which this legislation will proceed?

Sir Stephen Laws: The way in which it is scrutinised is a matter for Parliament to work out. It is not something that you would expect to be wholly within the Bill. When deciding what parliamentary scrutiny there should be, it is important to decide what parliamentary scrutiny is for. There is a sort of myth that Parliament should treat itself as the author of legislation and should look at every line, and that legislation for which Parliament has not looked at every line has not been properly written. That is an unrealistic position.

Parliament is a political filter for legislation. It is important that it should identify the bits of legislation that are politically salient, and that it should provide an incentive for technical quality. The first can be achieved, as was the case with the legislation under the European Union (Withdrawal) Act 2018, by having a really rigorous system of triaging subordinate legislation made under the Bill to ensure that Parliament picks up the things that are politically salient. The second is achieved in practice already right across the board by random sampling; what keeps drafters keeping the quality of their drafting up is not that Parliament will look at every line, but the fact that they do not know which lines Parliament will look at, so they have to get them all right.

The Bill establishes the conventional methods of scrutiny, but they need to be backed up by a parliamentary process decided by Parliament and not set out in legislation, because, as we have learned in the last six years, if you put provisions about parliamentary procedure in legislation, you find yourself in the courts. That is not where the processes of Parliament should be.

Q3 Justin Madders: You referred to there being ways to identify politically salient pieces of legislation. How do you see that happening if the Bill becomes law?

Sir Stephen Laws: By the support given to the parliamentary Committees that look at legislation, and perhaps by asking the Government to make sure that their plans for legislation are exposed first, so that Parliament has an opportunity to look at the plans and say, "Well, if that's what you're going to do, those are the things that we want to look at in particular."

Q4 Justin Madders: Would you accept that we do not actually know what the Government's plans are at the moment?

Sir Stephen Laws: Yes, I would, because they have not told you what they aim to do with all this legislation that is going to be repealed. I suggest that you ask them to do that as the process proceeds.

The Chair: I have a feeling that that might happen.

Sir Stephen Laws: Yes, I thought that it might happen too.

Q5 The Minister for Science and Investment Security (Ms Nusrat Ghani): Good morning. Now that we have left the European Union, is it right that the influence of retained EU law should be reduced in statute and in the courts?

Sir Stephen Laws: Yes, it is. EU law applied in a situation where we are not in the EU is quite difficult to work out. The provisions of the 2018 Act are extremely complex; they are glossed. A lot of the EU law was made in the context of trying to harmonise across Europe. When you are trying to work out what it means, you want to know what it is for, and what a lot of it was for is not now relevant. It is not about harmonising rules across Europe; it is about applying rules in a domestic context.

Q6 Ms Ghani: Do you agree that the Bill strikes the right balance between providing for legal certainty and allowing the Government to seize the opportunities of no longer being tied to EU law?

Sir Stephen Laws: On the whole, yes. I have some reservations, because there are respects in which the Bill contains worrying aspects through which it might be

possible for inertia to reassert itself, and for the status quo to become the default for what replaces it. My experience of all legal change is that it is most effective when it is ratcheted—when people do not have the option of saying, "Oh well, we will exercise this power to keep things the way they were." That needs to be watched carefully and, if possible, legislatively discouraged.

Q7 Ms Ghani: You have already talked about the conflict between domestic law and laws made to harmonise across Europe, but, for the record, does not the fact that the EU legislates in a very different way from the UK create tensions between retained EU law and other domestic law?

Sir Stephen Laws: Yes, it does. The major difference between the way the UK traditionally legislates and the way the EU—and indeed lots of other countries—legislate is that under a parliamentary system the Government take responsibility for the effect and quality of the law. That means that when law is made, it is made to do something that people have agreed on. Very often, law made in Europe—in different languages as well—was a matter of agreeing words, irrespective of what the words achieved. If you could agree on the words, that was the best that you could hope for; that may happen very occasionally in my experience, and very rarely indeed in the UK. In the UK people agree on the substance, so you know what the law does. Retaining all this law that was there because it was a compromise on words is making life difficult for those people who have to use it.

Q8 Peter Grant (Glenrothes) (SNP): Good morning, Sir Stephen. One of the things that we were told about leaving the European Union was that it would return powers to Parliament. What does this Bill do to the balance of powers between Parliament and Ministers?

Sir Stephen Laws: Well, most of the law that this relates to—certainly the early clauses about subordinate legislation—is not law that Parliament made; it is law that Parliament enacted or approved because it had to. The law that will be made under the Bill will be made by a Government accountable to Parliament. The powers in the Bill are equivalent in some ways to the power under section 2(2) of the European Communities Act 1972, but in that case there was no choice about the substance of how you exercised the power; the argument was all about the means. Under this Bill, Parliament will have an opportunity to look at the substance as well as the means.

Q9 Peter Grant: You said that Parliament enacted all this legislation because it had to. Is it not the case that, for every single piece of legislation that we are talking about in the Bill, a United Kingdom Government Minister was present at the time that the legislation was agreed in Europe?

Sir Stephen Laws: Yes, but that does not mean that Parliament agreed to the substance of the legislation—nor, in some cases, did the Minister. They are all part of compromises. In the end, the European law had to be enacted because it was European law.

Q10 Peter Grant: You say that Parliament did not agree. Is not it the case that the European Scrutiny Committee, which existed throughout the time that we were members of the European Union, had the power to call in Ministers and put a stop on ministerial approval of European Council decisions until the Committee, and therefore Parliament, were satisfied that it was the right thing to do? Whether or not Parliament exercised that authority, is it not the fact that there was a Committee of Parliament that could prevent Ministers from acting against the will of Parliament?

Sir Stephen Laws: There were mechanisms to feed in the UK view, but the UK view did not necessarily have to prevail.

Q11 Peter Grant: If enacted as drafted, what difference will the Bill have on the application of EU law in Northern Ireland, in particular in relation to the Northern Ireland protocol and the Good Friday agreement?

Sir Stephen Laws: Frankly, that is not a question that I have prepared for, so I cannot say much. What I can say about the Good Friday agreement is that I am not sure that the protocol is relevant, because the law by which the protocol applies is the law of the things that are not retained just because we were carrying over the old law, which is what this Bill is mainly about. I am sorry; I have not looked specifically at the Northern Ireland aspects of the Bill.

Q12 Mr David Jones (Clwyd West) (Con): Good morning, Sir Stephen. The Bill abolishes the principle of the supremacy of retained EU law. Do you think that that is the right course?

Sir Stephen Laws: Yes, I do. I think that that is part of the confusion. If we are going to work out what the law means, it is important that the system for retained EU law should fit the system that we have for all other law, which is that the latest views of Parliament should count.

Q13 Alex Sobel (Leeds North West) (Lab/Co-op): In your initial response, you said that we should replace the laws quickly. In your view, with 2,100 or so regulations, how quickly can Parliament include those laws in UK law?

Sir Stephen Laws: I did not intend to imply that every one of the laws that will disappear needs to be replaced. A rational approach is to say that everything will cease to have effect unless we replace or retain it. There is a fallacy around legal reform that was criticised by Cass Sunstein, the American jurist and adviser to President Obama, which is that the law is very fond of the status quo: the law thinks that if we know the law already, changing or removing it must be less clear. I think that the status quo is something that needs to be justified just as much as any proposal for change needs to be justified.

We have had six years to look at all this law and to decide what of it is so valuable that we need to keep it. If people are now not able to defend specific bits of the status quo that they think are important, it is likely that they never will be able to. People will keep relying on the fact that it is the law already and must be clearer than a change, but to say that we should not change law because change is always more uncertain than keeping things the way they are is an argument against all legislation. We might as well wind up Parliament all together if we are to pursue that argument.

Q14 Alex Sobel: At the moment, it is important for business and the finance sector to have clarity in the law, which to an extent we get from retained EU laws. With the sunset clause and the lapsing of so many regulations, the concern is that there might be a lack of certainty, so that people are unclear what they will get when they invest. That is particularly the case in my area as shadow Minister with responsibility for nature and the environment. Is that a concern we should take on board?

Sir Stephen Laws: I think you need to be concerned about it, but first, you have to exclude from the equation the idea that law becomes uncertain just because you are changing it; that is an argument against changing the law altogether. Secondly, you have to recognise that most law, but not all, is about either imposing duties on people to do things, or imposing duties on people not to do things. It is quite clear that repealing a law does not bring about anything that did not exist before. You do not, by removing a prohibition, require people to do what was previously prohibited; nor do you, by removing a duty, forbid people from doing what they were previously under a duty to do. For most purposes, if a law disappears, people can carry on behaving exactly as they did before until they see a good reason not to. It is just that they are not required to undertake that duty, or are no longer subject to a duty not to do something different. I am not sure that as much lack of clarity is produced by removing a whole load of law as is being suggested.

Q15 Alex Sobel: Even if the Bill has an extremely smooth run, we will have less than a year between Royal Assent and the sunset clause coming into force at the end of 2023. What are the implications of that? Should we not consider having a sunset clause that takes effect further down the line than the end of 2023?

Sir Stephen Laws: I do not think so, because as I have said, people have had six years to look at this law and see how much of it they think is important. Another year does not seem an unreasonable period in which to finalise their views on these things.

Q16 Saqib Bhatti (Meriden) (Con): Thank you for your evidence, Sir Stephen. In 2016, a key reason for leaving the European Union was to re-establish the sovereignty of Parliament. Does the Bill help us to achieve that aim?

Sir Stephen Laws: Yes, because it removes a whole load of law that was enacted under a system that qualified parliamentary sovereignty by imposing obligations on the Government and, indirectly, Parliament, to produce particular forms of law. The Bill replaces that with a system in which all new law will be subject to questions, as to substance and form, in a parliamentary forum.

Q17 Saqib Bhatti: There have been comments about safeguards and scrutiny. Is Parliament capable of creating law that we legislators can scrutinise, and are sufficient safeguards in place when it comes to creating law?

Sir Stephen Laws: I do not think I can add much to what I said before: there is a great volume of law here; a great volume of law was produced under section 2(2) of the European Communities Act 1972 and, indeed, under the 2018 Act. It is important that Parliament develops a sensible system of scrutiny, so that it can do its job of questioning and legitimising matters that are politically salient, and providing a robust system of random sampling, so as to make sure that the quality of legislation is maintained.

The Chair: There is time for one quick question, if anyone is bursting to ask one. Ah! I call Stella Creasy.

Q18 Stella Creasy (Walthamstow) (Lab/Co-op): Thank you, Chair. I apologise; I am afraid a very grumpy toddler would not let me come in. On the subject of grumpy toddlers, our witness has just suggested that the Bill will allow for scrutiny of laws in "a parliamentary forum". Can he explain how statutory instruments introduced by Ministers allow for appropriate parliamentary scrutiny? Is that not giving a lot of power to Ministers, rather than Parliament taking back control ?

The Chair: You have 30 seconds, Sir Stephen.

Sir Stephen Laws: It is possible to underestimate the influence Parliament has, even if the procedures are relatively formal. In the last six years, we have seen that Governments who try to do things that do not have the approval of Parliament get themselves into a lot of trouble. By now, they have probably learned the lesson—indeed, I think they have always known the lesson—that Governments do not propose things to Parliament that they know Parliament will not, in the end, want to agree to.

The Chair: Thank you. That is a high note on which to finish, Sir Stephen. Thank you for the clarity of your evidence.

Examination of Witnesses

Professor Catherine Barnard and Professor Alison Young gave evidence.

9.50 am

The Chair: We will move on to oral evidence from Professor Catherine Barnard, professor of European and employment law at the University of Cambridge, and Professor Alison Young, Sir David Williams professor of public law at the University of Cambridge. Both witnesses are joining us via the magic of modern technology. For this session, colleagues, we have until 10.25 am. Could the witnesses please introduce themselves for the record? Professor Barnard, would you like to go first?

Professor Barnard: Thank you very much for the invitation. My name is Catherine Barnard. I am professor of EU and employment law at the University of Cambridge, and a deputy director of UK in a Changing Europe.

Professor Young: I am Professor Alison Young. I am the Sir David Williams professor of public law at the University of Cambridge, and a fellow of Robinson College, Cambridge.

The Chair: Thank you for being with us. We have a plethora of questions for you. The first is from Justin Madders.

Q19 Justin Madders: Morning, professors. My first question is for Professor Barnard. You have said in your written evidence that there is a serious risk of mistakes

[Justin Madders]

with the EU dashboard. Have you—or has anyone, to your knowledge—done a comprehensive audit of whether everything is on the dashboard that should be?

Professor Barnard: Thank you for that question. No, we have not. UK in a Changing Europe is trying to track the changes to retained EU law, but as we have seen from the *Financial Times* reports this morning, the National Archives has worked with Government and found an extra 1,400 pieces of retained EU law that the Government did not seem to know about until about last week, so it looks like there are about 3,800 pieces of law. If they found an extra 1,400 pieces after the extensive work that Government had done before that, it makes you wonder whether other things are out there. This is the issue with the sunset being the default position. As a default, it will turn off all retained EU law, even if the Government are unaware of what that retained EU law actually is.

Q20 Justin Madders: Thank you for that news; I was not aware that there are another 1,400 pieces of legislation. I hope that the National Archives will send that information to the Minister, if not the whole Committee. It highlights one of our concerns about the Bill. Your report recommends the Bill making it clear which pieces of legislation are subject to the sunset clause; and/or the Government could exempt certain policy areas from the sunset clause. Could you explain to the Committee why you think that would be a good idea?

Professor Barnard: On the first point, listing the provisions that will be turned off avoids those bits of legislation that we do not know about—that is, they have not been found, despite an exhaustive search, including by the National Archives—being accidentally turned off, and our not knowing that they have been turned off until they become an issue down the line in some sort of litigation. One way of avoiding error is to have a list of legislation—it looks like 3,800 pieces of legislation have been identified—and to say, "This is the legislation that is potentially subject to the sunset." If you list all those in the statute, it avoids the problem of the missed bits being caught up by the sunset.

Once you have done all that, you can say, "Right, we should consult on those bits of legislation." I am not in any way advocating, as Stephen Laws suggested, being in stasis and doing nothing—quite the contrary. One of the reasons for Brexit was to think about how we can have laws that are more suitable for the United Kingdom. The trouble is that this slash-and-burn technique means that proper consideration is not given to what a future rulebook might look like.

Q21 Justin Madders: Obviously, the vote to leave was over six years ago. Would it be reasonable for the Government to have said by now which laws they intend to retain, and which they intend to remove?

Professor Barnard: Absolutely. I am in no way advocating for no change—quite the contrary. However, the trouble is that the rather brutal approach envisaged by the sunset clause, and the lack of clarity about how the delay process in clauses 1(2) and 2 will work, will generate huge amounts of uncertainty for users. Unlike Stephen Laws, I would say that these laws cover things as fundamental as gas equipment safety and food safety—what goes into food and the listing of foods. These are things that people absolutely take for granted. The idea that manufacturers will carry on respecting the law even when they are no longer required to because the laws have been simply turned off is, I am afraid, for the birds. All businesses need to try to cut costs, and they will not necessarily comply with high standards in the absence of legislation telling them to do so.

The Chair: Professor Young, did you want to add anything?

Professor Young: To confirm what Professor Barnard was saying, it is important to recognise that although we have had six years to think about which laws to keep and which to remove, we have to put that against a backdrop of those not having been six usual years. We have also had to deal with covid, which generated lots of difficulties, and we are now dealing with energy crises and austerity. I fully accept that there is a need to think about which laws we retain and which laws we change, and that we need a period in which to think about that, but you have to recognise that there are other things on the legislative agenda that might make it difficult to have a complete list of all of them.

I agree that having a list of those laws that we have found will increase legal certainty. It would then also always be possible, once others are found, for the Government to enact regulations and say, "These regulations will be subject to the sunset," or "These will be subject to a different sunset." That would give us much more clarity, while still enabling us to change laws to build on the advantages brought by Brexit.

Q22 Ms Ghani: I am not sure whether anyone ever has a normal political year any more; I am afraid it is what it is. My first question is to Professor Barnard. Thank you so much for your evidence this morning. It has been said that the principle of the supremacy of EU law is

"alien to the UK constitutional system".

As a creation of the Court of Justice of the European Union, it

"sits uncomfortably with established constitutional principles"

in the UK now that we have left the EU. Is it inappropriate for a non-EU country to still have instances where EU law takes precedence over its law?

Professor Barnard: Thank you for that question, Minister. Yes, at first sight, it looks rather unusual to have the notion of supremacy of EU law. You are absolutely right that it was a creation of the Court of Justice. That said, the 2018 Act essentially gave a parliamentary imprimatur to the principle of the supremacy of EU law in respect of retained EU law. Supremacy comes with quite a lot of baggage attached. Thinking about what supremacy means, it is essentially a conflict-of-laws rule—we have loads of them in the legal system. Where there is a potential conflict between two blocks of rules, a conflict-of-laws rule says which one will prevail in which circumstances.

The 2018 Act says very clearly that, in respect of pre-Brexit UK-retained EU law, if there is a conflict with EU law, EU law will prevail for the time being. However, there is absolutely nothing to stop Parliament legislating to reverse that in the future. The purpose of

the 2018 Act was to ensure clarity, legal certainty and continuity. You have continuity with the snapshot approach taken by the 2018 Act. If you turn it off, which, of course, a sovereign Parliament is absolutely free to do, there will still be issues about how to manage conflicts between the rules. Indeed, the Bill makes provision for the supremacy provision to be turned back on if a Department decides it is necessary in its particular area.

Q23 Ms Ghani: Professor Young, when you gave oral evidence to the European Scrutiny Committee in its inquiry on retained EU law, you explained that EU law is drafted differently from UK law, and needs to be interpreted in the light of what type of retained EU law it is. What challenges do these drafting differences pose to both amending and interpreting retained EU law?

Professor Young: Thank you, Minister. It is a matter of recognising that EU law tends to be drafted by setting out the purposes that it is meant to achieve in certain circumstances. Directives have a different format from regulations; they set out the aims and purposes, and allow member states discretion in how to implement them, which is why so much of retained EU law is secondary legislation that was enacted by the UK to implement particular provisions of directives. In that sense, it tends to be drafted in a slightly different style. You also have to recognise that its main aim was harmonisation, so that might influence how it was drafted.

While the UK was a member of the European Union, we got used to understanding how EU law was drafted, and to interpreting it in line with background EU law principles, including the general principles of EU law. Obviously, one of the things this Bill will do is switch that off. You then have to think about how, without those general principles, we will interpret any of the retained EU law that becomes assimilated or is retained by regulations. We might have to think about not just retaining particular provisions through regulations, but whether we need to add elements to amend them or make them clear, so that we have a fuller understanding of how they are meant to apply in certain circumstances.

Q24 Peter Grant: Good morning to both witnesses. Professor Barnard, as we heard, this Bill sets an automatic date by which several thousand pieces of legislation will disappear off the statute book unless they are specifically left on. The number of such pieces of legislation, as we have just heard, is about 1,400 more than we thought this morning. Are you aware of any previous incident, either in the UK or elsewhere, where that approach has been taken successfully with such a large amount of legislation at once?

Professor Barnard: The simple answer is no; I am completely unaware of any precedent for this. Of course, that does not mean that we cannot try to adopt this approach, but we need to be extremely mindful of the associated risks. That is one of the reasons why we have proposed carving out areas, such as environment and social policy, that are already subject to obligations under the trade and co-operation agreement. That will ensure that we do not accidently turn them off but not turn them back on again through the powers in clauses 1(2), 2 or 12 to 15, and so will ensure that we are not subject to the trade and co-operation agreement's dispute resolution mechanisms, which may result in tariffs being imposed on us.

Peter Grant: Professor Young, I saw you nodding. Is there anything you want to add? Do you agree with Professor Barnard?

Professor Young: I agree. I too am unaware of any process that has tried to make such a big change to so many laws in such a short period. That is why it could impose so many practical problems. In most systems, when you have a change of legal system or regime, there is this element of what we did originally, which maintains legal certainty by retaining the old provisions. Then, step by step, in what we often call a sector-specific approach, there is a detailed assessment of whether we should keep those laws or change them. As far as I am aware, this is quite a novel way of doing this with such a large amount of law.

Q25 Peter Grant: Thank you. I do not know whether you heard Sir Stephen Laws's evidence immediately before you came on screen. He suggested that the concerns raised about the uncertainty that the Bill might create can be partly explained by the traditional resistance of the legal profession to change of any kind. He said it is wrong to assume that changing the law makes it less certain. Professor Young, how do you respond to that?

Professor Young: It is not necessarily that I am reluctant to change or am concerned about change. We need to think about what this is asking against the backdrop of what we are aiming for in the Bill. You have to recognise that the difficulties of uncertainty will be not for lawyers, but for those trying to carry out business. Those carrying out business and trade need legal certainty, so that they have an understanding of the rules, now and going forward. As for the elements and problems of uncertainty, we do not necessarily think that things will be uncertain because they are changing; the issue is that those carrying out business will not necessarily be 100% sure whether things will be retained in the long term. If so, how they will be retained? Has everything that might be revoked been listed? They are not 100% sure whether it has been revoked or not.

Other provisions in the Bill might further that uncertainty. For example, under the Bill, legal officers can refer an issue to the court if they think that a decision should have changed the interpretation of a particular piece of retained or assimilated EU law but did not. That can happen after the agreement has been included and the decision has been made by the parties. You might think, "Well, the Bill says that is not a problem because it won't affect the result between the parties," but you have to recognise that others in the legal system will have seen that case, and that interpretation of the law, and will have perhaps planned their business on that basis. They will suddenly find that there is a reference to the court that might change how the law is interpreted or what it means.

That is why we are concerned about certainty. We are concerned about the consequences for those carrying out trade, because they need legal certainty to plan their business activities.

Q26 Peter Grant: Thank you. Professor Barnard, the concern about uncertainty was a significant element of your written submission to the Committee. Is there anything that you want to add?

Professor Barnard: I would just say that the business of legal academia is forever to be making proposals to change the law, to try and improve it in some way. The

idea that lawyers are hostile to change is just not correct. The way in which the legal system has worked and has run successfully over the decades is on the basis of incremental change rather than this really quite remarkable slash and burn approach proposed by the sunset clause.

Peter Grant: Thank you.

Q27 Stella Creasy: We have talked a little bit about the content, but could we talk a little about the process? You have just highlighted that there are actually another 1,400 pieces of legislation affected. The process then gives ministerial—not parliamentary—control about what happens next. Could you give us your reflections on that process and the scrutiny of it, and some of the practicalities? For example, which Ministers will retain responsibility for which pieces of legislation?

It would be quite helpful to know, with the extra 1,400, who has drawn the short straw? Are they all in one particular Department or across the Departments? A previous witness claimed that there would be adequate parliamentary scrutiny, and if Parliament did not like what Ministers were doing, it would intervene. What would this process mean for our ability to influence the content produced as a result of the Bill?

Professor Barnard: On the first point, as you rightly point out, there are provisions in the Bill to allow Ministers, by regulations, to keep retained EU law, which will eventually be called assimilated law, but what is not at all clear is the process by which the Minister decides to engage in that process. Remember, if the Minister decides to sit on his or her hands, the default kicks in, which is that those all those provisions will go. In reality, we understand that Government Departments have a reasonable idea of the law in their area, and civil servants will need to go through that law statutory instrument by statutory instrument.

There is a real issue about capacity in Government Departments. Jacob Rees-Mogg himself said that his own Department for Business, Energy and Industrial Strategy had identified that it needed 400 civil servants to be working on the 300 or so pieces of legislation that had then been identified. Presumably, now they have discovered an extra 1,400 that number will increase. It is a huge amount of civil service time. The issue is even more acute in the Department for Environment, Food and Rural Affairs, which is the Department most affected by retained EU law. The question is, what is the internal process? Even if the Secretary of State in DEFRA decides that he or she wants to retain all the legislation because it is so important in different forms, what happens? Does it go to the Cabinet? Is there some sort of star chamber that looks at what is being proposed by the Departments? We know none of that, and we know none of the detail about whether there will be any consultation with external stakeholders, which is particularly important in the field of agriculture, where a large number of stakeholders are affected.

Stella Creasy: Professor Young, do you want to add anything?

Professor Young: We also have to think about how ministerial Departments will liaise with each other, because those different Departments might be looking at the same statutory instrument that might regulate bits that fall within the ambit of their respective Departments. Something will also be required in Government to keep track of that and to work out what the process should be.

With regard to parliamentary scrutiny, under the Bill the default position would be the negative resolution procedure. Obviously, there are some exceptions, for example, if a measure is used to modify primary legislation, to create a power to enact subordinate legislation or to create a criminal offence in certain circumstances. There is an ability to bump that up to the affirmative resolution procedure, but it will be very difficult for Parliament necessarily to keep track of all this, because so much is coming through. As I am sure you are all aware, it is very difficult for either of the Houses to actually pass a resolution to say that they disagree with a particular provision. Because of the demands on parliamentary time, it will be even more difficult when you have so many provisions coming through. Although there is a process for parliamentary oversight, it will be difficult in the timeframe to ensure that that oversight can be exercised in a manner that enables Parliament properly to scrutinise the measures as they come through.

Q28 Stella Creasy: We know that the last time the Commons overturned a negative statutory instrument was in 1979, and that the Lords has not done so since 2000.

Professor Young: Exactly.

Stella Creasy: In your opinion, then, the ability of parliamentarians, as opposed to Ministers, to influence what laws come next, if they are enacted at all, is limited. Can you suggest, or are there examples from your experience, how parliamentary scrutiny could be strengthened in this Bill?

Professor Young: Obviously we have elements that we saw under the European Union (Withdrawal) Act 2018, which allowed for aspects of enhanced scrutiny in certain circumstances as well as the ability to exercise the affirmative resolution procedures. There can be procedures that you can use whereby you put forward drafts of delegated legislation and allow parliamentarians to scrutinise them. Obviously it is difficult to set that up and to have the time to do so.

I think we need to think about two issues. First, we need to think about what is the appropriate procedure that enables parliamentarians to have adequate scrutiny and we also need to think about how we ensure that parliamentarians have sufficient time to perform that scrutiny. That is why you accurately quoted the information relating to the last time that either the House of Commons or the House of Lords voted against a particular resolution. Perhaps that shows the very great difficulty of actually achieving the time to get that on the parliamentary agenda.

Q29 Stella Creasy: To clarify that point, obviously all of that requires a Minister to bring forward a proposal for any parliamentary scrutiny.

Professor Young: Yes.

Q30 Stella Creasy: So in your reading of the legislation, to confirm our reading of it, if a Minister chooses not to bring forward a replacement to a piece of legislation, there is no parliamentary scrutiny of that decision in and of itself at all?

Professor Young: That's it; absolutely. The only way perhaps to get around that would be to ensure that different departmental Select Committees could go away and look at the area of their law, and perhaps write reports to propose that there should be changes or provisions should be retained or revoked. Obviously, that would only be a report and not necessarily something that a Minister would have to follow in any way, shape or form.

Professor Barnard: If I may just put a footnote to your questions, of course if Parliament did decide to vote by resolution against a statutory instrument, that risks running out of time. Therefore the default kicks in and the sunset kicks in, so you lose a measure all together.

The Chair: Thank you. I call Alex Sobel.

Q31 Alex Sobel: First of all, as a shadow DEFRA Minister, we were expecting 570 regulations. I would like to know whether we will have any more, but that is an aside. As I said to Sir Stephen Laws, I am concerned about the amount of time that we will have between now and the sunsetting at the end of 2023. You gave a very good explanation of how thousands of regulations will likely fall because of the lack of time, but much retained EU law will have implications for the operation of the Northern Ireland protocol, which I understand is within scope of the sunset. What is your view on the operation of the Northern Ireland protocol, if we go ahead and, as expected, hundreds or possibly even thousands of regulations are automatically revoked at the end of 2023 because of the lack of parliamentary, ministerial and civil servant time to effectively replace them?

Professor Barnard: The *Financial Times* reports, and indeed the *Mail on Sunday* report, which is where the story about the extra 1,400 pieces originated, just talk about 1,400 pieces; they do not talk about the fields in which they fall. By definition, however, given that DEFRA already has the largest group of retained EU laws—it is about 500 and something—DEFRA is very likely to be affected by the discovery of an extra 1,400 pieces.

On your question about the Northern Ireland legislation, as you know, annex 2 of the Northern Ireland protocol lists all the areas of EU law that will continue to apply in respect of Northern Ireland on a dynamic basis. Clause 1(5) of the Bill contains a rather general and ill-defined carve-out for Northern Ireland legislation, but it is not clear because, as you will be aware, the Northern Ireland Protocol Bill is also going through Parliament at the moment, which will turn off a large amount of the EU legislation that applies in respect of Northern Ireland—all the annex 2 legislation. Other bits of legislation still apply, particularly in the field of equality law and social policy, but you have this generic and rather vague exclusion in respect of Northern Ireland in clause 1(5).

Professor Young: I have nothing to add.

Q32 Alex Sobel: I wanted to put this question to Sir Stephen Laws, but I will put it to both of you. He talked about the fact that, were regulations sunsetted and not replaced, people would just carry on doing what they did before, but the regulations create a legal floor. Many DEFRA environmental regulations in particular create environmental floors, so people may not do what they did before. They will lower their standards because the regulations will go. Do you think that that is a real danger with the sunsetting and the revocation of the regulations?

Professor Young: I agree that it is a real danger, because obviously a business takes business-based decisions. If a particular regulation that was perhaps making you not as competitive disappears, you might find ways of not following the old regulation because it might give you a competitive advantage in certain situations. We need to think about this against the backdrop of the United Kingdom Internal Market Act 2020, which provides that, if a good can be marketed in one component part of the United Kingdom, it can be marketed in any other component part of the United Kingdom. That will also incentivise what we call a race to the bottom—the idea that you will have a competitive advantage if you are not following other regulatory burdens that might make your good less competitive. If you are aware that you do not have to follow that, not only will you decide not to do so, which might give you a competitive advantage, but it might put others at a disadvantage across the 2020 Act. You can sell your good across the UK because you are adhering to a lower element, and it is lawful to sell it in one component part. I think that there is a real risk that people will not follow the former rules and regulations.

Professor Barnard: I think Sir Stephen Laws takes a very benign view of human and indeed business nature. If there is an opportunity to save costs by not complying with rules, businesses will take it. The only thing I would add to that is that businesses that are doing most of their trade with the EU will still be required to comply with EU rules, otherwise they will not be able to sell their products on to the EU market. Business that are part of supply chains that feed into the EU market will still have to comply with EU rules. Perhaps he is right there that there might be voluntary compliance, but it is actually market-induced compliance rather than absolute voluntary compliance.

The Chair: Thank you. Colleagues, any further questions? Stella Creasy.

Q33 Stella Creasy: I just want to follow up on that. Clause 15(5) specifies that no replacement legislation can increase the burden on businesses. That looks very much like it is locking in lower standards as one can only secure either parity or something reduced. Is that a correct interpretation or could burden be rewritten to allow us to have the higher standards that we were promised if we left the European Union because we could set our own standards? Professor Young, you looked like the one who was nodding most vociferously.

Professor Young: The problem with that particular provision is that it is that element of not reducing burdens, which includes elements of administrative inconvenience, as well as obstacles to trade or innovations or obstacles to efficiency, productivity or profitability. The difficulty is what would or would not be increasing burdens in these circumstances. On the one hand, you are right; this is incentivising a reduction in these burdens and the potential follow-on we would see is a reduction in standards, particularly because it is looking at obstacles

to trade or obstacles to efficiency, productivity and profitability. Another way of potentially reading it is to say that if I take a number of earlier burdens, turn them into one burden with a higher standard, that is also not increasing the burden. The difficulty is that the clause could be quite ambiguous, which could, in some senses, perhaps alleviate some of the risk that that might incentivise towards removing burdens. However, that is going to leave these particular measures open to potential legal challenges because people will argue "This has increased my burden in these circumstances." That, in turn, could add to legal uncertainty.

Q34 Stella Creasy: That is where the lawyers make their millions. In your interpretation of burdens, the TCA talks about us not using changes in our regulatory processes to undercut each other. So is there a risk in that interpretation that we may affect the TCA itself? How do you feel that this legislation interacts with those other forms of legislation?

Professor Barnard: Yes, you are absolutely right. That is one of the reasons we proposed carving out, for example, environmental law and employment law, because those are the two areas that are subject to the so-called level playing field provisions in the trade and co-operation agreement. We are free to lower our standards—that is our choice—but if we do and, depending on the provision, that materially affects trade between the UK and the EU, the EU can start the dispute mechanism in the TCA. In respect of the so-called rebalancing dimension in the level playing field, the retaliation is brutal, quick and immediate.

The Chair: Final question to Justin Madders.

Q35 Justin Madders: Just following up on the burdens issue, obviously lawyers can argue all day what a burden is. For us parliamentarians, whose opinion is it that this is reducing a burden? How would we as parliamentarians establish the basis upon which that decision has been made?

The Chair: Professor Young, you look like you are about to burst forth.

Professor Young: Sorry, I could not quite hear who you were asking. It would be for the Minister to decide, when they are deciding to make a regulation, whether they do or do not think it will or will not increase a burden. There is a possibility for the Minister to make a statement, but there is no requirement to do so, and it will be up to parliamentarians when they see that particular measure to scrutinise it. If you think it imposes a burden and you are concerned about it, you could use the negative resolution procedure to vote against it.

The Chair: Professor Barnard, did you want to add anything in 20 seconds?

Professor Barnard: No, I agree.

The Chair: Thank you very much, both of you, for the clarity of your evidence. We are now moving on to our next group of witnesses. Thank you to those from Cambridge.

Examination of Witnesses

Martin Howe KC and Tom Sharpe KC gave evidence.

10.24 am

The Chair: We are now moving on to hear more evidence in person, from Martin Howe KC of 8 New Square chambers and Tom Sharpe KC of 1 Essex Court chambers. In this session, we have until 10.55. Please introduce yourselves for the record; Martin, would you like to go first?

Martin Howe: I am a practising King's Counsel, principally in the field of intellectual property law, and formerly European Union law, mainly in the field of free movement of goods and services—cross-border freedom to trade. That is my professional background. I became chairman of a group called Lawyers for Britain, which was set up during the referendum campaign to campaign among the legal profession for a leave vote. I wish we had been able to wind it all up—job done—but we still exist and I am still the chairman.

Tom Sharpe: I am Tom Sharpe, King's Counsel. I spent too long as an Oxford don, but I have been in practice for quite a long time. The nature of my teaching at Oxford and my practice was heavily European law, which I now put in the semi-past tense. I have appeared in the European Court quite a few times. The central core of my practice has always been the regulatory area—competition law and state aids—but I have done quite a lot of judicial review work, attempting to overturn EU regulations and misapplied and misadopted directives. I, too, am a member of the Lawyers for Britain group, and Martin and I made submissions in Miller 1 and Miller 2.

The Chair: Thank you very much. We will turn first to Justin Madders.

Q36 Justin Madders: Good morning, gentlemen. May I ask a rather specific question? I am presuming that you have read the Bill. Under clause 4, there is a reference to removing references to sections 183A to 186 of the Data Protection Act 2018. If you do not know why it is there, that is fine, but are you able to provide an explanation?

The Chair: Are you seeking free legal advice, Justin?

Justin Madders: I am indeed. It is the best type.

Tom Sharpe: The honest answer is no. However, your excellent House of Commons research paper does indeed advert to this and describes the justification, which I have forgotten.

Q37 Justin Madders: That is fine. I will refer back to that. I seek some free legal advice in relation to subsections (3) and (4) of clause 7, which are about the criteria for departing from retained law. The criteria are slightly different. Could you set out your understanding of the rationale for why that is the case?

Tom Sharpe: Slightly different between case law and—

Justin Madders: Yes.

Tom Sharpe: Shall I kick off? I know that Martin has some fairly strong views on this. What the Department is trying to do here is to provide some illustrative guidance as to the reasons why people can depart. They

could have done nothing and left it open to the court, which would have been unsatisfactory. By and large, judges, like all of us, need some help and guidance. As to the differences, the justification is the TuneIn case, Martin, is it not?

Martin Howe: Warner against TuneIn, yes.

Tom Sharpe: Why don't you pick this up? It is your area.

Martin Howe: One feature of the 2018 Act, as you know, is that it made European Court judgments continue to be binding after exit in the interpretation of retained EU law. I would have preferred to see them just as persuasive authority from the beginning, but that is what the Act said. It gave only a very tiny exception, allowing the Supreme Court and the High Court of Justiciary in Scotland to depart, but only in circumstances where they would depart from their own previous decisions. It was extremely narrow. That was slightly widened by a statutory instrument under the 2020 Act, which expanded that to the Court of Appeal, the Inner House of the Court of Session in Scotland and the Court of Appeal of Northern Ireland, but it still had a very narrow test. I do not think, even if you got rid of all these restrictions, that the judiciary would actually make very many changes to or departures from legislation.

That comes out from the TuneIn case, in which the Court of Appeal considered a very unsatisfactory area of jurisprudence by the Court of Justice—a very technical area on communication to the public in copyright cases—and did not feel that it wanted to depart from that law, basically because it thought that to do that you have to almost legislate to fill in what you are replacing the judgments with. Judges are naturally reluctant to do that. My view of these provisions is that they are helpful. They slightly widen the circumstances in which there can be a departure, but are unlikely to make much practical difference. They will mean very few cases that see actual departures.

Tom Sharpe: May I add a supplementary? In answer to your specific question, clearly, the case law, which is the second provision in clause 4, is much broader. All sorts of case law is affected, and some would say infected, by European principles. What this is simply doing is inviting Parliament to say that the breadth of review can be triggered by any impact or any influence. It is really very broad—"determined or influenced by". I think that is the justification for it, and I think it is sound. What is the point of having an imperfect means by which higher courts can be seized of these matters if they are important enough to go up to the higher courts?

Q38 Ms Ghani: Good morning. There has been a lot of discussion about whether the Bill should be happening now and whether it should happen at all. My question is this: is now the right time for Government to reduce the influence of retained EU law in the UK statute books, as the Bill intends? I will turn to Mr Sharpe first.

Tom Sharpe: It is not the right time at all. This should have been started in 2016, and certainly the dashboard—the process of creation—should have happened then. When—or if and when—this is enacted, it will be, what, six years since the referendum? That is a very long time; it will probably be seven years when the Lords get hold of it. It seems to me that the promises that were made in the referendum and the obligations owed to those who voted for Brexit, which in turn, of course, were repeated in the 2019 election, have to be redeemed. It seems to me that it is appropriate for that to be done, and to be done by a means whereby good faith can be applied—that is to say, a balance between speed and comprehension, balancing the requirements of Government in order to get the legislation on the statute book with the interests of Parliament and the interests of stakeholders. It seems to me, as a general rule, that this is actually what it does.

Q39 Ms Ghani: Mr Howe, I will ask a supplementary, because I know you are eager to answer the question as well. We have heard a lot, especially from the critics, saying that the Bill is not needed because the European Union (Withdrawal) Act 2018 saved all the relevant EU law, and it has been suggested that the Act took a maximalist view on retaining EU law as, at the time, our future relationship with the EU was not yet known. What is your view on whether the Bill is necessary, and why?

Martin Howe: I think the Bill is desperately needed. The flaw with the 2018 Act is that it was clearly necessary to preserve what is now retained EU law on an interim basis until it could be reviewed and either kept or replaced or modified, but what was not necessary was making it impossible to change most of it except by Act of Parliament, which is what the 2018 Act did, and also to import a whole load of EU law doctrines on top of the legislation. It was all said to be for the purposes of legal certainty. In my view, it does not add to legal certainty; it generates legal uncertainties and allows vague things to be argued.

I have had a look to see what progress has so far been made in changing the vast body of EU retained law. There is one important Bill going through the Commons now, the Financial Services and Markets Bill, which would deal with that field, where we put in place our domestic policy choices.

There are also two further Bills that I have identified. One dealt with the Vnuk case, which was a case in the European Court that interpreted the motor insurance directive—in my view, misinterpreted it—to say that it applied to off-road vehicles, so things such as farm tractors would be compulsorily insured. That has now been corrected in our law, but only via a private Member's Bill, which became an Act in April when the Government lent parliamentary time to the Bill. I think that the Government estimates are that it would have cost £2 billion per year—mainly to farmers, I suppose.

The other Bill, which is actually more important, is on the gene editing matter, where the European Court, in the case between the French peasants collective and the French Government, decided that the genetically modified organisms directive covered gene editing. Now, gene editing is a different technique from genetic modification. There is a lot of criticism of that judgment. It was completely unexpected and had very damaging effects, particularly on the life sciences industry in this country. That is subject to correction by a Bill that has just finished its Commons stages and has gone to the Lords.

Those are just two interpretations of two bits of EU law. That shows the complete impossibility of performing this exercise by primary legislation, and therefore how essential it is to have the statutory instrument power in

the Bill. It is important to appreciate that the statutory instrument power does not apply to primary legislation, so Acts of Parliament that were passed in compliance with EU obligations are not within scope; only the secondary legislation is covered.

Q40 Ms Ghani: I assume, then, that you agree that the Bill allows for sufficient opportunity for parliamentary scrutiny.

Martin Howe: Well, it does. It is comparable to the parliamentary scrutiny that section 2(2) of the European Communities Act 1972 allowed when most of these measures were introduced.

Q41 Ms Ghani: Thank you. Returning to Mr Sharpe, does the Bill, as drafted, strike the right balance between providing safeguards and enabling the removal of outdated retained EU law from our statute books?

Tom Sharpe: I see the Bill as a framework Bill. Of course, it gives Ministers and Departments very considerable powers—powers of proposal, as you know, to amend, revoke or replace existing legislation.

As Martin has just said, an Act of Parliament, which was probably passed—if I may say so respectfully—before many of you were born, provided an enabling power to enact legislation of some quite sweeping character. Despite all the things that law students learned about how Parliament needed to approve legislation, not one single regulation—this is one of the bits we are discussing—has ever been debated, approved or amended by the House of Commons or Parliament. That is a striking statement, but it is absolutely true. We were forbidden, in law, to debate or amend such legislation. I suspect you all know that, but it does not hurt to be reminded.

As for the directives, of course they, too, were approved by Parliament—or, more accurately, not disapproved—but the power of Parliament was utterly residual because the objective of a directive had to be observed. If it was not, the UK would be subject to proceedings from Brussels—and it was, on occasion, but not as often as many other countries.

We are now debating a system of revocation, amendment and replacement, and giving it far more formality than we gave the creation of the laws themselves. That ought to give us pause for thought. That is the background. As far as parliamentary scrutiny is concerned, yes, most of it will be subject to negative resolution, and it is easy to make what I will disrespectfully call a good debating point about the times when statutory instruments have fallen under the negative procedure. But here, we are dealing with a sea change. We are dealing with masses of legislation, as we know, all of which will be subject to significant scrutiny within the House of Commons by parliamentarians and by the press. It seems to me that those issues have to be given notice. There is also the sifting procedure that we adverted to earlier, which I think could be quite a powerful brake on Ministers' discretion.

Q42 Peter Grant: The evidence submitted by the Bar Council, which I assume you are familiar with, says very firmly that it has profound concerns about the Bill, and that its preference would be for the Bill to be withdrawn in its present form. Why has the Bar Council got it so wrong?

Tom Sharpe: Where do we start?

Martin Howe: I am concerned by the attitude taken by the Bar Council. As a subscribing member, I fear that it is trespassing rather too far into political issues. Unfortunately, I think there is a sort of small "c" conservative lawyer's mentality, which has led over time to various things, such as counsel saying in the "Lady Chatterley's Lover" trial, "Members of the jury, would you allow your wives or your servants to read this book?" Since so many members of the Bar are imbued with the system of working with European Union law—it is all part of their practice and the way they operate—there is a natural mental attitude towards keeping it. I do not think that reflects the necessities of the democratic process following the referendum result.

Q43 Peter Grant: Mr Sharpe, do you have anything to add?

Tom Sharpe: It is our trade union, and it does not speak on my behalf on this political matter, very obviously, and it should not have done that. I think there is a broad issue here. If you look at the criticism of the Bill by the Bar Council and by members working with it—the Hansard Society, which got a mention, and various leading members of the Bar whom I know very well; they are my friends and I respect them—the dominant theme is one of extreme pessimism. That is to say that if we have a mendacious Government, a supine Parliament and a lazy and ignorant press, all sorts of things can happen. Now, I do not think that is true. I have far more respect for this House, and even for Ministers and the press. If Ministers are getting out of hand, they will be put in check. If they are not, the judiciary has a role in reviewing the exercise of these powers. We can ignore the judiciary in this context, but it has an important residual role.

We can call it benign or naive, but I do not think that is right. I think that by and large the House of Commons does a pretty good job, and I see no reason at all why it will not continue to do so in relation to this important Bill.

Q44 Peter Grant: You suggested that if a Minister gets out of hand, Parliament can act. You will recall, though, that quite recently a Secretary of State was found by an inquiry to have been guilty of severe bullying of civil servants, and nothing happened to her because a Prime Minister did not want her to lose her job.

To go back to the comments you made earlier about the difference between primary and secondary legislation, when was the last time Parliament amended a piece of secondary legislation?

Martin Howe: It does not. The procedure is a yes/no procedure either by affirmative resolution, in which case there has to be a positive vote or it fails; or by negative resolution, in which case, unless it is prayed against and there is a vote against it, it stands.

Q45 Peter Grant: Does that not mean there is significantly less opportunity for parliamentary scrutiny if all that Parliament is allowed is: we do this or we do not do it? Does that not mean that, almost by definition, there is less opportunity for parliamentary scrutiny with secondary legislation than there would be with a Bill?

Martin Howe: Indeed. By its nature, there is much less opportunity than with a Bill, which you go through line by line, but all the legislation that is within the

scope of the Bill to be potentially corrected, changed or left out by secondary legislation was introduced by secondary legislation. The primary legislation is not covered by the powers.

Tom Sharpe: Remember what we are discussing. I think it is very unlikely that there will be a wholesale slash and burn—to use the academic term that we heard earlier—of all EU retained legislation or assimilated legislation; a good deal of it will remain. I do not recognise the gloomy picture of businesspeople clawing their way to the bottom. I understand the theory, but in the course of a year I advise dozens of CEOs and chairmen, and not one has said: "We have a terrific opportunity to make extra money out of the consumer."

What is missing here is public scrutiny and reputation, and we have to be balanced and less shrill about this: not everything will change; not everything will change at once; and some things will be changed—in particular under clause 15(3) where, respectfully, the real issues arise for parliamentary scrutiny. There, as you heard, some will be determined by affirmative resolution and others will go through the sifting procedure, which requires the Minister to come to Parliament to justify the choice of a negative procedure. You will have an opportunity to deal with that.

Q46 Stella Creasy: Martin, I was interested to hear you talk about how you were happy with the scrutiny mechanism in the Bill, because I note that in your evidence to the European Scrutiny Committee you argued for the need to have a delegated power to revise retained law and then suggested a commission to propose what should be done. That would be much more scrutiny than you are talking about now. What made you change your mind about the requirement for scrutiny that you previously advocated? I thought that the argument you made before was compelling.

Martin Howe: The argument I was putting forward was for a practical way to speed up the process. Frankly, it was a suggestion that I floated, a possible—

Q47 Stella Creasy: Are you disappointed that there is no scrutiny mechanism in the legislation, as you floated?

Martin Howe: What I was then proposing was not so much a scrutiny mechanism as a sort of motor to get the process going—

Q48 Stella Creasy: You made quite a strong argument, did you not, that there was a case for being able to look? You were advocating the superfluity of some of this legislation, but now the Bill contains none of that. Are you disappointed?

Martin Howe: No, because the main thing—the important thing—is to get the job done. What I am disappointed about is that I published a paper in July 2016, a month after the referendum, arguing that we should start a systematic process of review of European Union laws. I naively suggested that that would be with a view to revising what we needed to revise by the time of exit two and a half years later—

Q49 Stella Creasy: You felt it was naive to know what we were revising.

Martin Howe: No. I was naive to think that the process of revision would be started. I share Tom's view that it would have been better had this process been started earlier, but it does need to be done.

Q50 Stella Creasy: You also said that there were limited respects—and gave two examples from your own practice—where you thought it was a good idea to retain EU law over pre-Brexit legislation. Do you accept that there might be other areas of law where it might be a good idea to retain some of those laws? In which case, would that not be helpful to us as parliamentarians? Your colleague dismissed the idea that the Bill will lead to slash and burn, but it has slash-and-burn powers within it. Surely it would be good practice—as you have argued—to know what it is that we are slashing and burning, and to have some process of exploring that as parliamentarians, if we are to be taking back control for this House?

Martin Howe: Well, it is a matter for Parliament as to what you press Ministers on with regards to their plans and intentions.

Q51 Stella Creasy: But we do not have powers to press them; we only have a negative resolution procedure. You made such a compelling case and argued in your previous evidence for several areas of law where you think we should retain. What has changed now?

Martin Howe: To be clear, I was not suggesting that they be retained in the long term. Those areas need revising and converting into coherent UK-based law. Elements of EU law should not be retained into the indefinite future.

Q52 Stella Creasy: You make a case for being able to change your mind yourself and having a process for changing your view on this legislation. Would it not be beneficial for this place to have powers to change the minds of Ministers? Like you, Ministers may make decisions that they come to regret.

Martin Howe: Sorry, I have not changed my mind on the relationship between retained EU treaty law and other EU law. The point is that that should be converted into domestic law, but our domestic legal system can cope with the question of precedence of one law over the other. I have never been in favour of indefinite retention.

Stella Creasy: Apologies, but you did propose—

The Chair: Stella, you have asked a lot of questions. We are moving on, and we will come back to you if there is time.

Q53 Mr Marcus Fysh (Yeovil) (Con): Would it be a good idea to have, within each Department, where there might be cross-cutting issues between them, particular taskforces established by Ministers, including practitioners in the area, to look at how things can be made more competitive within those areas by this process of assessing what retained EU law is out there and how it might be replaced? Should regulators be involved in that process, given that it might be necessary to take a practical approach to getting these things done, and to get expertise from outside the Government and the civil service to accelerate the process and get it done in the time available?

Tom Sharpe: The general point is very well made, if I may say so. It seems to me that that type of exercise—that kind of inclusive thinking about making the country more efficient and getting rid of silly regulations—would be valid even if we were not dealing with the Bill.

One of the problems with the Bill is that it is a framework Bill, and I can see a quite compelling case for eliminating some of the opacity that surrounds the Government's intentions. It is early days, and the Bill is just a Bill. I do not think it would be enhanced by Ministers detailing in fine print exactly what is to be done, but there is a case for some ministerial guidance as to where the priorities should lie.

As for doing away with dud regulation, I find it amusing to read the submissions to Government. This is an important point about consultation. My understanding is that there have been thousands of responses to the dashboard—I think I am right in that. That is an element of public consultation. It is amusing to me to see that so many bodies that campaigned remorselessly against some of the EU legislation that we had no control over now resolutely do their best to try to preserve it. With a little more honesty, they would have been more compelling, I think.

Q54 Mr Fysh: This is a follow-up question to Martin Howe. Would it be possible for those taskforce processes also to involve parliamentary scrutiny through the various Committees in the Lords and the Commons, which might help to look at this prioritisation and emphasis?

Martin Howe: That is helpful and it sounds like a good idea. Whether it ought to be spelled out in the Bill is a different question, because there needs to be a certain amount of flexibility over these processes. Certainly, involving outsiders in looking at these issues, as opposed to doing it as a purely internal measure within Departments, strikes me as beneficial.

The Chair: Gentlemen, thank you for your evidence. Our time is now up. Thank you once again for being with us.

Examination of Witnesses

Mark Fenhalls KC, George Peretz KC and Eleonor Duhs gave evidence.

10.54 am

The Chair: We will move on to our final group of witnesses for this morning. Of course, we have a long afternoon ahead of us. We will now hear oral evidence from Mark Fenhalls KC, chair of the Bar Council. I wonder whether he was listening to the previous panels.

Mark Fenhalls: I was listening, Chair.

The Chair: Excellent.

Mark Fenhalls: I am very much looking forward to trying to do my best.

The Chair: I am sure you will do a great job. George Peretz KC of the Bar Council's working group on retained EU law is joining us via Zoom. We also have Eleonor Duhs, partner and head of data privacy at Bates Wells, here in person—I hope that was the correct pronunciation of your name.

Eleonor Duhs: It was, yes.

The Chair: For this session we have until 11.25 am. George Peretz is not here yet, but if he does appear we will ask him questions as well. We turn to Justin Madders to start.

Justin Madders: Thank you for giving evidence today.

Q55 Justin Madders: This is probably a question primarily for you, Mark. At the moment we are in a position where we know several thousand laws will be automatically sunsetted at the end of 2023. We do not know which ones they will be or why the Government will retain, remove or amend particular laws. As we have heard today, it appears that the Government do not even know themselves which laws will be covered by the Bill. Do you see any risks with this approach?

Mark Fenhalls: There is nothing but risk. I will tell you one brief anecdote to illustrate this point. Last week I was at an international conference, working with the Ministry of Justice on selling legal services overseas, and talking to lawyers and Bar leaders from around the world. They asked me what this country's intentions were around its laws following the departure from the European Union. I explained that I have no difficulty with change; change is a necessary thing. We all hope there is a sunlit upland where we can find better or fewer rules and regulations in the future. But when I explained about the inherent uncertainty and risks around this, they all looked and me in horror and said, "Why would we do any business with the UK"—until 2024 on the current timescales—"if we don't know what the rules and regulations are going to be around all these issues?" There is a tremendous problem with this Bill, which was described by previous witnesses as a "framework Bill", because we do not know what Ministers are going to do and Parliament does not have the opportunity to take control of the process or scrutinise it.

In our judgment, the Government should take the approach referred to in relation to the Financial Services and Markets Bill, where it looks as though considered, measured changes are being put forward, and there is an undertaking not to change the rules and regulations without consultation with the sector. We cannot understand why financial services are the subject of such a responsible, measured approach, which does not seem to apply to consumer protection, cosmetic and household cleaning product safety, water and air standards, and so forth. If the Government could take the same measured response, sector by sector, that would be a more sensible and less risky way to proceed.

Q56 Justin Madders: Following on from that, if the Government adopted the approach you are suggesting, how feasible would it be for there to be a considered and properly democratic approach to this before the end of 2023?

Mark Fenhalls: I am no expert in how much civil service time exists, but I would be astonished if it were remotely possible to cover but a fraction of this. I do not know why it is set up as anything other than a political problem. The reality is that this is our law. It was passed over four decades of membership while we were a part of the European Union. The previous witnesses may not like the process of scrutiny that existed, but we were part of that. We had MEPs and a Parliament that dealt with that. There was a democratic process, like it or not.

We now have a different democratic process, but these laws are part of our laws, which our businesses operate by and which provide protection to our citizens. If I may say so, I think Parliament has a responsibility not to import uncertainty and change without showing there is something better—and certainly not by just having the power to let the laws lapse.

Eleonor Duhs: Perhaps I could add something on the timeframes. In order to get the statute book ready for Brexit, which was in some ways a much more simple task than this, it took over two years and over 600 pieces of legislation. The reason I say it was a simpler task is that we were essentially making the statute book work without the co-operation framework of the EU. We were taking out references to the European Commission and replacing them with "Secretary of State"—that sort of thing. That was a much simpler task than what we have here, and that took over two and a half years.

A lot of areas also have several pieces of amending legislation. In data protection, which is the field that I work in, there are at least three pieces of legislation that amended and then re-amended the statute book—just to get it ready, from a technical perspective, for Brexit. There may be huge policy changes under this legislation, and the end of 2023 is simply not a realistic timeframe for the process.

Justin Madders: I see that George Peretz has joined us. I do not know whether he wanted to respond to any of the questions first of all.

The Chair: Yes, Mr Peretz, welcome. Did you hear the questions that were asked?

George Peretz: I had a slight technical hitch in joining. I was going to make a point about the effect of the sunset clause. Stephen Laws made the point that law reform is necessary and it happens, and one should not get stuck in defending the status quo. But there is every difference between a Government saying, "Here is the existing law, we propose to replace it with legislation, and here is the text of the proposed reform," which is the normal process of law reform, and what is happening here. The Government are effectively saying to business and the wider world, "All of this law is open to change; we cannot tell you whether we will keep any of it. Some of it may just disappear, it may be replaced, and we cannot yet tell you what the replacement is. All of this is going to happen in 18 months." That inevitably produces an enormous amount of uncertainty, and that is uncertainty above and beyond the inevitable uncertainty of law reform.

Q57 Justin Madders: I have one further question for Mark. There was correspondence between the previous Secretary of State—the right hon. Member for North East Somerset (Mr Rees-Mogg)—and the Justice Committee over engagement with the judiciary in respect of the Bill, particularly the effect of clauses 7 to 9. Can you tell us what kind of dialogue there has been? Do you foresee any issues with the application of those clauses?

Mark Fenhalls: I am not privy to any of that correspondence; I cannot help with that. I do not know whether either Ms Duhs or Mr Peretz is familiar with it.

Eleonor Duhs *indicated dissent*.

Justin Madders: That is fine.

Q58 Ms Ghani: Good morning, Mr Fenhalls. You talked about scrutiny quite a bit. Most retained direct EU legislation has not been through a UK parliamentary scrutiny process, but you keep going on about scrutiny. How much oversight did the UK Parliament have over laws that came into effect under section 2(1) of the European Communities Act 1972?

Mark Fenhalls: I am sorry if you think I am going on about it. All I am doing is saying that there was a democratic process, which we were party to for several decades: we were members of the European Union, and we followed the lawful processes. We now have this body of law, which Parliament owns, and we are all looking for an opportunity for Parliament to say, "Let's now take advantage of our departure from the European Union, put aside the conflict of the past and work out a better way." We are all delighted by that. None of us is hostile to change. We just want change in a measured and balanced way, so that we know what the alternatives are.

The effect of the Bill—I was thinking about it as I listened to the previous speakers—feels a bit like the uncertainty and the uncosted promises made by the former Chancellor, which so disrupted the bond market. *[Interruption.]* You asked the question, Minister. The difference between that and the Bill is that we are being told to trust Ministers to see what will happen, and we have no idea what they will do. We have no idea what is being left or what will be changed. There is conflict between current Bills before Parliament, such as the Levelling-up and Regeneration Bill, and the Bill we are discussing, and we do not know how the Government propose to address it.

Ms Ghani: Mr Fenhalls, you said you are not hostile to change, but you have been nothing but negative about the Bill. You also mentioned a democratic process. There was another democratic process in 2016—just for the record.

Q59 Peter Grant: Good morning. In your submission from the Bar Council, Mr Fenhalls, you suggested that the Bill should be withdrawn. You have also accepted that we need to do something about the huge volume of retained EU law that we still have. What would be a better way to deal with all that law, rather than the way it is being dealt with in the Bill?

Mark Fenhalls: I am not a parliamentarian or a politician. The short answer to that is that I do not know, but I do know that every single stakeholder and lawyer I have spoken to—who are simply thinking about their clients' business interests and the rights of the people involved—wants to know what the alternative proposals are before they take a view. The difficulty with this Bill is not change, because change in itself is fine; it is the fact that we do not know what the proposals will be. We have suggested what we suggested in our submission and we have put in fall-back positions saying that if the Bill is to proceed, we should put in place scrutiny measures or duties on Ministers to come to the House and say, "This is what we propose to do," and not run the risk, for example, of the sunset causing us to crash into the wall at the end of next year.

Peter Grant: For the record, there are two lawyers sitting behind you who quite clearly do not share the view that you just expressed about the various lawyers you have spoken to. Some of us think that lawyers argue with lawyers all of the time; that is what they are there for.

The Chair: Before we continue, I think Mr Peretz wanted to come in on that point.

George Peretz: I wanted to come in in response to the Minister's question about section 2(2) of the European Communities Act 1972. There are two points here. One is the point, developed by Martin Howe, that it considerably underestimates the degree of democratic scrutiny that EU law actually had, particularly in the European Parliament and on the reform of EU law. It also understates the mechanisms that Parliament had to scrutinise how Ministers acted in the Council of Ministers.

I suppose one is getting slightly political here, but perhaps the more important point is that one of the arguments for Brexit, as I understood it, was that it would strengthen democratic accountability for legislation. It is slightly disappointing that the argument put forward for the Bill is sometimes, "Well, the EU was undemocratic in this, so you cannot complain that this is equally undemocratic." We can do rather better than that.

Q60 Peter Grant: This question is for all three witnesses. Would the Bill be less of a concern if there was not a sunset clause, or if the sunset clause was later than the end of 2023? Are your concerns partly about how little time there is for the process to be completed?

Eleonor Duhs: I would still have some concerns, because the end of 2026 is not far away and that is what people are saying would perhaps be the revised timeframe.

There are some really significant things in this Bill in terms of changing the way in which the law works. I will give an example from data protection law. Clause 4 would change the relationship between retained EU law and domestic law. To show what that might mean in practice, I will give the example of a conflict between the UK general data protection regulations and the Data Protection Act 2018. This is not addressed by the provisions that Mr Madders asked about; that is simply about how data protection legislation as a whole interacts with the domestic statute book and is not overridden by it. In a conflict between the UK GDPR and the Data Protection Act 2018, if we remove the principle of supremacy, for example—which is what the Bill seeks to do—we could end up reducing data protection standards in the UK. That could cost UK businesses up to £1.6 billion and significantly increase red tape, so this is really important.

Last year there was a case called the Open Rights Group case, which was to do with exemptions in the 2018 Act that were overly broad. The Court of Appeal said that the UK GDPR had precedence—so this was decided under the retained principle of the supremacy of EU law—and that the provision in the 2018 Act was unlawful. If we had not had that retention of the principle of supremacy of EU law, and had had this new section 5(A2), the 2018 Act would have had precedence and the broader exemption would have applied, which would have reduced rights in the UK.

Why is it helpful for rights in the UK to remain as they were before? Because our current standard of protection of personal data has been deemed by the EU to be essentially equivalent to their standards of protection. That allows a data adequacy decision and, at the moment, the free flow of data between the EU and the UK. If we did not have that—if we lost data adequacy, which could happen under proposed new section 5(A2) in clause 4—UK businesses would have to spend time putting in place contracts and would have to do transfer risk assessments.

The New Economics Foundation and University College London wrote a paper entitled "The cost of data inadequacy", which they published in November 2020. It stated that losing the free flow of data could cost UK businesses up to £1.6 billion in extra red tape, and it would have other economic implications, including a reduction in UK-EU trade, especially digital trade; reduced domestic and international investment in the UK; and the relocation of business functions, infrastructure and personnel outside the UK. So the Bill could have really significant implications for trade.

Q61 Peter Grant: Mr Peretz, do you want to comment on my previous question? How much of the concern about the Bill is simply down to the very short time provided by the sunset clause? If we moved that clause further back, would it ease your concerns?

George Peretz: The short time is clearly a concern given the enormous work that will need to be done both in Whitehall and by Parliament if it intends to scrutinise any of this properly within a very short timeframe. A lot of this law is very important, a lot is very complicated, and quite a lot of it is both, so one should not underestimate the resource implications. Obviously, if you have a longer timeframe—until 2026, say—that resource could be spread over a longer period, and perhaps more efficiently.

There are other, wider concerns about the Bill and how it amends the application of some EU rules to retained EU law as it continues to operate, and about Ministers' power to revoke and replace. Those are separate from the sunset clause concerns, but the sunset clause does interrelate with the question of Minister's powers. One of the problems with the effectiveness of parliamentary scrutiny is that although one hears that Parliament has powers—in some cases via the negative or affirmative resolution procedures—the background against which it is being asked to approve legislation means that if it votes against that legislation, the sunset clause will apply and regulations disappear completely, rather weakening Parliament's ability to do anything.

To take an example, if Ministers decided to keep the working time rules but rewrite them to make them less favourable to employees, and came up with the new regulations in November 2023, those rewritten regulations would probably be introduced under the affirmative procedure. However, when the House of Commons voted on them, Ministers would say, "You may not like these revised regulations very much, but if you do not vote for them, the alternative is that we will not have any regulations at all." That weakens Parliament's ability to control the exercise of ministerial power.

Q62 Alex Sobel: I will put this question to you, George, as it is something of a follow-up. You just gave a qualitative response about the sunset-clausing, but this is more of a quantitative question. I was not aware

until Catherine Barnard and Professor Young pointed it out earlier that 1,400 additional pieces of legislation have been found. I have now found the article in the *Financial Times*, which states that

"A plan…to review or repeal all EU laws on the UK statute book by the end of 2023 has suffered another setback after the discovery of 1,400 additional pieces of legislation."

We were aware of 2,100 pieces of legislation, but that is another 1,400, so we are now seemingly aware of 3,500, with a sunset clause at the end of 2023. Is that the end of it? Will it be 3,500 pieces of legislation or could there be more? How are we going to find and define all these pieces of legislation so that we know what law we are acting under? You have just described qualitatively how pieces of legislation will fall under the negative resolution procedure because they are going to be sunset-claused out. Quantitively, where do you think we are going to end up by December 2023?

George Peretz: One does not know. On your point about the legislation being discovered, like you I have read the story in the *Financial Times.* I do not know the background to it, but we drew attention in the Bar Council paper to the risk of things simply being forgotten. As that story shows, that is not a hypothetical risk. That is one reason why we suggested as a possible amendment to the Bill that the Government add a schedule that simply lists all the regulations that are going to be affected and if it is not on the list, it does not fall. It is very difficult to see the argument against that. Presumably, the Government want to know what is being repealed. One does not want to repeal things one does not know about. What would be the good of not evaluating the risk? It is very difficult to see why there would be an objection to listing everything out. Then everyone would know precisely what goes and what stays. That was one suggestion we put forward.

It is very undesirable to have the sunset clause—for all the work that is going to have to be done to be done effectively with a gun pointed at everybody's head saying, "Unless you've done all this analysis within a very restricted time period, the rules will fall." There is just endless room for mistakes.

One of the points we discovered when we were rewriting a lot of EU rules for the purposes of the withdrawal Act—which Eleanor knows very well about and can speak about in more detail—was that, as the legislation was being rewritten, it was discovered that there were problems with it. If we look down any of the lists of amended rules, as one might experience in practice, one normally finds that over the 2018 and 2019 period there were frequent amendments. As one version was done, it was found that there was a problem with it or something needed to be added, and another amendment was made. There just is not time within the process of this Bill for that amendment process.

There is also a technical problem. It is not clear that there is the power once a regulation has been rewritten for Ministers then to say, "Oh dear—we realise that this regulation contains the following defects; we would quite like to amend it now." I am not actually sure that the Bill contains a power for Ministers to do that. That is a bit of a problem.

Mark Fenhalls: I agree with what George just said. You will know far better than we do the stresses and strains on you as individual constituency MPs attempting to deal with those issues, and what in truth MPs can do as individuals scrutinising material like this. Ministers will know how pressured their civil servants are. I know from my dealings with civil servants how afraid they are of the possible forthcoming cuts. It is very difficult as an outsider to contemplate how the civil service can begin to cope with an assessment of what all this law involves.

The concluding point would be that if you have the list that George spoke to, that is a foundation for a proper ministerial division of responsibility as to who is doing what—which regulations affect which ministries and therefore what should our plan be? By the time we get through the end of next year, we might have dealt with financial services, perhaps, and with regeneration and levelling up, perhaps, because that covers environment and habitat and planning, but with that list and that firm foundation, you can make sensible evidence-based decisions about what to do. The frightening thing about the *FT* story—again, I know nothing about where it has come from—is the thought as to the unintended consequences, which nobody can possibly want, of not knowing what is out there. That is why, in a sense, a framework Bill is so flawed in its approach, because we do not know what we are dealing with.

The Chair: I have three questions to get in before 11.25 am, so let us have quick questions and quick answers, please.

Q63 Mr Fysh: Is it not the case that the people of the UK have given Ministers the responsibility to sort this legislation out now, in this Parliament? Are you not simply trying to frustrate that because you never voted for Brexit in the first place and you hate it with every fibre of your beings?

Mark Fenhalls: That is a political accusation that could not be more unfair. That is not the case at all. The short answer to your question is no. Parliament, rather than Ministers, should be making the decisions. That is the democratic point, if I were to engage with you on a democratic level. It does not matter what I did or did not want; I have said to you, and I mean it, that I have no difficulty with change—absolutely none whatsoever.

Q64 Mr Fysh: You just do not want it to happen now.

Mark Fenhalls: I want it to happen on the basis of evidence and—

Mr Fysh: Do you want to make it happen under a different Government?

The Chair: Marcus, you have asked a question and now you are interrupting Mr Fenhalls. Let him finish.

Mark Fenhalls: I want it to happen on the basis of evidence and with better proposals coming. What I do not want is to be lost in a world of uncertainty when we do not know what is coming, because, out of uncertainty, clients and people will stop doing business and they will not know where we stand.

Q65 Mr Jones: I want to come back to Ms Duhs on her point about the supremacy of retained EU law. As a consequence of the referendum in 2016 and all the legislation that has been introduced since then, this

country has recovered its sovereignty. Do you not think it repugnant to that sovereignty to have a state of affairs whereby the laws enunciated by a foreign jurisdiction and applied by a foreign court continue to have supremacy in this country?

Eleonor Duhs: Retained EU law is domestic law. We domesticated the statute book, and we did that to provide certainty for businesses, for individuals, for the Government and for users of the law, so that they would know what the law was. That was a policy of maximum certainty. Of course, it is now for Parliament—this was in the White Paper on the European Union (Withdrawal) Act 2018—to look at the law and to decide how it should change. We should absolutely make the most of the opportunities that we have, but it must be done in a thoughtful way. It must not be done in a rush and in a way that gives rise to legal uncertainty, because this is our domestic statute book and it needs to work for all of us. It needs high standards, it needs to enable trade and it needs to be the best post-Brexit outcome that we could have.

George Peretz: I can add something to that. It is slightly unfortunate that the EU withdrawal Act chose to continue what was called the principle of supremacy of EU law, because it is something of a misnomer. As Professor Barnard explained, it is actually a conflict-of-laws rule that gives priority to retained EU law over pre-Brexit statutes. You have to remember that pre-Brexit statutes were passed by Parliament, or made by Ministers, against an understood background that EU law was supreme, so you could say that when Parliament passed a pre-Brexit statute, it expected that statute to be inferior to EU law. It was the sea in which we were all swimming at that point, so I do not accept that there is anything constitutionally objectionable about having the conflict-of-laws rule.

Before you change the conflict-of-laws rule, you also have to think very carefully about its effect. One of the disappointments I have is that nobody in the Government or outside has produced any analysis at all of the concrete effect of removing the conflict-of-laws rule. I have likened it to pushing a very large button that says, "We do not know what happens if you push this button." That is not a wise legislative technique.

Q66 Stella Creasy: I will just say that we are all free to take advice from competing lawyers, but I do not think we are free in this place to treat our witnesses with contempt, regardless of whether we agree or disagree with what they have written.

All the lawyers have talked this morning about the approach of working with businesses and whether a regulatory burden could be created, which clause 15(5) is designed to avoid. We do not have any business witnesses coming forward, but we have heard that businesses are talking about risk being a drag on growth. Can you give us some examples of where you have worked with businesses with legal uncertainty? You have all talked about uncertainty, but can you explain what it could do to your clients?

The Chair: I am afraid we have 40 seconds left.

Mark Fenhalls: In 10 seconds, an organisation such as TheCityUK, which represents a range of financial services, accountancy, law and consultancy firms, will tell you that all its international clients are saying, "We don't know what the rules are going to be; therefore, we are troubled." There are business organisations out there from which you may choose to try to take evidence, and they may be useful to the Committee.

Eleonor Duhs: That is exactly what I am hearing too. They want to invest, but you cannot invest if you do not know what the law is going to be.

George Peretz: This is not my area of practice, but colleagues of mine at the Bar have made that point. If you are involved in a large development project—

The Chair: Forgive me, Mr Peretz, but I have to cut you off because we have reached 11.25 am. It is an existing law that we have to honour. Thank you to our three excellent witnesses. We appreciate your time and thank you for being here in person and for contributing online. Colleagues, we will meet again at two o'clock this afternoon for more fun.

11.25 am

The Chair adjourned the Committee without Question put (Standing Order No. 88).

Adjourned till this day at Two o'clock.

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

RETAINED EU LAW (REVOCATION AND REFORM) BILL

Second Sitting

Tuesday 8 November 2022

(Afternoon)

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No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Saturday 12 November 2022

The Committee consisted of the following Members:

Chairs: Sir George Howarth, † Sir Gary Streeter

† Bacon, Gareth *(Orpington)* (Con)
† Bhatti, Saqib *(Meriden)* (Con)
† Blomfield, Paul *(Sheffield Central)* (Lab)
† Creasy, Stella *(Walthamstow)* (Lab/Co-op)
† Evans, Dr Luke *(Bosworth)* (Con)
† Fysh, Mr Marcus *(Yeovil)* (Con)
† Ghani, Ms Nusrat *(Minister for Science and Investment Security)*
† Glindon, Mary *(North Tyneside)* (Lab)
† Grant, Peter *(Glenrothes)* (SNP)
† Jones, Mr David *(Clwyd West)* (Con)
† Madders, Justin *(Ellesmere Port and Neston)* (Lab)
† Morrissey, Joy *(Beaconsfield)* (Con)
† Nici, Lia *(Great Grimsby)* (Con)
O'Hara, Brendan *(Argyll and Bute)* (SNP)
† Randall, Tom *(Gedling)* (Con)
† Sobel, Alex *(Leeds North West)* (Lab/Co-op)
Stuart, Graham *(Minister for Climate)*

Huw Yardley, Sarah Thatcher, *Committee Clerks*

† attended the Committee

Witnesses

Barney Reynolds, Shearman and Sterling

Sir Richard Aikens, Brick Court Chambers

Jack Williams, Monckton Chambers

Sir Jonathan Jones KC, former Treasury Solicitor

Dr Ruth Fox, Director, Hansard Society

Tim Sharp, Senior Policy Officer, TUC

Shantha David, Head of Legal Services, Unison

Ruth Chambers, Senior Fellow, Green Alliance

Dr Richard Benwell, CEO, Wildlife and Countryside Link

David Bowles, Head of Public Affairs and Campaigns, RSPCA

Phoebe Clay, Co-director, Unchecked

Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture, Scottish Government

Michael Clancy OBE, Director of Law Reform, Law Society of Scotland

Charles Whitmore, Research Associate, School of Law and Politics, Cardiff University

Dr Viviane Gravey, School of History, Anthropology, Philosophy and Politics, Queen's University Belfast

Public Bill Committee

Tuesday 8 November 2022

(Afternoon)

[Sir Gary Streeter *in the Chair*]

Retained EU Law (Revocation and Reform) Bill

Examination of Witnesses

Barney Reynolds, Sir Richard Aikens and Jack Williams gave evidence.

2 pm

The Chair: Colleagues, this is just a reminder: we are sitting in public and the proceedings are being broadcast, so best behaviour is required at all times. We will now hear oral evidence from Barney Reynolds, of Shearman & Sterling; Sir Richard Aikens, of Brick Court Chambers; and Jack Williams, of Monckton Chambers. We are delighted to see that all of them are with us in person, and we have until 2.35 pm for this part of the sitting. Could our witnesses begin by introducing themselves for the record, starting with Sir Richard?

Sir Richard Aikens: Good afternoon. My name is Richard Aikens. I started my professional career as a barrister in commercial chambers. After 25 years, I became a judge of the High Court, where I sat, among other places, in the commercial court. I then went to the Court of Appeal. I gave that up in 2015. I now work as an arbitrator in international arbitrations. I teach law at King's College London and Queen Mary University of London. I am also involved in writing and editing textbooks, most recently the latest edition of "Dicey, Morris & Collins on the Conflict of Laws", where of course issues concerning EU law and the subsequent part it might play are important.

Barney Reynolds: Hello. I am Barney Reynolds, partner at the international law firm Shearman & Sterling, where I am head of financial institutions—about half the firm's business—and the financial regulatory group. I practise in UK and EU regulation and associated areas. I led a team, of about 50 people, that drafted the laws and regulations for Abu Dhabi Global Market, which is a new financial centre in Abu Dhabi. It is now in operation, with about 20,000 people and 4,000 companies, and is based entirely on the English law, UK regulatory model. I have been helping other Governments look at adopting our model—in fact, without the EU bits—as well.

Jack Williams: Good afternoon. I am Jack Williams. I am a barrister at Monckton Chambers. Prior to entering practice, I taught constitutional law at Brasenose College, Oxford University. I have written and spoken a lot about the legal implications of Brexit as a matter of domestic law.

The Chair: Thank you very much. The first question will be asked by Justin Madders.

Q67 Justin Madders (Ellesmere Port and Neston) (Lab): Good afternoon, Sir Gary, and good afternoon, gentlemen. You all have a great deal of experience in advising people. You will be familiar with clause 7 in particular and the impact on domestic law. Could you say a little about how significant or insignificant you feel that is going to be in terms of creating certainty, and what the impact will be on the legal system?

Jack Williams: I am happy to begin if that is okay with the other panel members. Clause 7 obviously has a number of different aspects to it. If I may, I will start with the departing from retained EU and domestic case law aspects, before turning to the domestic reference procedure, because I think the implications of both are significant.

The first is essentially a nudge to the courts—a gentle nudge but a nudge none the less—in order to encourage greater departure from retained case law. It achieves that by essentially modifying the test for when certain courts—the Court of Appeal upwards, generally speaking—may depart from retained case law, and it does so by listing three particular factors. As a normal matter of statutory interpretation, when certain factors are listed, they are to be given greater significance and weight. Each of those factors in its own terms is encouraging departure. What you do not see there, for example, which was very clear in the House of Lords practice direction, which this is moving away from, is whether it is right to depart from case law, based on legal certainty grounds and taking into account that change in case law by judges necessarily is different from changes that the politicians and Parliament bring into force prospectively. That has implications for certainty, because one does not know what cases the judges may or may not apply, but also for something that has not been discussed this morning: the separation of powers. This puts an awful lot of policy decisions in the hands of judges.

Q68 Justin Madders: Does that mean that, in essence, developments will be dictated by what case law comes before the courts?

Jack Williams: It does dictate what matters are litigated and which arguments parties run, particularly because litigators and our clients will have a number of different options going forward. Does one wait and see how the first-tier judge deploys the retained case law and whether one can convince them to depart from it directly by distinguishing it, so that one is not actually changing the law but departing from the EU principle? Or does one ask now for a reference at first instance stage, which would add in delay and costs, and go off the Court of Appeal, for example, to argue whether that case should remain the law or not? This raises a number of strategic questions that I am sure we will debate in this session.

Sir Richard Aikens: I agree with everything that Jack Williams has said, but, in my experience at least, it is likely that judges will take a very conservative view on the question of deciding whether to depart from retained EU case law, and an even more conservative view about departing from retained domestic case law, which is itself based on what was European case law as applied by judges in the United Kingdom. That is just the nature of the judicial animal: he or she is very conservative and, as Jack Williams said, they will be very reluctant to tread into areas that might be seen as policy or more political. Such departures would obviously have to take account of the statutory considerations that are set out

in clause 7(3) and (4), but even when taking them into account, I suspect that judges will be very reluctant to change things—we will see.

On the other aspect, I wonder whether getting a reference to a higher court will be of any practical use at all because of the delay and expense. Unless you have two parties for whom money is no object, money is a very big consideration, especially in civil matters—these are all civil matters—in which, in the vast majority of cases, you do not have anything such as legal aid. The prospect of something going to a higher court and then perhaps coming back again is not something that parties will consider lightly. I really wonder whether it is a practical proposition.

The Chair: Do you want to come in on that question, Mr Reynolds?

Barney Reynolds: The provision is drafted in a very limiting and narrow way. It gives three examples of things that the court should have regard to when considering whether to depart from EU case law, and those three are pretty extreme instances. The first is that you are not banned. The second is a change in circumstances, but it is possible to make a departure under our system anyway if there is a change in circumstances. And the third is if we think that the retention of the EU case law decisions begin to affect adversely the development of our law. Again, that is pretty narrow. I do not think that the Bill as drafted is going to have a dramatic effect. In fact, I would even consider going further in the text by adding to those examples.

It seems to me that—this is true of the Bill as a whole—there is a tension here between lawyers wanting legal certainty, continuity and so on, which is all perfectly justifiable, and the fact that we are going through a constitutional change and need to effect that change. India has taken until only recently to get rid of its version of the Companies Act 1948, but that is a fellow common law country. We are moving from an alien legal system to our own, and our methods are different. The sooner we get on with it, the better.

That transition—this is just in the context of case law, and the same goes with the provisions—inevitably involves some element of change and some element of legal uncertainty. But I think our lawyers will coalesce with the judges around revised interpretations of provisions very quickly. I observe that, in terms of expanding the provision in clause 7(3), for instance, one of the key methods of interpretation that the EU adopts is its own version of the purposive method of interpretation, which of course—

Stella Creasy (Walthamstow) (Lab/Co-op): It is hard to hear you. I wonder whether it is because you are between two microphones. I am sorry.

Barney Reynolds: One of the EU's methods of interpretation is its version of the purposive method of interpretation, which we also have—we look at *Hansard* and so on when things are not entirely clear—but it is very limited in its use here. We basically go on the meanings of the words on the page, whereas in the EU, the purposive method, which they leap to pretty quickly in the courts, involves trying to work out the intentions of the legislators behind provisions. In the EU context, that includes ever closer union and various other purposes that are alien to our country and our system—as it now is, at the very least.

As I say, it seems to me that the sooner we get on with it, the better. Clause 7(3) is pretty anodyne. I would consider expanding it, and I would not get too troubled by the fact that moving from A to B—that is, where we are now to where we want to get to—potentially involves some element of legal uncertainty that would not otherwise arise. If we wanted perfect legal certainty, we would do nothing.

Q69 Justin Madders: As an aside, when I quoted *Hansard* when I was in practice, I usually felt that that was because I did not have much else to go on. I go back to what Sir Richard said about the cost to parties of litigating these references. A lot of the EU regulations are consumer or employment rights-based. Unless you are a member of a trade union or have legal expenses insurance, you are not likely to have the resources to litigate cases upwards. Will that create an issue regarding access to justice if some of these issues get taken up?

Sir Richard Aikens: It is difficult to say. I cannot give you express examples, of course, and I am concerned only with the process, rather than any particular provisions that might be tested. Here, after all, we are looking at the issue of what the case law says, and how the case law has interpreted any particular EU regulation, directive and so on. It may be rather more limited, but as soon as you get into litigation, there are costs. We cannot get away from that.

Q70 The Minister for Science and Investment Security (Ms Nusrat Ghani): I apologise for my phone ringing; I have switched it off. Mr Reynolds, the evidence in front of me suggests that you know a lot about business, and you have commented on the issue for a while. As someone who works with business all the time on regulatory affairs, do you think the Bill will add unnecessary additional costs and uncertainty, as others have claimed, or do you consider any such risks to be manageable or even beneficial?

Barney Reynolds: I think it will be beneficial as soon as we get through the process. Our system delivers greater legal certainty, which business craves, than the code-based method that we are coming out of, which has swept through our law in a number of areas, including my practice area, financial services law, which is almost all from the EU. I see it day to day. When we come out the other side—how quickly we get through is up to us—I think we will get those benefits.

The transition will probably involve some element of uncertainty arising from that, inasmuch as reinterpreting provisions interpreted using these EU techniques under our system, or wondering whether a judge is going to retain some of that element of interpretation or move completely to our own method, is unclear at the very beginning. I think that very quickly, after a few early court cases, we will get certainty on that. In fact—it is very interesting to hear Sir Richard talk—I think that the judges themselves will do their absolute utmost to make sure that legal certainty is there through the transition, and I would trust that process to work well. I have no real concerns even about the transition. Yes, there could be things that go wrong. If we try to craft it so that there is no conceivable possibility of something turning out in an unexpected way, we will deny ourselves the benefits that I have mentioned.

Q71 Ms Ghani: Thank you. I have a question for Sir Richard Aikens. The Government have made it clear—although I do not think it helps when the Government "make it clear", because everyone assumes we are doing the opposite—that the intention of the Bill is not to remove rights and protections but to safeguard them by assimilating them into UK law and to sunset the laws that are unnecessary. Does the Bill deliver in that aim?

Sir Richard Aikens: May I start a bit further back? We are now in a situation where there is no EU law as such that affects this state, the UK. Everything we have here is, by definition, UK law. The question that has to be addressed is how you deal with that UK law, given its origin and the way it was treated and the way it was interpreted by the EU court, in particular. The whole of this Bill is an attempt to produce a process that enables what is now UK law to be dealt with, as I understand it, in a manner that is consistent with all other aspects of UK law.

Having set that as the objective, it is inevitable that you are going to have some problems on the way. The way in which this has been done means that the timescale is very short. To my mind, it is an almost impossible task to have the whole process done by the end of 2023. Frankly—you will say that I am pessimistic, perhaps too much so—I doubt whether it could be done by the end of 2026.

Given all that, it is inevitable that, because the process is almost entirely by secondary legislation, you are going to get challenges because people will think, rightly or wrongly, "That is a political matter, not a legal one", or that the changes are not in accordance with the law or not in accordance with due process. I think that the way this has been fashioned is actually an invitation to litigation and an invitation to controversy. It may well mean that there are going to be challenges, because people feel that they have lost rights and that they are disadvantaged, and the manner in which it will have been done is through a short form of secondary legislation, which is not what you might imagine is the normal way of dealing with some of the big issues that have to be dealt with, such as workers' rights, environmental issues and so on. This is a very difficult process.

Jack Williams: In response to that question, may I add that the outcome of the Bill may well be to preserve rights, but it is an absolute "may" and is entirely in the gift of Ministers. The Bill does not preserve rights or give any safeguards for that outcome to be achieved. That may be the outcome, but that is in the gift of Ministers. That is because the Bill sets one on an irreversible train track that leads to a cliff edge, and Parliament has not built in any breaks or stops on the train track to save or preserve those rights.

I have full faith in Ministers. I am sure that they want to do good for their constituents and to maintain rights. I love the fact that they are coming out and saying those words, but they are only words—it is not in the legislation. There is no legal protection for those rights in the Bill.

Barney Reynolds: I am not sure what the alternative would be. The Bill gives the system as a whole, as it were, the opportunity to execute on a shift that cannot be prescribed in advance, given the unprecedented volume and complexity. I have some limited relevant experience—I mentioned creating a system in Abu Dhabi—but one can go quickly. The main work there took 18 months, and I think that with the right size team we could go even quicker.

I note that in the Bill, the deadline is not in truth the end of 2023, because there are various ways under the switching back on powers in clause 13(6), (7) and (8), to allow even sunsetted provisions to be reinstated before mid-2026. In effect, there is a quick rush to do the main job, and an ability to tidy up things before mid-2026, which seems to be sensible.

You can choose different deadlines; you can debate all of these things. My basic point is that I am not sure quite how else one could do it if you actually want to get it done in any realistic timetable. Obviously, behind and above all that, Parliament will itself need to decide how, through a joint Committee, your Committee, or some other Committee, it wishes to oversee the process. That is a completely separate matter from the Bill.

The Chair: I call Stella Creasy.

Q72 Stella Creasy: Thank you, Sir Gary. It is a pleasure to serve under your chairmanship this afternoon as much as it was this morning. This is a very interesting discussion about how we make law. You are talking about how case law then informs outcomes for our constituents. I am struck by the picture that you paint of the powers that might then fall to judges by default, without clear ministerial or parliamentary direction.

Perhaps Abu Dhabi, as part of an authoritarian state, is not the best example for us democrats of how we might wish to proceed. I wonder if you could talk a little bit more about some of the barriers created in the Bill for judges because of the lack of parliamentary scrutiny, and if there are other examples of legislation that you have seen that may offer us a way forward. Perhaps we start with Jack, as you look most interested by the question, then go across the panel.

Jack Williams: It is extraordinarily difficult to think of ways that the Bill tells judges exactly how and how not to do things. Ironically, one of the ways that the Brexit legislation is going is to codify almost into a civil system exactly how judges should interpret certain matters. The roles of the court are only in clause 7 provisions, which say in their own terms that they may have regard to certain things, but do not give a definitive list. Those that are listed are nudging towards departure, as I said earlier.

I do not think there is anything in the Bill that gives judges the power to preserve or save certain rights. What I would say is that it puts them in a very tricky political position because they will be asked to depart from case law and make all sorts of policy decisions. That is slightly ironic when a lot of the political discussions over the past few years have been to save judges from stepping into the political arena.

I very much agree with Sir Richard that the outcome of the Bill is to generate litigation, because the vast majority of the laws that come out of it will be secondary laws, which are susceptible to challenge. One will be arguing, for example in relation to clause 15, whether the similar objectives were being met by regulations that replaced the earlier retained EU law, and whether that has been met by the new rules. That is an incredibly difficult task, and one that could end up in lots of litigation. I think that we will end up with a lot more cases on those sorts of issues.

Sir Richard Aikens: I agree with what Jack said. As I read clause 7(7), the factors that the court must have regard to are not exclusive. In other words, they can have regard to other factors as well, which Parliament has not identified and has left to the judges to decide whether they might be relevant. So I would like to make two points. First, this is not exclusive, and it may well be that, in future cases, appeal courts will introduce other factors, maybe on a case-by-case basis, which are only relevant to that particular case, but there may be a development of more general factors, which, once you get that at a Court of Appeal or above level, will then tend to be repeated thereafter.

The second point, as has been made by both my colleagues already, is that EU case law necessarily involves a consideration of the way that the Court of Justice of the European Union looks at regulations and its previous case law. In my view, the CJEU is a much more active court in terms of both interpretation of EU instruments, to use the phrase that is in the Bill, and its previous case law. It tends to develop principles derived from both instruments and case law in a rather more positive way than the UK courts do. I can only speak for the English courts, of course.

The problem, therefore, that the judges are going to have to deal with is: do they carry on with that approach, as in the case law of the EU, or do they somehow retreat from that? Although they have got these factors here that are laid out, they do not really deal with that aspect at all. That, again, puts the judges in a difficult position, because they have not got the guidance from Parliament. They have got this body of law—the acquis of the retained EU case law—but do not really know quite how to push it on, or not push it on. I think it will make life quite difficult for the judges.

Jack Williams: As a footnote to that, on the Court of Appeal for the reference procedure, the Court will not even have decided facts, so it is quite ironic that what is being imported with the national reference procedure is like the preliminary reference procedure under EU law at the moment where you ask a court a legal question—an abstract legal question here—on whether to depart from retained case law. And yet, very unlike common law reasoning, one would not actually have a judgment from below with a factual position working out how the case law is applying to a certain set of facts, so it is even harder for the judges, because you are asking them a pure abstract question: should we depart as a matter of law from that EU case law without understanding the full factual matrix? That is very unlike common law reasoning where you incrementally grow and apply to the facts.

The Chair: Order. I have three colleagues bursting to get in and we have only about seven minutes left, so short answers to short questions, please.

Barney Reynolds: In short, I am not suggesting we follow another country. The court interpretation provision is unprecedented. Abu Dhabi created something from scratch. It was not a transition from what they have got, which was based on the French-Egyptian model, to the common law model. We should do our own thing that works for the UK, and using our methods. I agree with that.

I agree with my colleagues on the uncertainties that can potentially arise. As a lawyer, I think we need to be very careful about those. I am concerned with them. My solution is to expand clause 7 and the list of things that should be borne in mind in order to execute an adroit shift to our common law method in a way that does not involve interpretation too much. I do not think you can remove the necessity for judges to exercise interpretative powers to execute the shift. Ultimately, this shift involves trusting the judiciary, which I do. I am fine doing that, and I do not think that there is a shortcut or a way in which we can box people in so they cannot use any discretion and nevertheless get to the same place. We have to trust people to do it.

Q73 Mr David Jones (Clwyd West) (Con): I will ask you about the principle of the supremacy of EU retained law, on which we had some conflicting evidence this morning. As you know, the Bill abolishes that principle. Do you think that it is a good thing that it does so, or are there any dangers inherent in that?

Sir Richard Aikens: You start from the fact that supremacy no longer exists unless it is retained by UK law. Half speaking as a lawyer, but I suppose half speaking as a commentator, I do not myself see why there should be any part of our UK law that is regarded as more supreme than another, unless specifically identified by Parliament as being necessary for some reason. In many other countries, there is the principle of the constitution, which is inevitably supreme and cannot be crossed; we do not have that and have never had that in our law, except perhaps in very specific circumstances.

In general, therefore, I would say that the whole idea of supremacy should be done away with, unless there is some specific reason in specific areas of law why it is necessary to retain it. For my part, I cannot think of anything that immediately comes to mind that is not already dealt with in our law—I am thinking in particular of human rights.

Q74 Alex Sobel (Leeds North West) (Lab/Co-op): My question follows on from what Jack was talking about earlier: the lack of parliamentary scrutiny and how it will be up to Ministers to make decisions on what we now understand might be as many as 3,500 individual pieces of EU legislation. Jack, what would you deem to be an appropriate level of scrutiny? The negative procedure for statutory instruments really means no parliamentary scrutiny at all—I think Stella mentioned that 1979 was the last time we managed to overturn one of those in the House. What would be an appropriate way, considering the number and importance of some of the regulations?

Jack Williams: I would start by not necessarily having what George Peretz KC calls the gun to your head, so that by the end you do not have time to scrutinise, because if you did take the time to scrutinise it, you might be left with the choice on the last day of what is there or nothing at all. That is obviously a difficult position for Parliament to be put into, having to save its own law somehow without a set procedure.

A direct answer to your question, however, is more scrutiny from Committees. One can imagine, for example, a Committee that was set up specifically to analyse all the changes that are coming to certain practice areas, with consultation and independent experts assisting—much like this Committee format. There is also the legislative reform order super-affirmative procedure, which builds and bakes in consultation and I think extra time in the

process—the downside is exactly that last point, which is that it leads to delay. If you have a cliff edge of 2023, it is not particularly suitable, but it might give some ideas for inspiration. It is under a 2006 Act, but I think it has been used fewer than 50 times, precisely because it takes so much time and involves so much scrutiny—but if you are looking for an example.

The Chair: We have 15 seconds, Marcus.

Q75 Mr Marcus Fysh (Yeovil) (Con): Quickly, I wondered whether there were any alternatives in legislation—through evolution of the Interpretation Act 1978, for example—that could be used in addition to or other than reworking clause 7(3) to achieve more certainty.

Barney Reynolds: Yes, I think we should look at reinstating the Interpretation Act 1978, which spells out the UK method of interpretation. That would mean all lawyers could understand what existing EU provisions will mean on the basis of the words on the page, with very limited delving beyond that, and would probably lead to greater certainty than trying to move slowly from one to the other, case by case.

The Chair: Thank you. I am afraid our time has run out, and we are under strict time limits. I thank all three of you for your expert evidence. It has been very helpful for the Committee.

Examination of Witnesses

Sir Jonathan Jones KC and Dr Ruth Fox gave evidence.

2.35 pm

The Chair: We move on to more experts. We have with us in person Sir Jonathan Jones KC, former Treasury Solicitor, and Dr Ruth Fox. Please take your seats. We have until 3.05 pm for this session. Please could the witnesses introduce themselves for the record?

Dr Fox: I am Ruth Fox. I am director of the Hansard Society. For transparency, the Hansard Society is leading a review of delegated legislation, on which we have a cross-party advisory group that will be reporting shortly. Sir Jonathan is a member of that advisory group.

Sir Jonathan Jones: Good afternoon. I am Jonathan Jones. I am a consultant with a law firm Linklaters and I was previously Treasury Solicitor.

The Chair: Thank you. We will start, as usual, with our shadow spokesman, Justin Madders.

Q76 Justin Madders: Good afternoon. I start with a question for you, Dr Fox. The Hansard Society report described this Bill as flawed. Would you like to expand on why you say that is the case?

Dr Fox: The fundamental concern we have, as you have heard from other witnesses, is with the sunset clause and its cliff-edge nature. It is also the fact that Ministers will decide which pieces of retained EU law will expire at the end of next year and Parliament will not have any oversight of what falls away. It has been variously described as being turned off, but that implies that it might be turned on again at a later date. It cannot; it will fall away and expire.

The concern is there could be pieces of retained EU law that have been missed. We have heard today that there is a possibility that a significant proportion of retained EU law has been missed from the Government's dashboard, so we do not know exactly what the scope of retained EU law is. If pieces of legislation have not been identified and saved by the expiry date, they will fall away and we may have regulatory gaps. That is a significant concern for Parliament's oversight of the regulatory landscape going forward. That is our primary concern: the cliff-edge nature of the sunset clause and the fact that the Government's objectives, in our view, could be done in a different and less risky way.

Q77 Justin Madders: You referred in your report to the withdrawal of the scrutiny powers in the European Union (Withdrawal) Act 2018 in clause 11. Could you explain what that refers to and why it is a concern?

Dr Fox: There were provisions in the European Union (Withdrawal) Act providing additional consultation periods for proposed instruments under the Act. They ensured additional oversight for Parliament. Although the Government are proposing to remove those provisions, that is not a major concern for us because the Government are, frankly, right that there has not been much tangible benefit to that process, because parliamentarians have not used those oversight provisions. For example, when statutory instruments have been laid for pre-consultation for 28 days, parliamentarians have not looked at them. They have not raised issues about them and a Committee has not looked at them.

The House of Lords has done marginally better. Its Secondary Legislation Scrutiny Committee has looked at the instruments, but the Commons has not. It is hard to argue that they need to be retained. There have been problems with them from a civil service perspective because it is complex to determine which of the consultation and oversight provisions apply to the instrument in front of them. Mistakes have been made and they have had to withdraw instruments and lay them again. I do not have a major concern about that, but there are broader scrutiny issues in terms of sifting in the legislative and regulatory reform order process.

Q78 Justin Madders: Could you set out what would make a proper scrutiny process for this legislation?

Dr Fox: You are inviting me to give away the Hansard Society's review proposals before we have published them! We all know that the delegated legislation scrutiny process is, at various points, inadequate for everybody concerned. Ministers spend a lot of time attending delegated legislation Committees, carving out significant time in their diaries. You all spend time in those Committees and feel that they are not necessarily a constructive form of scrutiny and oversight. There are lots of problems with the process.

The triage system applied to European Union (Withdrawal) Act orders was a technical sifting of instruments. Those who participated in European statutory instrument Committees found that it was a useful exercise but a very technical and legal process. We feel that that could be widened and expanded. There is no reason why sifting could not apply to all the instruments laid under the Bill rather than just to those laid under three specific clauses. That would have implications for

parliamentary time and management, but it could be a way of improving scrutiny. We would certainly extend sifting to clause 16, for example, which is quite an extensive power that is not sunsetted. Those are possible ways to improve scrutiny.

Q79 Ms Ghani: I feel that this is the right time to correct the record, because I am sure that Dr Fox would not want to say anything inaccurate on the record. Earlier, you referenced a National Archives story in the press, Dr Fox. We do not often talk about leaks, but I think you said either that it was "uncovered" or that it was "discovered". For the record and for the Opposition's understanding, the Government commissioned the National Archives to investigate whether anything else needed to be explored, and the number of the laws still in force has not been verified. I do not think it is appropriate to continue to use misleading language about a story that has not yet been verified, or to leave people in doubt about where the work came from.

Dr Fox and Sir Jonathan, you are not comfortable with what the Bill proposes, but I get the feeling that you are probably just not comfortable that we are trying stop EU law continuing to sit on the UK statute books for ever without us having any power to amend it. Is that the case, or do you see a time in the future when it would be appropriate to move EU laws off the UK statute books? I will come to you first, Dr Fox.

Dr Fox: I reject that. I am up for change and quite embrace it. This was the purpose of Brexit, was it not? We should therefore get on with it. I do not object to your objectives; I object to the particular nature of the process and procedure by which you are proposing to achieve them, which is unduly risky.

If, for example, you do not find a regulation or a piece of retained EU law and so do not deal with it by next December, it will fall away. You cannot know the implications of that if you do not know about, and have not dealt with, the existence of the regulation—that is my concern. As I set out in our written evidence, I think you could achieve your objectives, and indeed my objectives, in a different way.

Sir Jonathan Jones: I agree with that. Plainly, I have no objection to Parliament changing any law it wants, be it former EU law or any other law. I am sure that the EU law that we inherited when we left the EU is a mixed bag, and that some of it is ripe for review and change.

Like Dr Fox, the difficulty I have with the Bill is twofold. First, it creates a huge amount of uncertainty as to what the law will actually be by the end of 2023 or thereafter, because there are no policy parameters on what might change, what might stay or what might fall away. That is quite aside from the risk you have heard about—that some law might fall away simply by accident, because it has been missed, which creates a huge amount of uncertainty for users of the law.

The second issue that I have difficulty with is the lack of scrutiny—an issue that I know you keep coming back to and that Dr Fox touched on—by Parliament itself of the process. In the Bill, Parliament is not being invited to consider particular policy areas or particular changes to the law; it is simply signing off on a principle and a process, and I would say that the principle and process carry with them all that legal risk as to what the outcome will be. Those are the difficulties that I have. It is not a difficulty with Parliament being able to change any law it wants, including former EU law, whenever it wants to; it is the process being followed that I have difficulty with.

Q80 Stella Creasy: Another question we could ask is whether it is reasonable for Parliament to ensure that Ministers know the consequences of their legislation. What the National Archives work shows is that that is possibly not the case with the Bill.

I say that as someone who this week received something I had never, ever received before—I wonder, Dr Fox, whether you can advise me if this is common: a ministerial correction to an answer to a written question. The written question was to the Department for Environment, Food and Rural Affairs about the application of the legislation to the Avian Influenza and Influenza of Avian Origin in Mammals (England) (No 2) Order 2006. Originally, Ministers told me that the order was not made under section 2 of the European Communities Act 1972 and therefore did not fall within the scope of clause 1 of the Bill, but they issued me with a ministerial correction to admit that it did. Have there been other instances of Ministers not knowing the consequences of their legislation? What impact do you think that has on our ability to scrutinise legislation as parliamentarians?

Dr Fox: I cannot give you a number, but I am sure that there have been corrections of that kind. We also see that in respect of statutory instruments, where instruments have to be withdrawn and re-laid because of errors.

Clearly, one of our problems is that the complexity of law now, and the layering of regulations on regulations, coupled with inadequate scrutiny procedures, makes the whole scrutiny process incredibly difficult. Another problem is that the breadth of the powers in Bills which enable Ministers to take action, but do not define on the face of the Bill the limits and scope of that action, are very broadly drawn. That makes scrutiny incredibly difficult.

We also have amendment of legislation going through both Houses, and that adds layers of complexity. Particularly in the House of Lords, Members seek to introduce scrutiny constraints of the kind we have talked about in respect of the European Union (Withdrawal) Act. That is just additional complexity, which then hits civil servants trying to work out which powers they should be laying instruments under, and which scrutiny measures apply. For people who have to interpret and implement the law, it becomes ever more difficult.

I hope that one aspect of the review process would be to simplify some of those areas, with things like consolidation and so on, to help the process. However, given the scope and scale, I do not think that can be done by December of next year.

Q81 Stella Creasy: Sir Jonathan, a similar question to you: what impact does that have on the ability of Departments to operate and, indeed, on Parliament's ability to scrutinise, if it is not clear what legislation is effective? For example, the dashboard does not currently contain the Conservation of Habitats and Species Regulations 2017, but that is a piece of European retained law that will have an impact on environmental

[Stella Creasy]

concerns. In your experience, what is the impact on civil servants being able to advise Ministers and to provide information to Parliament? I note that Ministers told me that the dashboard is an authoritative but not comprehensive list of laws to be affected. What impact might those absences and omissions have on the ability of civil servants to do their job for us?

Sir Jonathan Jones: I am not in the civil service, as you know; I am on the other side, advising clients about what the effect of the Bill will be on their businesses and so on. This was always going to be a very complicated exercise, including for the civil service. We are leaving one legal order and, in one sense, we are out of it—we are free—but the legal constitutional consequences of that were always going to be very complicated, because we had this huge body of law that over decades had been integrated into UK law. We were not keeping a running tally throughout that time of the laws that we might one day want to change, because they had come from a particular source. They were enmeshed it all sorts of different ways with UK law.

As soon as we left, we had to begin the process set out in the European Union (Withdrawal) Act 2018, which was about identifying what retained EU law needed to be changed in order for it to work operationally and technically. That was the process that was done with the 2018 Act, and it involved, as I think you have heard, many hundreds of sets of regulations to cure deficiencies in the language of that legislation. That was complicated enough, and it is possible that things were missed. There are certainly examples of some changes having to be made multiple times because they were not got right the first time.

That was complicated enough but at least, if something was missed, the law did not fall away altogether; it could be corrected later. What was being done then was an essentially technical exercise to keep the pre-existing law and to make it work as far as possible, in a way that provided continuity and certainty for users. What we are talking about now is an exercise of a completely different order. This is about changing policy, potentially getting rid of some laws and, in some cases, deciding what replaces them.

This is an immensely more complicated exercise even than the one that has already been done, and the civil service will not have started with a pre-existing list, however authoritative they are trying to make it. There is therefore a risk that as Departments perform an audit, or as the National Archives help with that process, additional laws will be found. There must be a risk that some will be missed altogether. If that is so, again as you have heard, the consequence of the Bill is that the law will fall away altogether on the sunset date, and you will not have the option of making a correction. Ministers, if they wanted to, would have to come back to Parliament with a Bill to replace or change the law. That is the complexity of the exercise.

Q82 Mr Fysh: I am very much in favour of injecting urgency into the process of transition from one order to the other, as you have described, and I am well aware of the complexity involved in that, which is one of the reasons why I have been making the argument for taskforces that involve more than just civil servants and Ministers in the process. I encourage Ministers to get very good advice from outside—from practitioners, and so on.

I have two questions. First, how else could you inject such urgency to get this done quickly, other than through what has been proposed? Secondly, we have heard a lot about the permanence of the falling away—this is your contention—of the laws because of the sunset, but is it not the case that in various clauses, such as clause 2(1), and clauses 12 and 13, there are powers for a restatement or reproduction of different things up until 2026 should it become necessary? Is that not an adequate safeguard mechanism should there turn out to be something that the taskforce approach, which should be very competent, has missed?

Dr Fox: On the latter point, yes—there is provision to extend the sunset through, as you say, to 2026, but that applies to the piece of retained EU law that you know about and are saving and assimilating, and that you will then have the option to amend later. The concern is that if you have not identified and saved it, it could fall away and you could then have that problem. There is also the prospect that you end up with a patchwork quilt of sunset dates, because it could be before 2026.

There are issues about at what point in that process, prior to December 2023, the Government would identify what they intend to do, either with the individual pieces of retained EU law or sections of retained EU law, which will introduce uncertainty. What we have proposed is to do that in a slightly different way: that is, take away the cliff edge where everything falls away—unless you choose to save it—and use Parliament as an ally in that process.

I completely understand the concern about internal inertia, particularly in the final two years of a Parliament and in these current socioeconomic conditions, where there are lots of capacity pressures. However, it seems to me that you could use Parliament as an ally by, instead of having cliff edge dates where legislation and law falls away, having dates in the process, possibly linked to your taskforces, where there are statutory reporting requirements to Parliament by Government Ministers and Departments and where Select Committees could be engaged in that process by scrutinising those reports.

You could set out what you want the Government to report on—what are their plans, what is their implementation timetable, what progress are they making, as with the EU withdrawal Act process for the statutory instrument programme; you could engage the National Audit Office in monitoring implementation of that; and you could have reporting. One of the things that wakes up permanent secretaries and others in the civil service is the possibility of having to appear before a departmental Select Committee and report on a lack of progress, or the fact that their plans are failing. Your model of taskforces to ensure consultation, coupled with statutory reporting requirements, through to a deadline of 2026 or 2028—whatever you choose—would be a better approach, because you could still achieve what you want to achieve but reduce the risk of missing something.

The Chair: Thank you. I have got a few more questions to get in before five minutes past. It was the first or second question, Marcus, which perhaps Sir Jonathan could answer, if you can remember it?

Mr Fysh: It was whether there are in fact powers to bring back things that have been sunsetted, such as in clause 13.

Sir Jonathan Jones: The short answer is that the powers to extend and save do not work if an instrument has been missed altogether by the time you get to the sunset date.

Mr Fysh: Clause 13 is about the reproduction of sunsetted retained EU rights, powers and liabilities. Is that not—

Sir Jonathan Jones: I do not think it works if an instrument has been missed altogether.

The Chair: Thank you. David Jones, followed by Alex Sobel.

Q83 Mr Jones: Dr Fox, you postulated earlier that sifting committees might be established to assess whether individual pieces of retained EU law should be retained or dispensed with. Given the volume of retained EU law that we are aware of—and given that there may well be more—how long a process do you think that would be, and do you not think it would take up a huge amount of parliamentary time?

Dr Fox: It will probably not be that dissimilar to what we were talking about in terms of what we went through with the Brexit process. On sifting, the process proposed is that all negative instruments will be laid before the sifting committee in draft form. They would have 10 sitting days to decide whether to upgrade it to the affirmative procedure. The implications for parliamentary time will depend on what their decisions and recommendations are and whether the Government accept them, and therefore whether there has to be a delegated legislation Committee.

So yes, the potential is for an increased number of delegated legislation Committees. The reality is that doing all that before December 2023 is clearly nigh-on impossible; if your deadline is 2026 or 2028 and you smooth it out over time, then it is achievable. Again, it will depend on what the numbers are and what proportion of negative and affirmative instruments there are, depending on what the Government propose to do.

Q84 Alex Sobel: I could get into a debate about the numbers, but we have explored that quite a lot. I have a number of concerns about clause 15 and the sort of power grab that it makes. Ministers debated Henry VIII powers at length during the Brexit legislation and the EU Act. I am also concerned that clause 15 says that Ministers should not "increase the regulatory burden" when changing retained EU law. Last night, I was at a rewilding reception where the Minister of State, Department for Environment, Food and Rural Affairs, the right hon. Member for Sherwood (Mark Spencer)—he must get a lot of outings in this Committee—said that sometimes they will improve regulatory arrangements. But clause 15 says that they cannot. Can they or can they not? If a Minister tells the sector informally that he can do that—perhaps we should ask a written question to see if he will say it formally—it creates uncertainty in the minds of non-governmental organisations, businesses and everyone else about the direction of travel in certain areas where it is intimated that the regulatory burden could be increased. My reading of clause 15, however, is that Ministers cannot increase the regulatory burden.

Dr Fox: It would depend on what the enhancement was—improvement, but if the improvement implied obstacles to trade or innovation, financial cost or administrative inconvenience, then no, it could not. It is hard to see how the kinds of enhancements that have been talked about—for example, in relation to animal welfare—would not necessarily imply an administrative burden; they therefore could not be done under this provision. That said, my understanding is that the former Secretary of State who was the architect of the Bill took the view that it was not appropriate for imposing new regulations through delegated legislation. That is not a bad thing, but the problem is that the nature of the exercise does not work in that context, because of the cliff edge.

Sir Jonathan Jones: May I add a brief comment? First, the power in clause 15 is undoubtedly very wide, so the Minister has huge discretion in deciding what is appropriate. The test about regulatory burdens is quite a slippery test, not least because the assessment is whether the overall effect of the change is to increase regulatory burden. All sorts of factors might weigh within that burden. It may be that the Minister decides to increase some procedural burden and reduce some other, and makes the assessment that overall the effect is to reduce the burden. Within that, however, could be all sorts of complexity. It is very difficult to predict in the abstract exactly how the power might be used.

Q85 Paul Blomfield (Sheffield Central) (Lab): Sir Jonathan, you talked about the difficulty for civil servants simply in identifying all the laws that might be affected. Drawing on your experience as a Government lawyer, how do you think that the civil service will be able comprehensively to review and revise all the laws that they can identify by next December?

Sir Jonathan Jones: They will all be doing their best, I have no doubt. The example we have is the one already mentioned, which was the process gone through under the 2018 Act to identify the laws that were going to be carried forward as retained EU law and to work out what changes to those were necessary to make them work. As I said, that was complicated enough, and some things were either missed first time around or needed to be amended more than once, because they were not got right.

I was in the civil service for the first part of that process, and I helped to set it up and saw it happening. Of course civil servants do their best—Government lawyers were drafting like crazy to get the relevant regulations done in time, and by and large I think that did work. I am sure some things were missed, but the consequences for missing something then was not that we had a great gap in the law, but that we would have a technical flaw that later on could be cured. This is of a different order, but I will not repeat myself.

What can I say? They will be doing their best. There must be a risk that things will be missed, and the timescale set for doing this is much tighter than the time that was taken to do the previous exercise, hence the concerns you have heard us express.

The Chair: Thank you very much. I see no further questions, but I think a point of order is about to come.

Justin Madders (Ellesmere Port and Neston) (Lab): On a point of order, Sir Gary. With reference to the Minister's clarification earlier in respect of the story

[Justin Madders]

about the National Archives, from what she said I understand that that was work commissioned by the Department. I seek your guidance on a process by which the Committee will have the full information about that report and, in particular, on whether more laws will be covered by the ambit of the Bill. The situation is unusual, but a written statement by the Minister or a letter to the Committee might be appropriate as a way ahead.

The Chair: That is not a point of order for the Chair. I know the Minister—a very helpful Minister—will have heard the point, and I am sure something positive will be forthcoming.

Ms Ghani *indicated assent.*

The Chair: Nodding is going on. I thank the witnesses for their expertise and advice.

Examination of Witnesses

Tim Sharp and Shantha David gave evidence.

3.5 pm

The Chair: Colleagues, we have until 3.35 pm for this session. Will the witnesses please introduce themselves for the record?

Tim Sharp: I am Tim Sharp, senior employment rights officer at the Trades Union Congress, which has 48 affiliated trade unions representing 5.5 million members.

Shantha David: Hello, and thank you for having us here today. I am an employment law solicitor. My name is Shantha David. I am head of legal services at Unison, the public sector trade union, which has 1.3 million members, 75% of which are women.

I have listened to some of the evidence, and there is a lot of discussion around process. I, on behalf of the union, would quite like to talk a little bit about the effect that this Bill will have on employment laws and workers.

The Chair: Thank you. I am sure that some of the questions—perhaps even some of the early questions—will draw that out from you. I call Justin Madders.

Q86 Justin Madders: Indeed. That seems a nice point to start. Could you set out your understanding of which employment laws will be covered by the Bill? Could you explain what some of the effects might be on certain groups?

Shantha David: As we know, the Bill in the abstract looks at removing EU-derived laws. What we do not understand is how, if the provisions are sunsetted, that will strip away some very basic employment rights. I thought I would set some of those out.

For example, through EU-derived provision, the UK allows for 20 days of statutory annual leave. That will no longer survive if the provision is sunsetted. There is also protection for eight additional bank holidays, which is derived from the UK but is contained in the working time regulations. It is unclear whether those provisions would go, along with the 20 days of statutory leave, leaving UK citizens with no provision and no statutory annual leave entitlement.

Other typical basic employment rights are things such as the TUPE—transfer of undertakings (protection of employment)—regulations and protections, which I am sure you will know about. Those preserve an employee's employment where their employment is outsourced or brought back in house, or where an employer's business is bought out by another. Those employees are protected from dismissal. Their terms and conditions are also protected from being varied because of the transfer. If TUPE legislation goes, those sorts of employees could be sacked with no legal recourse, so it is unclear what would happen to them.

Family-friendly provisions are contained in a variety of different legislation. They are derived from the EU, as well as through Acts of Parliament. It is a tapestry of rights. Basic rights to maternity and paternity leave fall under the Employment Rights Act 1996, but the specifics in terms of the length of leave, who is eligible for that leave and payment of leave comes through EU provisions. Given the lack of information, it is unclear what will survive and what will face the chop.

There are other protections, such as part-time worker regulations and fixed-term regulations, which allow for parity of treatment for those types of workers. Again, those provisions will disappear overnight.

There are other provisions, such as the Equal Pay Act 1970. There are certain facets of that Act that are derived from Europe. Where there is a single source of payment for people's terms and conditions, an employee can compare themselves with employees at a different establishment. Again, there are cases in the tribunals and courts at the moment dealing with this particular point. Removing the principle of direct effect will mean that these women in particular can no longer rely on the principle of equal pay for work of equal value. These are just some of the rights. There are many more, but we will provide written evidence if that is helpful.

The Chair: That was a point very strongly made.

Q87 Justin Madders: I want to return to one point you mentioned, which was interesting because it contradicted what some of the witnesses said earlier on. They said that one reason we do not need to worry too much about parliamentary procedure for removing these rights is because we did not have proper parliamentary procedure in the first place—it was imposed on us by the EU. You gave the good example of the eight days' holiday pay, which was a decision by the UK Government. That was not actually imposed by the EU. Are there other examples of UK Government decisions or enhancements to EU regulations that will be lost as a result of this Bill?

Shantha David: Yes, the TUPE provisions provide for certain types of service provision changes and protections, particularly for outsourcing and insourcing. These are UK-derived provisions that survived and were potentially updated in the 2014 TUPE regulations. It was interesting at that time because the consultation responses said there was a certain level of certainty in the provisions and to keep making changes was unsettling for businesses. It was businesses that came out most loudly saying, "We

all know where we stand at the moment. Let's leave this piece of legislation alone." Removing it altogether will create a great deal of uncertainty and take us back to the '70s and '80s when we did not know quite what was going on. The effect will be to block up the courts and tribunals, which are already under-resourced. We know of the delays and backlogs in the court system. Trying to rectify and understand how the laws will work if TUPE is removed is very hard.

Q88 Justin Madders: On that point, Mr Sharp, with the TUC being the umbrella body for trade unions, you will be having discussions with not only everyone in the trade union movement, but employers. What conversations are taking place about what the legal landscape will look like after 2023?

Tim Sharp: Following on from what Shantha said, it is clear to us that these rights are not some sort of additional "nice to have" rights, they are crucial ones. They are particularly crucial for low-paid and vulnerable workers, and particularly the protections for part-time workers, for agency workers and for security guards and cleaners who are being transferred from one company to another.

At best, the uncertainty means that more things will be fought out in the courts. If you are a low-paid worker holding together multiple jobs, going through that process is both expensive and more than you can probably cope with. At worst, those rights go completely, so we are really worried about the impact it will have on vulnerable workers in particular. When you talk to business groups, it appears to be bad news for good bosses who want to do the right thing and follow what the law says. It is great news for bad bosses who do not care either way and they will have more freedom to do what they like. We are really worried about the impact of the legislation as it stands.

The Chair: It is a good time to turn to the Minister.

Q89 Ms Ghani: Ms David, did you mention eight bank holidays?

Shantha David: Yes.

Q90 Ms Ghani: So we are going to lose our bank holidays. Are we going to lose the one we get for the coronation of the King?

Shantha David: I would not know. That is down to the Government.

Q91 Ms Ghani: But you are speculating that we are. I am anxious about this constant speculation and the fear that it is creating. People on the Government side, and in the Opposition as well, have done a huge amount of work to ensure that women and vulnerable people are protected at work, so I have struggled with your evidence today and references to us falling back to the 1970s and 1980s.

The UK is leading in a number of these aspects. We were the first to introduce two weeks' paid paternity leave in 2003; the EU has only just legislated for this. We have the highest minimum wage if you compare us to France, Germany and Japan. We are leading on paid bereavement as well. We have far more maternity leave with over a year; the EU has just 14 weeks. In April 2019 we quadrupled the maximum fine for aggravated breaches of workers' rights, so the assumption that we are somehow going to fall into the 1970s, creating an atmosphere of insecurity, is not healthy.

I am sorry; I will get to the point and ask my question. The Government have stated many times in the past few years that we will not reduce rights and protections as we leave the EU, and the Bill contains powers that enable the Government to preserve and codify the REUL in a way that will incorporate it fully into UK law. What basis is there to be fearful of those rights diminishing? I do not want to hear speculation—we do not have enough time. I want to understand what basis there is.

Shantha David: I do not think this is speculation because, unfortunately, the Tableau does not provide a full list of legislation that is due to go. Without knowing what that is, it is impossible to know what will stay and what will go. It is imperative that the Government produce a list. The Tableau is the most incomprehensible piece of equipment. You have to put in random words to try and identify whether certain pieces of legislation will remain or go. The working time regulations contain the provision for the eight bank holidays. Whether they stay or go will be down to the Government, of course, but at the moment we do not know, and that is the biggest problem. It is the lack of clarity that is causing us the biggest headache.

Also, we are talking about 2,400 or 3,800—whatever the number is—pieces of legislation that are due to be sunsetted within a year. I understand they will simply go away at the end of next year unless something positive is done to replace them. If that is the case, yes, we will lose our rights to the 20 days of minimum annual leave entitlement. Women, who tend to be part-time workers, will not have the protections against dismissal and parity of treatment. And fixed-term workers, who also tend to be female, will not have their protections. Women who want to go back to the workplace and have the same employment and protection will not have that protection. You might think that is conjecture, but without knowing anything else, what else is there?

We need to have a comprehensive list of the legislation that is due to be affected. Once we know that, perhaps then we can be consulted as trade unions, as individuals and as members of the public so that we can have our say on what we want to keep. I do not think the Government intend to simply remove all legislation that assists workers and employees. I cannot imagine that that must be what the Government wish to do, so it would be helpful to have that information in front of us so that we can respond.

The Chair: Minister?

Ms Ghani: That is all.

The Chair: I call Stella Creasy.

Q92 Stella Creasy: I thought the Minister helpfully set out a whole range of employment protections that are rooted in retained EU law when it comes to women's rights. Removing the foundation of those laws that have been applied in UK law creates the legal uncertainty

[Stella Creasy]

that you alluded to. The answer is therefore a commitment, clarity and a confirmation to all those who depend on these laws that, as the Government say, they are going to be retained. But exactly which ones are going to be retained? What is the point of this legislation if we are just going to delete everything and start again? Have you, the organisations that work on employment rights, had any confirmation or commitment about these specific pieces of legislation?

Tim Sharp: No, we have not had those conversations. We are still in the dark. We are really concerned about the array of rights that have been set out so far today. There are lots of health and safety laws as well and things like protection for pregnant workers—there are lots of protections—but, so far, we do not know. It seems we are taking a shortcut to an unknown destination.

Q93 Stella Creasy: Just so we are clear, the reason why that bank holiday entitlement exists in UK law is because EU legislation required it, and we have written proposals for bank holidays into law on the basis of EU legislation. If we remove that basis and that law is not retained, could an employer challenge the right of an employee in the next year to take a bank holiday?

Shantha David: Just to clarify, the 20 days are derived from Europe. The additional eight days were because, historically, those eight days were incorporated into the 20 days. To ensure that people had the additional eight days of bank holiday, they were allowed for under UK law, but it is contained within the same piece of legislation, which is where the confusion might arise.

Q94 Stella Creasy: In terms of my specific question, it seems we would be going down to 12 days. Could an employer challenge the right of an employee to take a bank holiday if the Government do not rewrite this piece of legislation?

Shantha David: I think it is worse than that, actually; we will not have the 20 days at all. We will have the eight days of bank holiday only if they are taken out of the current regulations, presumably, and put somewhere else. If the regulations go altogether, regulation 13A, which talks about the bank holidays, will go with them.

Q95 Mr Fysh: I am quite sure that the Government and their Ministers will be keen to ensure that the rights that people have enjoyed thus far are preserved. I cannot personally imagine a scenario in which they would not be careful about those things. I point out again that under clause 13(8), should anything inadvertently go that was not meant to go or have effects that were really bad, there is a power that could be used by a future Government to reproduce anything that was retained EU law in the European Union (Withdrawal) Act 2018. I just wanted to share my strong belief that that is not where the Government would go. I cannot speak for them, because I am not a member of the Government, but I would be amazed if there was anything different.

Shantha David: It would be helpful, though, if that were in writing. I am grateful for your words, but as a lawyer it would be helpful to have a full list of what is included. If that piece of legislation, say, is sunsetted and introduced at a later date, there will be workers who do not have access to those laws. That is a breach of access to justice as well.

Mr Fysh: That would be a strong incentive for the Government to get it right.

Shantha David: Indeed, but the timing is an issue. There is only just over a year to identify the pieces of legislation, and, as we mentioned, they are a tapestry of rights; we do not know where one right begins and another ends. I recommend the Employment Lawyers Association paper, which sets this out clearly.

Q96 Mr Jones: I imagine that you both have regular meetings with Ministers and senior Government officials. Is that correct?

Shantha David: I am a lawyer, so I do not necessarily.

Mr Jones: I do not think that that necessarily precludes you.

Shantha David: I am a practising lawyer.

Mr Jones: What about you, Mr Sharp?

Tim Sharp: We meet BEIS officials, for example, on a reasonably regular basis.

Q97 Mr Jones: So you have presumably raised your concerns about the issue of protecting workers' rights and the potential impact of the proposals in the Bill?

Tim Sharp: We have raised our concerns about the protection of workers' rights on a number of occasions when there has been speculation in the past, and have received lovely assurances, but I do not think we have met BEIS Ministers—there have been quite a few lately—in recent weeks. We certainly have not had the confirmation on workers' rights. We have not been told if they are being retained.

Q98 Mr Jones: Have you actually requested comfort from those senior officials on the issue of workers' rights? Have you asked for assurances?

Tim Sharp: I do not think anyone has been able to tell us anything about what decisions have been made.

Mr Jones: Have you asked for assurances?

Shantha David: I am unclear how that would assist—

Mr Jones: You are clearly concerned that there may be a wholesale scrapping of workers' rights as a consequence of this Bill. Have you asked for any reassurance from the officials to whom you have spoken?

Shantha David: Can I—

Mr Jones: Sorry, I thought you had not met any officials.

Shantha David: No, but I am allowed to have an opinion, I think. I do meet officials from time to time.

Mr Jones: No, can Mr Sharp answer this? He is the person who has had the meeting.

Tim Sharp: We have met BEIS officials as the TUC. Have we asked for assurances? We have asked for information on what is planned on workers' rights, and we have not been given any information on what is intended.

Q99 Mr Jones: It seems to me that you have not asked for any assurances, including in this evidence today. Frankly, you are raising hares that are completely illusory, and you know full well, don't you, that there is no way that the Government would scrap the rights that you are concerned about?

Tim Sharp: It would be lovely to think that the Government will retain the rights as they are, but even in this benign scenario—it would be great if it happened—we are still going to have great chaos. Let us say that all the regulations are restated. We still have all the interpretive principles and the case law falling away. It has taken years of litigation to work out what entitlement workers have to carry over sick leave, for example. We do not know what the position might be after this Bill is passed. If you are a worker or a rep in a workplace, you do not want to be going to tribunal and to court to settle all these matters again, which is effectively what this Bill does. You want to be able to have a conversation—

Mr Jones: Do you not think a simple conversation might assist? You have not had it.

The Chair: I think you have pressed far enough on this, David. I would like to hear from Shantha.

Shantha David: Thank you very much. I am just going to remind Mr Jones that the equality impact assessment does identify that the removal of laws will have a detrimental effect. I am not sure that that is an assurance, because it is not. Beyond that, I do not know what help we have. I do not have access to Ministers in that way. It takes a while to get an answer.

Much like Mr Sharp was saying, the only way to clarify legislation as we go along and to get certainty in the law—we will not have it if provisions are sunsetted—is via litigation. That is something I am able to talk about. Litigation is costly, and pursuing appeals in the Senior Courts will take a long time because of the delays I mentioned. Given that tribunals and lower courts will no longer be bound by retained EU law, there is also the question of how long-established principles of precedent would work, and whether referrals would have to be made from tribunals and lower courts to the Senior Courts, which is what is envisaged in the Bill—either to go to the Courts of Appeal in Scotland, Northern Ireland and England and Wales, or to go directly to the UK Supreme Court. We are not aware—there is nothing mentioned in the paperwork, which is the only thing we have to work on—that that will be resourced in any way. We already know that it takes at least a year to get to the UK Supreme Court. There are only 11 justices. I am unclear as to who will make those decisions around interpretation.

Q100 Justin Madders: You are obviously a lawyer after my own heart, Ms David. Unless it is there in black and white, it is not worth a penny, is it? We have heard lots of assurances from various people who accept that they are not in a position to speak on behalf of the Government. Is it not the case that unless we get positive action from Ministers and things in black and white, these rights will automatically fall at the end of next year? The question is: would it not be much simpler if we put in this Bill a clause that said, "These pieces of legislation—these employment rights—will not be sunsetted"?

Shantha David: Absolutely. If it is the Government's intention not to get rid of workers' rights and legislation that protects employees, of course it would be a lot simpler to simply set out what is protected.

The Chair: I feel an amendment in Committee coming on.

Q101 Stella Creasy: I appreciate that this is something that people feel strongly about, because they are concerned for their constituents. Can the representative of the trade unions tell us what it was like when the Beecroft report came out? It talked about some of these issues, so if there is a concern to get not just a promise but a commitment in writing to protect these rights, would such an amendment be welcome? Would that be enough, given that Beecroft shows a direction of travel that this Government have previously considered?

The Chair: Let us not stray too widely into Beecroft, because we are considering this Bill, but an answer would be helpful if it is relevant to this.

Stella Creasy: But it is relevant as an element of employment rights.

Shantha David: The difficulty we have here is the speed at which this thing is happening. It is not about whether you want EU-derived legislation to exist; it is about being able to have a considered view on the employment provisions that exist for workers, and to ensure that employees and employers are not mired in litigation forever and a day. The costs of this are incredible, and I think that is not completely understood. The costs of litigation are profound. If there are to be clear exceptions, and if it is very obvious that certain employment legislation will survive this cull, perhaps that should be specified. That would be very helpful.

The Chair: Marcus Fysh has the final question.

Q102 Mr Fysh: Would you be willing to be part of a taskforce organised by Ministers to try to ensure that, in the replacement of the EU-derived law, the rights that are put in place by Ministers as a part of English common law or UK law are drafted in a way that will give you the comfort that you want? That would mean that they would not have to be litigated up and down through different courts because they would be clear enough and good enough for what we all want for our constituents and for your members?

Shantha David: We would be more than happy to help.

Tim Sharp: Absolutely; trade unions would want to engage in such a process. I am not sure that it would stave off the scenarios we see, as the exact meaning of different rights would still end up being litigated. Even in that scenario—great, we would love to have those conversations, as it is really crucial that workers' voices are heard, but the Bill will still cause immense confusion and costs to business and workers.

The Chair: Thank you very much indeed for your evidence. We now move on to our next set of witnesses. We will slightly change the language and tone of proceedings, as we will be discussing the environment, which is an ever important issue.

Examination of Witnesses

Ruth Chambers, Dr Richard Benwell, David Bowles and Phoebe Clay gave evidence.

3.32 pm

The Chair: Thank you very much to our next set of witnesses. We are starting three minutes early, but we expect a Division at about 4.15 pm. If that is the case, we will try to end our session when the Division bell rings. Will you please all introduce yourself for the record?

Ruth Chambers: Good afternoon. I am Ruth Chambers. I am senior fellow at the Green Alliance, representing the Greener UK coalition of environmental groups.

Dr Benwell: My name is Richard Benwell. I am from Wildlife and Countryside Link, which is a coalition of 67 environmental and animal welfare charities.

David Bowles: I am David Bowles. I am head of public affairs and campaigns at the RSPCA, and I am representing the animal welfare stance.

Phoebe Clay: I am Phoebe Clay. I am co-director of Unchecked UK. We are a non-partisan network of 60 organisations making the case for strong environmental and social protections.

Q103 Alex Sobel: These regulations cover huge areas in the DEFRA brief, including habitats regulations, environmental protections, and animal welfare and standards. First, I would like to hear your assessments of the Bill's implications. Secondly, during Brexit a huge number of staff had to be drafted into DEFRA from the Environment Agency, Natural England and other Government agencies—leaving a vacuum in those agencies—to support the Department on those issues. Now we will have the EU retained law. Does DEFRA have sufficiently qualified staff to examine laws across animal diseases, air pollution, water quality, chemical safety, the habitats regs and all the rest of it to cope with what is coming? As Link, the Green Alliance and others have said, we are looking at 570 regulations, although it might be more now, given the work of the National Archives; maybe we will get up to four figures. What is your assessment and can DEFRA civil servants cope? I will start with Richard.

Dr Benwell: Thank you so much for the question. Link has given evidence to lots of Bill Committees over the years—I have given evidence to some of the members of this Committee—and I do not think we have ever been moved to say at this stage in a Bill that it should simply be withdrawn. That is our view of the Bill at the moment.

We see the Bill playing out in perhaps one of three scenarios. In the most benign scenario, you could imagine a situation where the whole body of environmental EU retained law is simply restated and moved across on to the UK statute book as assimilated law. Even in that most benign scenario, we see a situation in which Parliament and the civil service have spent huge amounts of time, likely costing millions of pounds, in delivering the shift across. Even more importantly, we see a huge opportunity cost in terms of lost time to actually make environmental improvements. You said, Mr Sobel, that DEFRA has already had some capacity crises, and it is true. All sorts of important DEFRA agendas—the environmental principles, the environmental targets, the river basin management plans—and a whole raft of pieces of vital DEFRA work being proposed by this Government are now extremely delayed, and that would only be made worse by that scenario.

The second scenario is the cliff-edge version of the Bill, where you imagine huge swathes of potentially vital environmental laws falling off the cliff edge at the end of the sunset. I do not think any of us imagine that the Government will knowingly let things like the habitats regulations, the water framework directive or pesticides rules hit the buffer. I do not think anybody thinks that is the intention, but the fact is that we imagine there will be mistakes along the way. If you look at the process following the European Union (Withdrawal) Act 2018, there were lots and lots of wash-up SIs at that point from all the mistakes that were made by DEFRA alone—simply to get through the legislation at that point. With this version, so much more is on the table. Things are likely to be missed. Mistakes are likely to be made.

The third scenario is one of change and ministerial fiat to mess around with things along the way. The delegated powers in the Bill are some of the most extraordinary that I have ever seen. They give Ministers the power to change things almost without scrutiny along the way. The third scenario, and probably the most likely, is that we see elements of law being cherry-picked, either to be taken out or changed over the next 12 months, without any opportunity for people to amend, scrutinise or improve.

All three are really terrifying scenarios, and we can talk about why they come through the Bill later, but our view at the moment as Wildlife and Countryside Link is that the Bill is irredeemable and should be withdrawn.

Q104 Alex Sobel: Ruth, do you have a view on assessment and capacity on behalf of your members of the Green Alliance?

Ruth Chambers: Absolutely, and I endorse what Rich has just said. One other implication of the Bill relates to environmental law and policy making across the rest of the UK. I know we are very much focused on Whitehall today, but how, for example, will this process be conducted in Northern Ireland without a functioning Government? How are stakeholders going to be involved? That is not clear to us. We know that the Department of Agriculture, Environment and Rural Affairs in Northern Ireland has identified 600 pieces of rule that pertain to it as a Department. Again, where is it going to find the capacity to deal with that?

In relation to Scotland, there is an interesting angle, because the Scottish Government have a legal commitment to keeping pace with the EU. What is the interplay between that legal duty and the programme of rule in relation to the Bill and the Scottish Government? We note the concerns raised by Senedd Cymru, the Welsh Parliament, that the Bill risks imposing a regulatory ceiling on ambition and distracting from programmes in Wales. Those are some additional impacts to the ones identified by Richard.

I will come back to DEFRA, which is where we are perhaps more qualified to speak, and look at some numbers for a minute, in case that is of assistance to the Committee. We have heard talk of the previous EU exit statutory instrument programme, which we were involved

with. Looking at the numbers of SIs involved in the two years of that programme, there were 108 in 2018 and 161 in 2019. That was a huge undertaking for the Department. As you have just said, it took a lot of resource from outside DEFRA, which put in some really innovative consultative mechanisms to help it to cope with that number of instruments.

By contrast, under this programme, the dashboard shows that DEFRA has 570 published pieces of REUL, but that is not the final number. We understand from the Department that the number is 835 and counting. That is not yet a published figure, and obviously we will need to have it confirmed by the Department, but that is a huge increase. The EU exit SI programme will pale into insignificance when you look at those numbers, which will require resource housed in legal capacity and technical policy capacity, and will require asking the expert stakeholder community as well. There is a lot of work to be done.

The Chair: I just want to intervene before the other witnesses give their answers. This is all very good stuff, but the answers will need to be quite a bit shorter or we will run out of time.

Q105 Alex Sobel: Do you want to come in on the animal welfare aspect, David?

David Bowles: I concur with everything that has been said. Two years from now will mark the 50th anniversary of the first ever animal welfare law passed at the EU level. The RSPCA has worked out that since that date in 1974, we have had 44 different animal welfare laws.

I will make one additional point. Obviously, animal welfare plays out very resonantly with the public and, indeed, with the Government. The Johnson Government came in with five different manifesto commitments on animal welfare and a pledge to improve animal welfare. It is quite ironic that the Bill, in Richard's cliff-edge scenario, could get rid of those 44 pieces of legislation.

An additional issue that I do not think the Committee has looked at is that of devolution, which Ruth touched on. As you are probably aware, the Senedd yesterday put out advice on the legislative consent motion to reject the Bill, which it does not believe is good for the Welsh Government. Curiously enough, although Ministers of the Crown have the chance to delay the Bill's deadline from 2023 to 2026, that option does not apply to Welsh Ministers.

Most animal welfare legislation is devolved—we have worked out that only 13 of the 44 pieces of legislation are reserved, while the rest are devolved—so it is up to those in Wales to decide what to have in their country, such as the battery hen ban and a vast array of other farm legislation, including on the live transport of animals. They will have all those things only until 2023 because Welsh Ministers have no option to extend that deadline. Only Ministers of the Crown have that option, and that really worries me.

Q106 Alex Sobel: That is quite stark, isn't it? We are talking about 10 months—maybe 11 if we are lucky—to look at 44 pieces of legislation just for animal welfare, as well as all the devolution issues. Ruth, you were involved in this last time— albeit with far fewer SIs—so who else should be consulted for that process? It affects a huge number of different organisations, including yours, vets, businesses, the National Farmers Union, the farming community, academics and so on, and then there are the agencies—the Environment Agency, Natural England or Forestry England or whatever it may be—which may or may not be pulled into DEFRA to deal with this. Who else needs to be pulled in, and what level of support and capacity would those organisations have for such a big programme? Perhaps you could talk about your organisations first before talking about others.

Ruth Chambers: All the groups you mentioned would be immensely helpful to the various Departments in identifying and commenting on the body of REUL that belongs to them. The important question is how such consultation should be conducted. For us, it should be hardwired from the outset and conducted in a transparent and structured way. Navigating the complexities and time constraints of consultation will place a huge burden on businesses and civil society. The more that that can be signalled in advance, the easier it will be for us all.

Last time around, the Department put in place a reading room on statutory instruments, for example. That was a helpful vehicle that gave stakeholders of all persuasions some extra time to look at the statutory instruments in question. It was just one mechanism that was put in place, but that sort of thing probably is not sufficient given the scale of the work that we are talking about. The more structured the engagement can be, the better, but it will be a big undertaking. It goes back to clarity on just how many pieces of law we are talking about, so that we know which laws are in scope and which are out of scope.

Q107 Alex Sobel: Phoebe, your organisation is used to doing this sort of work. What is your capacity and what do you think?

Phoebe Clay: Looking further from that list, one important facet of that process is missing, which is people—the public. This is not an expectation of the public, certainly not during the referendum and certainly not in the past five years. What we have done a lot of is talk to people—your constituents—about their attitudes and what they value in relation to regulations. We find very little appetite for a process of this kind. We have been doing polling consistently over three years; all our polling suggests that a good two thirds of the British public think we should retain or, indeed, strengthen the level of standards that we had as members of the European Union. We find very little evidence that people see Brexit as an opportunity to deregulate—quite the opposite. People want to play to a sense of British standards, of the march of progress towards a better—and more—level of protection. In terms of what we value in the UK, this goes very deep. I would echo what my colleagues have said in relation to transparency and having in place a process whereby there is a level of democratic engagement with the Bill.

Q108 Alex Sobel: I want to delve down with an example—particularly as I am a shadow DEFRA Minister—and also declare my interest as the parliamentary champion for white-clawed crayfish. One of the regulations we are going to have to look at is the Invasive Species (Enforcement and Permitting) Order 2019. I am sure you are all well aware of that; Richard is nodding his head, so I will come to him first. That order sets out and

[Alex Sobel]

underpins the enforcement regime for invasive species such as the American signal crayfish, which threatens my crayfish; pennyworts; killer shrimps; and so on. We dealt with that in the EAC and I think that Richard was present at that hearing. That order is the only piece of current legislation that prevents the introduction of invasive species, and it is part of retained EU law. I want to ask Richard how many of our important regulations that support nature and animal species are supported purely through retained EU law? If that order, and others, are sunsetted and we do not have the capacity or time to get to them before December 2023, what will then happen in terms of our ability to stop invasive species coming in, and what other effects could there be?

Dr Benwell: As you say, that order is the main plank of action against invasive species. If we were imagining that the Bill is about reducing costs, far from it. If we were to lose that piece of regulation—the cost of invasive species in the UK on businesses at the moment is already in the billions. I think the sum is about £4 billion per year at the moment for the cost of invasive species on, for example, water companies. That would only multiply if we were to see those regulations lost or weakened. There are several areas where those kinds of rules exist only in retained law. For example, think of air quality threshold standards, or provisions such as the habitats regulations for protecting rare species or for providing the gold standard of protection for habitats. Think of the environmental impact assessment and the strategic environmental assessment rules. In some areas there is overlap, but in each of those areas EU retained law adds a really important element, over and above what existed in domestic law.

In some ways, it is a bonkers distinction. We have the term of "assimilation" in the Bill, as if we are taking something that is currently alien and making it British. It is already UK law; it has been on our statute book for a very long time. It has been assimilated in so far as businesses and people know how to work with it, expect it to operate and feel as if it is part of our law. There are loads of areas where the law can be improved, but simply choosing to tackle this block as if it were a special thing is a bad way to target areas for improvement. We could do much better through consultation, and by doing proper impact assessment of the laws that we know need improvement.

The Chair: Thank you. We turn to the Minister now.

Q109 Ms Ghani: It was good to hear recognition of the UK's long legacy of environmental and animal welfare protections. Often we have higher standards here than the EU does, so I struggle to understand the argument that we need to keep environmental laws that were introduced by the EU just because it was the EU, and that we cannot trust the UK Government, which introduced the Environment Act 2021. I cannot understand why you cannot trust your own elected officials here in the UK, who are accountable day in, day out.

My question is for Ruth Chambers. The review of the substance of retained EU law has uncovered more than 500 pieces of retained EU law owned by DEFRA. Many of those pieces of legislation relate to environmental regulations and protections dating back 20 years. Surely there is merit in reviewing the totality of those regulations, as the Bill provides for, to see whether they can be consolidated. Do you agree or disagree?

Ruth Chambers: It is certainly true that the body of retained EU law is ripe for being improved. That is what we would hope the processes of the Bill, or anything else, would lead to. Our concern is that the Bill would, either accidentally or if powers were misused in the future, not lead to those sorts of outcomes. Instead of the processes in the Bill, we would prefer a much more targeted approach that looks at retained EU law, and that picks the areas where the benefits to business are the greatest and environmental outcomes could be maximised, which Minister Trudy Harrison said, in answer to a written question, is DEFRA's aim for reviewing retained EU law.

We are not opposed to reviewing the law, and we are definitely not opposed to improving it; we just do not think that the processes in the Bill will naturally lead to that outcome, especially when you look at clause 15, which we might have time to talk about. It basically makes the direction of travel of the Bill about deregulation rather than anything else.

Q110 Ms Ghani: It is good that you agree with most of what the Bill is trying to achieve, compared with Dr Richard, who does not want the Bill at all, because it provides us with an opportunity to enhance the protections that we have. You shake your head, Dr Richard, but you are very clear that you do not want the Bill to be around at all. I love the way that you are representing a coalition, as it were, but fundamentally you are also an active Lib Demmer who campaigns to get elected all the time, so the neutrality of your evidence should be taken into account.

Ms Phoebe Clay, previously your organisation has accused the Bill of threatening to interrupt the Government's target to halt the decline of nature in England by 2030. Can you set out how you consider that the Bill could interrupt a legally binding target that has been established by the Environment Act? We have a lot of lawyers this morning, and we want to contrast their evidence with yours.

Phoebe Clay: I think that is an ambitious target, and regulation has to be part of the pursuit of it. As Ruth has just said, the intent in the way that it is expressed at the moment is deregulatory. Our view is that, if that intent is pursued, we will struggle to stay on course with those broader objectives. It is worth stressing that is not just my organisation. Like Richard, we are a coalition. We represent a whole series of organisations across the spectrum, ranging from the Royal Society for the Protection of Birds to women's institutes and a number of organisations working on worker protections. I guess it is worth underlining that this is not our position as a small coalition, but the position of all the other organisations that have signed up to that.

The Chair: I think it is only fair to give Dr Benwell a chance to come back on the issue of neutrality, very briefly.

Ms Ghani: May I respond to the response that was given a moment ago, to get clarity?

Q111 The Chair: We will come back to that in a second, Minister, if that is okay. Dr Benwell, I think you should have an opportunity to put on the record your neutrality.

Dr Benwell: Thanks, Sir Gary. Just to emphasise, we definitely see areas where EU-derived law can be improved, and absolutely share that intention. I could list quite a number for you now. Here I am representing not my personal views but those of the coalition. It is extremely clear from our published materials that the strong view of the environmental sector is that, while we share the intention of improving environmental law, we do not think that this process is the way to achieve it, because of the sunset clause, the deregulatory lock-in and the overly generous delegated powers to Ministers along the way.

The Chair: Minister, you wanted to come back to Phoebe Clay.

Q112 Ms Ghani: Dr Benwell, earlier you said you wanted the Bill to stop—I am sure the transcript will provide that evidence. Ms Phoebe Clay, your organisation accused the Bill of threatening to interrupt the Government's target to halt the decline of nature in England by 2030. You used the term "I guess", but I do not want you to guess; I want you to tell me how we will interrupt the legally binding target of the Environment Act.

Phoebe Clay: I guess that we just want the guarantee that those environmental protections will remain in UK statute. At the moment, we do not think that the other providers—

Q113 Ms Ghani: But you have no evidence for that statement at the moment.

Phoebe Clay: We have the evidence that—

Ms Ghani: What is the evidence?

Phoebe Clay: That these rules are not protected. We need to ensure that they will be.

Ms Ghani: Thank you.

Q114 Dr Luke Evans (Bosworth) (Con): My question is to Dr Benwell. Does your organisation have a position on the supremacy of EU law over UK law?

Dr Benwell: No.

Q115 Dr Evans: Yet you are the only organisation here to say that it wants to repeal the Bill, or does not want it to come in, although the principle is to re-enact the supremacy from EU law to UK law. How does that work out in what you have just said? You act as if you do not want the Bill to go through, and yet you do not have a position on the crucial part of the Bill when enacted.

Dr Benwell: I am not sure that is the crucial part of the Bill from an environmental perspective; the crucial part of the Bill from our perspective is that it potentially or inadvertently allows for the loss of large portions of the statute book and for changes to environmental law without scrutiny. It also locks in an old-fashioned view of regulatory costs, seeing cost to business as the only way to judge the costs of regulation.

Q116 Dr Evans: We have heard about this several times, with the debate about the timing of sunset clauses and so on. I am just intrigued as to why your organisation, which you represent, said that the Bill needs to go, whereas every other organisation—whether it liked it or not—tried to work out solutions within it. On that basis, you are unusual as the outlier, and it is always good to question the outlier, to understand their thinking. Perhaps you will explain that thinking for how you got to that position, because the practical problems you assumed and set out we have heard and agreed with, but you are still saying that the Bill should not go ahead at all. That seems to rub against everything else we have talked about and put forward in it. Would you mind answering?

Dr Benwell: I do not think that we are the only organisation to have said that. I think that the Bar Council included the suggestion that the Bill should be withdrawn in its evidence. Wildlife and Countryside Link does not speak as a single body; it speaks on behalf of many of our members. The RSPB, for example, has been very clear in saying that the Bill should be withdrawn, as have lots of our members.

The Government might find features of the Bill they could bring forward separately. I think that the question of supremacy is one where we would see some risks in the interpretation of the law, but that is a political choice and, in itself, it is not the bit that we are most worried about. The bits that we are worried about, however, are so deeply ingrained in the fabric of the Bill that we suggest starting again.

On the sunset clauses, if you look at the House of Commons Library interpretation of what a sunset clause should do, it is there to stop emergency powers existing in perpetuity, giving Parliament a chance to review them. The Bill is taking, en bloc, huge amounts of environmental law and saying that they should potentially end within a year; it is a very strange amplification of sunset powers. On delegated legislation, the provisions in clause 15 that suggest Ministers should be able to bring forward alternative provisions without even tethering that to the original purposes of the regulations on offer are extremely broad delegated legislation powers. Another aspect that is deeply ingrained in the Bill is the idea that no alternative provision should be brought forward if it imposes new costs on business or hampers innovation and that sort of thing. That is an old-fashioned mentality that sees the costs to business of implementing regulation as the only view of the point of that regulation. Actually, if you take a deregulatory approach, it does not reduce costs; it simply transfers them from the businesses responsible for delivering them to the public. Those are all part of the weft and warp of the Bill, and that is why we think that the whole thing should go, rather than starting to amend it.

The Chair: That is clear, thank you. I will bring Ruth in on this, and then we will go to Stella Creasy. Ruth, you wanted to come in.

Ruth Chambers: Thank you, Chair. I have two points of clarification to make. First, I confirm that Greener UK as a coalition also wishes the Bill to be paused and withdrawn. That is not inconsistent with our position that we also believe that the body of retained EU law could be improved and that a process could be devised to do so. I feel that there was a little conflation of those two points but, to be absolutely clear, they are not the same thing.

Secondly, Minister, may I come back to your point about environmental targets, the 2030 species recovery target and the relationship with REUL? The relationship is a rather straightforward one: the opportunity costs that will inevitably come with the Department having to review, assimilate and reform such a large body of law. In fact, the Government have already missed their first legal milestone on environmental targets, on 31 October. That is just one example of how this can have a serious impact—because of the sheer deliverability challenges.

Q117 Stella Creasy: David, may I turn to you? Earlier in this session, you will have heard me say that I had a ministerial correction for the first time ever as a parliamentarian—old dogs and new tricks, all the time—*[Interruption.]*

The Chair: Order. We will come back to your point.

4.1 pm

Sitting suspended for a Division in the House.

4.14 pm

On resuming—

The Chair: We are all reunited, more or less. Stella has the floor. We will let you know in a moment what the ending time for this witness panel will be; we are still trying to work it out.

Q118 Stella Creasy: Thank you, Chair. We were not actually discussing shrimp when we were rudely interrupted by the Division bell; we were just about to talk about avian flu. David, could you update us? Originally, Ministers said that the requirements around avian flu control—something I feel strongly about, because we have it in my local community—were not within the scope of this legislation, but they have issued a ministerial correction to say that it is. That seems a good example of legal uncertainty. What is the practical impact of having legal uncertainty about the requirements when it comes to environmental protections? Could you give us examples of where there has been legal uncertainty?

David Bowles: There are many examples. I mentioned at the beginning of the session that there are 44 different animal welfare laws, but that is my assessment; if you look at the dashboard that the Government have set up, there are 16 that are not on the dashboard but are on my list. That gives you an indication of the uncertainty, although to be fair, the dashboard is one of the most opaque measures of what the Government are doing. It does not seem to be in alphabetical or chronological order, and going through the 570 laws under the Department for Environment, Food and Rural Affairs tab is quite onerous. I think it is uncertain about where it is.

The Bill applies not just to the UK, but to Wales, and probably 31 of 44 laws in my area of animal welfare are devolved. The Senedd and the Scottish Government, who have responsibility for them, are uncertain as well, because they are taking their lead from DEFRA. Yesterday the Welsh Government said they were not minded to work out which laws were devolved, which were not, and which came under retained law. They were going to leave that up to the UK Government. That just fuels the uncertainty.

Q119 Stella Creasy: On the point about uncertainty and the approach we should take, you all seem to be making the case for a sunrise clause rather than a sunset clause, so that we start with everything and work backwards. You have found 16 laws that are definitely not on the dashboard. I feel inferior now; I found only one: the Conservation of Habitats and Species Regulations 2017. However, the Conservation of Habitats and Species and Planning (Various Amendments) (England and Wales) Regulations 2018 is on the dashboard. From the point of view of layperson who is not legally qualified, how much variation is there between those orders? What sort of omissions could we be talking about? What uncertainty might be created when there are gaps because laws are not on the dashboard? "Enmeshed" was the word that Dr Benwell used?

David Bowles: It could create huge uncertainty. Two things need to be worked out. First, what does retained EU law mean? As we saw today from the article in the newspaper, there seem to be more such laws coming forward. Secondly, which are devolved and which are not devolved? There could be a huge discussion about that. The Bill will have huge implications. There is not just the devolution issue, but the common frameworks issue, which is how the three Governments work out how to move forward on specific pieces of legislation. There is also the matter of the United Kingdom Internal Markets Act 2020, which is the legislation that allows free trade within Great Britain. There are huge implications for all those issues.

Q120 Stella Creasy: Finally, a big question to all four of you. We were all promised that on leaving the European Union we could have higher standards, particularly in environmental protections. I think that people across the House would want them; we are all very keen on defending them. Clause 15(5) talks about burdens. What is your interpretation of where a burden might impact our ability to provide environmental protection? I am thinking particularly of town and planning orders; environmental requirements are part of the planning process. When you read about that concept of burdens, do you have concerns about maintaining standards, let alone increasing them? what impact could that word have on laws that are not immediately considered to be environmental, but do have an environmental impact? We will start with you, Ruth, to give David a break.

Ruth Chambers: That is a really important question. Clause 15 and how it defines "burden" is one of our biggest concerns about the Bill. If you look at the passage that defines "burden", it is everything from an administrative inconvenience to something that causes issues to do with profitability. What does it actually mean? It also does not seem to sit readily with the answer that DEFRA Ministers have given, which is that their intention, in reviewing that body of rules, is to improve environmental outcomes. How does that sit with reducing regulatory burdens?

Not many weeks ago, some Government Ministers were suggesting that environmental protections were regulatory burdens and should be removed. That is not the case, we believe, with the current Government and

current set of Ministers, but it shows that things can move quite quickly. That is why the Bill needs to be watertight on these issues.

The Chair: Shall we move down the table? Dr Benwell.

Dr Benwell: This is a really problematic part of the Bill because, as has been said, "burden" is defined in purely financial and business terms. It imagines that the small cost that business might incur is not worth it for the environmental benefits that come out the other end. Of course even critical laws, such as the habitats regulations, can be improved. For example, you could define projects and plans better, so that you could take intensive land management in as well. Those are conversations we are actively having with DEFRA, and we want to find ways to do that, but those proposals simply could not be given effect through the Bill because of clause 15, which sort of sets out a deregulatory agenda. Altogether you see a lock-in of deregulation where you might otherwise find improvements. We want to improve the law, but the Bill does not allow us to do that.

David Bowles: I concur with the two previous witnesses. The Government came in with a manifesto commitment to improve animal welfare, and indeed they are looking, hopefully, to get rid of cages for laying hens and pigs, but because we are so uncertain about the status of the conventional ban on battery hens, which was agreed in 1999 and finally came into force in 2012, we do not know if that ban is to be scrapped. The Government are almost looking two ways on the issue, and that worries us.

We need reassurance that there is a transparent process for filtering the 570 DEFRA Bills, and a time period in which to do that. I concur with the other witnesses: we are not against improving legislation; of course we want to do that. We are not saying that the legislation is perfect, but there are a number of caveats, including the time period, the filtering process and the impact on devolution. All of that is so unclear that we need reassurance.

Phoebe Clay: You put your finger on it when you mentioned the word "burden", Stella. That is a really problematic word from our perspective. If we were to frame the discussion around environmental, social and human protections, the Bill would probably be less problematic. We know that people see the rules as protections, and conceive of them as things that keep them safe, particularly at a time when people are feeling incredibly uncertain and under-protected. Shifting away from the idea that regulations are necessarily burdensome would be a really important step forward.

The Chair: We have until 4.33 pm, slightly to my surprise, so we have another 11 minutes to go. Minister, did you want to come in?

Q121 Ms Ghani: We have spoken a lot about the word "burden", and how it is creating anxiety. Obviously, you are having meetings and trying to get as much clarification as possible. I was just going through the transcript of the evidence provided by Professor Alison Young this morning—I am not sure whether you heard it at all. She noted that clause 15 specifies that no replacement legislation can increase the burden on business. That does not mean—I refer again to her evidence—that you can take a number of earlier burdens and just remove legislation. We can bundle legislation together, which could also reduce the burden, but it also means amending legislation so that we have a higher standard, too. We have to accept that there is an opportunity to increase standards. All we are saying is that we want to make sure that by increasing standards, we are not necessarily increasing the burden on business. Those two aims are not conflicting. Do you not agree that there is an opportunity here to make things even better?

David Bowles: *indicated assent.*

The Chair: Some nodding from the panel, which is excellent news. I call Saqib Bhatti.

Q122 Saqib Bhatti (Meriden) (Con): Thank you, Sir Gary. We passed the Environment Act 2021, which was a great piece of legislation of which we are incredibly proud, though there may be opinions about how that legislation could go further. Dr Benwell gave evidence when I served on the Bill Committee. There is no indication that we will go back on a major piece of legislation that we passed in this Parliament. The talk of getting rid of environmental laws and regulations is just scaremongering, isn't it?

Ruth Chambers: It is not, unfortunately. I think you have to see these things in their places. On the Environment Act 2021, you are absolutely right: it was groundbreaking legislation that the Government passed to do many things. It is an enormous Bill, as you know, because you were on the Bill Committee. It sets up the Office for Environmental Protection, and it passed law on resource efficiency and so forth, but in the main, it is new legislation. Part 1 ensured that some protections that we lost after we departed from the EU were put in place—for example, on environmental principles. Other parts are brand new, such as the requirement to set environmental targets.

That is, however, separate from this vast body of law that we are talking about today, which is inherited from the EU. It relates to some of the laws I have just been talking about, but also covers completely different areas—for example, pesticide regulation. The important thing is not to pit one against the other, but to make sure that we have a coherent and functioning statute book, in which primary legislation such as the Environment Act continues to work and to be given priority, and the body of retained EU law is treated with respect and improved in a manner that we can all get on board with. They are part of the same legislative picture, but they are not really in competition with each other.

Q123 Saqib Bhatti: There is a lot of talk about reassurance. At the end of the day, we have passed a major piece of legislation with great targets. It goes a really long way. Surely that is enough of a signal of our intent not to row back on our environmental protections and high standards, not least because our constituents want them.

Ruth Chambers: It is great to hear you say that, but of course every Act of Parliament is only as good as the pace and vigour with which it is implemented. We mentioned that the first statutory deadline on improvement targets has unfortunately been missed. We very much hope and want to work with the Government to address that legal breach at the earliest opportunity. The Act is

full of powers. It gives the Government the option to do a great many things, but of course it is only the Government who can decide to do them. We will support you all the way in putting those powers in place in the most ambitious way, but it is not sufficient to say that the Act is testament to the ambition. It has to be implemented, delivered and resourced.

Q124 Saqib Bhatti: Dr Benwell, I wanted to pick up on your testimony. You spoke about how this legislation re-establishes parliamentary sovereignty and takes away the concept of EU supremacy of law. You said that was not a critical part of the legislation. I would argue that it is, because it is a framework piece of legislation that sets out the standards. Do you accept that, as a result of this and previous legislation, Parliament is now sovereign, and that is what the Bill enables? Do you accept that EU law is no longer supreme over our legislation?

Dr Benwell: That is what the legislation enables. I do not have a particular view on that from an environmental perspective.

Q125 Saqib Bhatti: I am asking you. What would you say?

Dr Benwell: I do not have an environmental view on that question. I completely understand the political point, and that is for Parliament to decide.

Q126 Saqib Bhatti: Let me build on that. If Parliament is now sovereign and we are able to make our own laws, free from the shackles of European Union law, surely there is a great opportunity, as the Minister said, to make stronger environmental law. It puts us in a stronger position to do that.

Dr Benwell: Definitely, and things like the Environment Act are a brilliant sign of progress. The promise in the manifesto to have the most ambitious environmental programme on Earth was excellent, and if we can deliver the species target that is in the Environment Act to halt the decline of species by 2030, that will be the first time in the world any country has set and met a target like that—but it does not operate by itself. Delivery of that Act rests on many of the environmental provisions that are put at stake by this Bill, such as provisions on planning rules, species protection and water protection. They do not live in the Environment Act; the Environment Act builds on them.

There is definitely the chance to do things better, and to bring forward lots of the positive things that the Government have already promised in their environmental programme, but they risk being set back as a result of the amount of time that the Bill will take and the potential for mistakes that this Bill introduces. That is why we are worried about it, not because of any of the principles around sovereignty. That is not a question we have a view on. It is more a matter of the practicality and enormousness of the task in front of us.

Q127 Justin Madders: I have a quick question for Ms Clay. Your report from September, which looked at the public's attitude to protections, suggested that there was not a great appetite out there for deregulation. May I turn that on its head? In your research, were people saying, "Well, actually, we would really like to get rid of this law or that law"? Did you get any sense of a clamour for the removal of any particular rules?

Phoebe Clay: We have asked questions very generically, as you saw in the research that was published in October, and we have asked more specific questions. We find time and again that the majority of the British public opt for strengthening rules, including members of the public who voted to leave the European Union.

We find very little evidence of significant geographical differences. People in the south and north of England, for example, have similar views. Our research has been corroborated by research by others, including by Professor John Curtice after the EU referendum, the Legatum Institute and others, so we can state with a lot of confidence that the British public do not perceive these rules as burdensome. I think there is a real sense that they are protections, including the environmental rules, and there is a general sense that protections are something that we should aspire to, exactly as the Member of Parliament just mentioned. We should be aspiring for stronger standards than we had when we were part of the European Union, rather than weaker ones.

The Chair: That concludes this session. Thank you to our witnesses on our expert panel. We appreciate the evidence that you have given.

Examination of Witness

Angus Robertson MSP gave evidence.

4.31 pm

The Chair: We are moving on to Scotland. We will hear via Zoom from Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture in the Scottish Government. This session must end at 4.53 pm. Thank you for joining us, Angus.

Angus Robertson: Thank you for having me, Sir Gary. Hello to erstwhile colleagues.

The Chair: Lovely to have you with us, Angus. The first question will be from the shadow Minister, Justin Madders.

Q128 Justin Madders: Good afternoon. For the Committee's benefit, will you set out which areas covered by the Bill will be considered to be within the competency of the Scottish Parliament?

Angus Robertson: If you do not mind, I was told that I could briefly make a few points at the beginning of the session. If you would indulge me, I might be able to both answer the question and set out some of the concerns of the Scottish Government and, by extension, the Welsh Government—we have the same position.

Thank you for the opportunity to speak to you all. I know you have had a lot of witness sessions today, so thank you for your patience. It will come as no surprise to members of the Committee to learn that the Scottish Government have deeply held, fundamental concerns about the legislation, particularly because of the undermining of devolution. There is concern about the democratic deficit that it exemplifies, and there are concerns, as we heard in the previous session, about the potential deregulatory challenges. We would want amendments brought forward in each of those areas.

Fundamentally, the Bill is the result of Brexit, which was overwhelmingly rejected by people in Scotland and is causing real damage to our economy and our society.

The Bill is yet another example of a policy agenda being imposed by the Westminster Government on people in Scotland against their consent.

Let me start with devolution and why that is important. I represent a Government who were elected with a mandate to maintain close regulatory alignment with the European Union and EU standards. I recognise that the UK Government have a different agenda, but the whole point about devolution is to allow diversity, and it would be entirely possible to reconcile the difference in approaches through agreed common frameworks. After the EU referendum, that exact approach was agreed between the devolved Governments and the UK Government, yet the United Kingdom Internal Market 2020 and now this Bill make that near impossible. The Bill would allow UK Government Ministers to act in devolved areas without the consent of Scottish Ministers or the Scottish Parliament; there is no requirement even to consult. The internal market Act is having an insidious and erosive effect on devolution; in contrast, this Bill is a direct assault on devolution.

The second concern is about democratic scrutiny. The Bill grants Ministers, including Scottish Ministers, powers to amend or abandon legislation with minimum democratic scrutiny. Mere inaction or oversight could result in important protections falling from the statute book. Far from the promise of Parliament taking back control through Brexit, the Bill sidelines proper and appropriate parliamentary scrutiny.

Thirdly, on deregulation, the UK Government have said that they want the Bill to "utilise regulatory freedoms" by "lightening their burden" on UK businesses. The businesses here that I hear from are not interested in discarding 47 years' worth of protections. Businesses, workers, consumers and our environment all benefit from high standards and not from a race to the bottom.

In conclusion, the people of Scotland rejected Brexit by a margin of 24%, and there was a majority for remaining in the European Union in every single local authority area in the country. The more people in Scotland see of Brexit, the less they support it; a panel-based survey this summer found that 63% of people in Scotland would vote to rejoin the European Union. Given that level of support for the EU, I note with some sorrow Labour's pro-Brexit position alongside the Tories, most recently articulated by Keir Starmer when he was in Scotland at the weekend.

To finish where I started, the Scottish Government are fundamentally opposed to the Bill and have lodged with the Scottish Parliament this very morning a recommendation that consent be withheld. Thank you very much, Sir Gary.

The Chair: Thank you so much for making your position crystal clear. Justin, do you have a follow-up question?

Q129 Justin Madders: Yes. I would just point out that we are pro democratic decision making in this country and we respect the outcome of the referendum.

I wanted to ask specifically about some of the inconsistencies when it comes to the powers available to you vis-à-vis the UK Government. Am I right that you will generally have the power to revoke and amend regulations, but the power to extend the sunset clause is not available to you? Do you know why that distinction has been made?

Angus Robertson: Indeed. It runs contrary to the conversation that I had with the erstwhile Cabinet Minister with responsibility for this, Jacob Rees-Mogg. He was very keen to give me assurances that devolution would not be undermined and that Scottish Ministers in the Scottish Parliament would be able to exercise maximum control to fulfil our democratic mandate: to remain aligned with the European Union.

Different powers are being assigned to UK Government Ministers and Scottish Government Ministers in important respects, and that is problematic for us—as is the point of capacity. I do not know whether you want to come on to that, but it is an absolutely massive challenge given that we are a Government who have a legislative agenda already. If we want to remain aligned with 2,000-plus or, if the *Financial Times* is to be believed, 3,000-plus pieces of European legislation, many of which are about devolved areas, we are talking about massive displacement activity in our Parliament here in Scotland. That is hugely challenging.

Q130 Justin Madders: I have one final question. Have your officials done an analysis and come up with a figure on the numbers of regulations covered by the Bill?

Angus Robertson: We have begun to do that. I should say that when I asked Jacob Rees-Mogg—as the proposing Minister, you would have thought he might have known—how many pieces of legislation would impact directly on the UK Government but then also on devolved policy areas, he was not able to tell me. We have still not been told the scale of the legislative impact, but it will be very considerable. Consider what is devolved—environment, rural affairs, transport and a whole series of other things. It will necessitate the legal services of the Scottish Government and the Scottish Parliament spending a lot of time dealing with the consequences of this Bill.

The problem could quite easily be solved by the UK Government simply acknowledging that there is no demand for this to happen from either the Scottish or Welsh Governments and simply carving out devolved areas. It would remain on the statute book here. If colleagues down south want to go ahead with that, I leave that up to them. We did not vote for this, and we certainly do not want it to happen, yet our parliamentary process and the way in which Government operates here is going to be deluged by trying to deal with this proposal, to which little to no thought has been given as to how it impacts on the devolved institutions of the United Kingdom.

Q131 Ms Ghani: Mr Robertson, you have been crystal clear that you do not support any aspect of the Bill. The Bill provides for broad powers that the devolved Administrations will be able to use concurrently to preserve retained EU law. Will these powers not make it easier for Scotland to align its REUL more closely to the EU if it wants to?

Angus Robertson: The Bill confers significant powers on Scottish Ministers and UK Ministers in devolved areas. Where the powers are exercised by the UK Ministers,

no role is afforded to the Scottish Ministers or the Scottish Parliament. In devolved areas, it is the Scottish Parliament that has a democratic mandate to hold Government to account. That is why we have consistently argued that where the UK Government have powers in devolved areas under this Bill, they should need the consent of the Scottish Government, which is of course scrutinised by the Scottish Parliament, in order to exercise those powers.

As it stands, the powers you highlight would allow the UK Government to make broad changes in retained EU law in devolved areas, including revoking and entirely replacing standards that we have inherited from the European Union. This Bill will introduce a massive democratic disconnect. I would hope that colleagues across the parties would realise that this is a huge challenge to the basic understanding of how devolution works.

I would be interested to know, Sir Gary, because we have not yet heard, how this will work now that the Scottish and Welsh Governments have both withheld consent for this legislation. We have the ability through the Sewel convention to say that this, as it stands, is not workable, practical, proportionate, and I could go on—

Ms Ghani: Please don't; I think the point is crystal clear. So much of this is caught up in legal language. You made it clear that there are some powers that would allow you easily to align yourself to retained EU law. This Bill does not limit the powers given to Scottish Ministers in the European Union (Continuity) (Scotland) Act 2021 to align with EU law in areas of devolved competence. Rather, the Bill will give Scottish Government Ministers further powers to more easily preserve or sunset retained EU law within a devolved competence. These new powers sit alongside those given to Scottish Government Ministers in the 2021 Act. I can fully understand that you have perhaps had some unsatisfactory conversations with Secretaries of State, or not had the assurances you are constantly seeking, but the reality is that you would have far more authority than you are alluding to with regards to control of legislation with this Bill. *[Interruption.]* Let's move the conversation on, because we are very short of time. If we follow your argument, there is a concern that the Bill will cause greater divergence between retained EU law in England and Wales and retained EU law in Scotland. Is that conflict a concern for you?

Angus Robertson: With the greatest respect, the point about devolution is that we are able to do things differently in different parts of the United Kingdom. That is the point.

There are two significant problems that I really hope colleagues understand the scale of. We do not wish the proposal to go forward, yet if it does, we are a Government who already have a legislative programme which is going to come under massive pressure over the next years, depending on when the sunsetting arrangements are finalised for, and we are going to have to legislate through primary and secondary legislation to retain alignment with the European Union. That is the first point. I would hope there is an understanding of that.

The second point that I have tried to underline is the ability of UK Government Ministers to, in effect, override the concerns of the Scottish Government. That is much more than a democratic deficit; it is an undermining of the devolution settlement in its entirety. I am sure that some colleagues on the Committee will have looked closely at the workings of the United Kingdom Internal Market Act 2020 and the common frameworks. In effect, they mean that decisions made in the UK Parliament in relation to England are then applied throughout the UK regardless of the view taken by Parliaments in Scotland, Wales or Northern Ireland. I hope colleagues understand the seriousness of the territory we are getting into.

Q132 Ms Ghani: I want to understand exactly which laws you think will be returned to Westminster. Instead of being broad, can you say exactly which laws you believe will be returned to Westminster? I can then try to respond to the points raised.

Angus Robertson: I am not talking about any laws returning to Westminster; I am talking about UK Government Ministers having the ability, in effect, to legislate in areas that are devolved. That is a totally different thing—

Q133 Ms Ghani: Which particular area that is devolved will they be taking control of?

Angus Robertson: They can in any area they like—that is the problem. That is the concurrent nature of the powers for UK Ministers and devolved authorities. It is clear to be read: it is a power that can be used. I cannot foresee exactly which Minister would seek to use such a power or for what purpose, but they would have that power. That should surely be a concern for everybody. Is it not?

Q134 Peter Grant (Glenrothes) (SNP): Good afternoon, Angus. To be clear, the Scottish Government have a fundamental objection in principle to the fact that this Bill, as past Acts of Parliament have, creates the possibility of a UK Government Minister ruling in devolved areas. That is your objection, yes?

Angus Robertson: Yes.

Q135 Peter Grant: Is that concern shared by the Welsh Government?

Angus Robertson: Yes, it is. I believe the Welsh Government are withholding legislative consent, as are the Scottish Government. If the UK Government are true to the word of the erstwhile Minister with responsibility for this legislation, Jacob Rees-Mogg—when I met him on 28 September he said to me, in terms, that the UK Government would respect the Sewel convention—it is a moot point because they will not proceed. I hope they do not.

Q136 Peter Grant: If, as the Minister appeared to suggest a few minutes ago, nobody in the UK Government has any intention of ever acting in the way you fear, would it be reasonable to expect them to support an amendment that explicitly prevented UK ministerial interference in devolved matters?

Angus Robertson: Indeed. First, the Bill could be drafted in such a way that it did not apply to Scotland or Wales. That would be the easiest solution: just limit the scope of the Bill to non-devolved areas. That is suggestion 1. Suggestion 2 is to amend it now to do that or to have a similar effect. Why proceed, given the serious concerns that have been raised by both the Scottish and Welsh Governments? I do not understand

why the UK Government seem to be ploughing on regardless, given that there has been a dialogue and these concerns have been enunciated for quite some time now.

Q137 Peter Grant: We have heard from a number of witnesses today concerns about the capacity of the UK Parliament and the UK civil service to properly scrutinise all this legislation, potentially before the end of 2023. Have the Scottish Government been able to put any kind of figure on how many hours or days it would take?

Angus Robertson: We know that the scale of the challenge is significant first, for the reasons that I have pointed out: we already have a legislative programme and a Government legal service involved in all the legislation currently going through the Scottish Parliament.

Now we have this additional challenge, which has not been properly quantified by the UK Government, who cannot even tell us what they believe to be the split between reserved and devolved. As I have outlined, we know in broad terms what devolved powers are—they cover very significant areas. Our estimation, which is still to be gone through with a fine-toothed comb, is that this will have an extremely serious impact on the ability of the Scottish Government and the Scottish Parliament to scrutinise legislation that would need to go through our process to ensure that legislation does not fall over the sunsetting cliff edge. That is very significant.

Should the retained EU law dashboard identify whether retained EU laws in scope of the Bill are devolved or reserved? Absolutely. Do we have any sense that that is going to happen? No, we do not. A lot of work will have to be undertaken, and it is a massive displacement effort from what we are trying to get on with. If the UK Government really want to respect the devolved settlement and listen to the Scottish and Welsh Governments, and do not want to break the Sewel convention, they should bring forward an amendment that disapplies the legislation either in whole or specifically in devolved areas. That would be the most sensible and, given what the UK Government Ministers have said to me personally, the most pragmatic way of going forward. If not, one can only conclude that what was said was not said in good faith.

The Chair: Thank you very much. We have one minute left. I am keen to bring in Stella Creasy for a quick question, and then Angus for a quick answer, please.

Q138 Stella Creasy: Angus, I understand why you suggest that the challenge is that we need a practical response because our constituents will cross borders, but so will Dikerogammarus villosus, which is a killer shrimp. Although that species has not been found in the River Tweed, is it not better—rather than not involving devolved areas—to look at how we could redo the whole process so that constituents and shrimp crossing borders do not come a cropper?

Angus Robertson: I am all in favour of good intergovernmental relations. I have been doing this job since last year, and I have gone into conversations in good faith about any and every potential challenge. If that is one of them, I am happy to do so again.

The wider point is that we are supposed to have a range of measures that we can use to make devolution work, including the Sewel convention. We have subsequently agreed ways in which Governments in the UK should work together to push through potential challenges, and common frameworks and the like are supposed to deal with some of these issues. I wish the UK Government would live up to their promises to work with the devolved Administrations across the UK, as I am keen to do. They have an opportunity to do so by respecting the Sewel convention in this particular piece of legislation.

The Chair: Thank you so much. Your evidence has been very clear, but sadly we have run out of time. It is very nice to see you again.

Angus Robertson: Thanks for having me.

Examination of Witnesses

Michael Clancy OBE, Charles Whitmore and Dr Viviane Gravey gave evidence.

4.53 pm

The Chair: I thank our final set of witnesses for being patient—we have run slightly over time because of the Division in the House of Commons. We will now hear oral evidence from Michael Clancy, director of law reform at the Law Society of Scotland; Charles Whitmore, research associate at the School of Law and Politics at Cardiff University; and Dr Viviane Gravey of the School of History, Anthropology, Philosophy and Politics at Queen's University Belfast. All three witnesses are appearing via Zoom. We have until 5.23 pm.

Would the witnesses introduce themselves for the record, please? Let us start with Mr Clancy—*[Interruption.]* We cannot hear you at the moment—*[Interruption.]* Okay, we are having technical problems. We will suspend briefly and someone will do something with a hammer.

4.56 pm

Sitting suspended.

4.59 pm

On resuming—

The Chair: I hope that we have got it right this time. Would our witnesses like to try introducing themselves again, please?

Michael Clancy: Thank you, Sir Gary. My name is Michael Clancy. I am director of law reform at the Law Society of Scotland.

Dr Gravey: I am Viviane Gravey, a senior lecturer in European politics at Queen's University Belfast. I am also co-chair of Brexit & Environment, a network of academics looking at the impact of Brexit on the environment.

Charles Whitmore: My name is Charles Whitmore. I am a research associate with Cardiff University's Wales Governance Centre, where I lead on its joint work with the Wales Council for Voluntary Action, which is the national membership body for charities in Wales, on the constitutional and legal changes arising from, in this case, withdrawal from the EU.

Q139 Justin Madders: This is a question for Dr Gravey. The evidence so far has not touched very much on the effect on Northern Ireland. I understand that there are some concerns, particularly, around the protocol and the United Kingdom Internal Market Act 2020. If you have those concerns, could you talk to the Committee about them?

Dr Gravey: Thank you very much for the question. It is true that, in any case, there will be many more concerns for Northern Ireland. We have two different types of concern. First, it will be more complex for Northern Ireland, and secondly, in the absence of an Assembly or Executive, it will be harder for Northern Ireland to either participate in the retained EU law powers or to give any kind of oversight.

In terms of how it is more complex for Northern Ireland, there were some mistakes in the discussion this morning around the scope of the Bill when it comes to Northern Ireland, in clause 1(5). That is basically just about excluding, as with the rest of the UK, a primary role from the scope of the Bill. Basically, that is there because we sometimes have direct rule in Northern Ireland. There are Orders in Council, and they are not secondary legislation, but there are statutory instruments and statutory rules in Northern Ireland that will fall within the scope of the Bill.

The protocol comes in in two different ways. First, because of the protocol, we have retained EU law in Northern Ireland, but we also have a different type of EU-inspired legislation, which is directly applicable EU law, through the annex to the protocol. There is some question about the overlap between those two groups, and what will happen, for example, if we start removing or adding protocol laws that do different things from retained EU law. We have a very complex system in Northern Ireland right now. That is one of the issues.

The other issue is, as I think you have heard, about the primacy of EU law. That will be removed by the Bill, but it is maintained and reaffirmed in the Northern Ireland Protocol Bill, which is also in front of the Commons. How those two Bills will work together is one of the big questions, and I do not think anyone has an answer. Civil society and Government—Ministers and civil servants—in Northern Ireland have a lot of questions, and there are concerns that we are not getting answers or clarity from the UK Government on this.

Q140 Justin Madders: I have one supplementary question. You touched on this briefly. What impact will the Assembly not sitting have on the operation of the Bill?

Dr Gravey: Again, there are two different impacts. There is the impact on deciding on REUL, and what happens on the revoking end impacts on oversight. Before we lost our Ministers at the end of last month, some of the Departments had started work on mapping REUL. We know that the Department of Agriculture, Environment and Rural Affairs has identified around 600. The Department for Infrastructure has identified around 500. But the other Departments have not yet told us how many. It looks like the Northern Ireland Office is pushing the Departments to do something, but there is very little clarity. On a NI dashboard, for example, it is very unclear what we are going to get —if anything.

The other point is on consent and oversight for REUL. Through the UK Brexit SIs, we experienced that best efforts at involving the devolved Administrations were very limited in practice. On the environment and agriculture, for example, the experience in Northern Ireland has been that, even when the Assembly returned in 2020, the Committee for Agriculture, Environment and Rural Affairs and DAERA were getting only parts of the Brexit SIs, and they got them very late, with very little time to engage at all with stakeholders or to provide consent. That was when we had an Assembly. When we did not have an Assembly—for most of the Brexit process—there was no formal process for stakeholder engagement and involvement in the massive change that has already happened for the creation of retained EU law.

The fact that this Bill creates even more of an opportunity to change a vast amount of legislation even more deeply, and the lack of an Assembly, leads to the concern—the Scottish Minister said this earlier—that decisions will be made without the involvement of devolved citizens. That is even more the case in Northern Ireland because we do not have the mechanism for normal consent through the Assembly and the Executive.

Q141 The Chair: We have experts here from Scotland and Wales, so let us have a quick view from Mr Clancy and then your colleague about the likely impact of the Bill on Scotland and Wales.

Michael Clancy: The Law Society of Scotland's principal concerns are about the potential for confusion and the lack of clarity about what the law is, what law applies and when it applies. In particular, we think that the sunset provisions are unduly short. We are told that the sunset will operate from the end of 2023—a phrase that lacks some statutory precision, I might say, so we will be preparing amendments to deal with that.

There is also a lack of clarity about what comes afterwards. It will be difficult for citizens and businesses to deal with even the provisions about replacement, restatement and the creation of the new category of assimilated law in a short—apparently very compressed—period of time, and without the adequate consultation that one would expect when this sort of law is changed. I hope that is helpful.

The Chair: That is very helpful. Mr Whitmore?

Charles Whitmore: It is important to emphasise as a starting point just how significant the Bill is from a devolved perspective. There has not as yet been sufficient consideration of the implications at the governmental level. It is not evident to me, from the Bill and the Bill documents, that sufficient consideration has been given to that.

For instance, there is a lack of a consent mechanism, despite that being contrary to practice in recent legislation. The clause 2 extension power is not being granted to devolved authorities. There is significant uncertainty about how the legislation might interact with different levels of governance and the different levels of inter-dependence therein. Crucially, we do not know much yet about what mechanisms relating to institutions for intergovernmental relations we might need, have or lack so that we can ensure co-operation in what is fundamentally a shared policy space.

It is important that those issues are given due consideration, ideally prior to the introduction of the legislation. Not having an understanding of them could amplify the significant risks of omissions and accidents arising from the sunset mechanism.

A second core concern for us is the legal uncertainty, which I am sure the previous panels spoke to you about. There is significant scope for the Bill to lead to legal uncertainty, and that is compounded at the devolved level because our capacity constraints are probably more acute, so the time sensitivity is even greater, and because there is uncertainty around how you address the tensions in the Bill at an intergovernmental level.

For instance, we do not know how different parts of the UK will make use of the powers in the Bill. Which will fall within the market access principles of the United Kingdom Internal Market Act 2020? Will they fall within or without an area covered by a common framework? If you start thinking about the different uses that might be made of the restatement powers, and which parts of the UK might take different approaches to supremacy and the general principles, the level of uncertainty really does start to get quite extreme.

The Chair: That is very helpful. Thank you.

Q142 Ms Ghani: Mr Clancy, we heard earlier that the EU legislates very differently from the UK, and that creates tensions between retained EU law and other domestic law. Is that a concern with regard to Scottish law?

Michael Clancy: In terms of the EU legislating differently from Scotland, it all depends on what was meant by that phrase, Minister. I am therefore kind of in the dark about what you are asking me to comment on. Certainly, the EU is a completely different legislative creature from legislatures within the UK. It operates in the field of supranational law, rather than national law, and has a different mechanism in the relationship between the Parliament, the Commission and the Council. Those are significant differences constitutionally from the way in which we operate, but I am not really sure what your fundamental objective is?

Q143 Ms Ghani: You have actually answered the question, more than you think. Some people said that creation of retained EU law under the EU (Withdrawal) Act created a second statute book, but is legal certainty not improved by fully assimilating retained EU law into UK statute?

Michael Clancy: As you might have seen from our evidence, we took a lead from the comments made by Theresa May when she was Prime Minister about the creation of retained EU law as a route to certainty following the UK's withdrawal from the European Union. Of course, it is always in the gift of Governments to change tack. To change to a different legislative structure, following the creation of retained EU law, is certainly possible, and the Bill seeks to do that, but I suppose the question is whether it is wise to do that in the time of the current economic crisis in which we are living.

Is it wise to do that with what could be described as a doctrinaire approach to time limits? The symbolic element of the later time by which changes can take place terminating 10 years after the referendum is all very well in terms of the political discourse, but will it be practicable to get to that point? Will there be adequate time for consultation with relevant individuals and businesses before that date arrives? Those are real issues embedded in the Bill.

There is then of course the issue that Mr Robertson and others talked about: the way in which all that interacts with the devolved Administrations and legislatures, and how they can deal with that approach to changing REUL. That is where one would want to criticise the Bill and ensure that we get it right if the changes are to proceed.

Q144 Ms Ghani: I am conscious of time, so I will be as quick as I can. I hope we get some quick answers. I have a question for you, Dr Gravey. A blog of 10 October that you co-authored on Brexit & Environment was brought to my attention. You noted:

"The UK government is in effect telling the devolved administrations to put on hold a lot of their priorities if they want to keep the status quo in any areas such as the environment where REUL plays a significant role."

The compatibility and preservation powers in the Bill have been drafted as concurrent powers allowing either the devolved Administrations or UK Ministers to use them in devolved areas, or acting jointly. Those concurrent powers mean that devolved Administrations do not necessarily have to put on hold their priorities or allocate significant resources if they wish to maintain the status quo. Do you not agree?

Dr Gravey: Thank you so much, first of all for having read the blog—

Ms Ghani: I will never get those hours of my life back. That is fine. Please carry on.

Dr Gravey: Just the fact of the need to map all retained EU law in the devolved sphere is something that the devolved Administrations had not planned to do, and are being asked to do. Whether we can restate everything or not, there is one thing that as a Minister you might be able to help us with. Through transposition back in the '90s or 2000s, a single SI might have been taken for the whole of the UK, even though it is an area of devolved competence. Can the different Administrations now each retain or amend that same SI differently? Can we have that kind of restatement of devolution powers?

There is a potential issue there. We are not sure what will happen when there was only one Brexit SI or one SI that was transposed back in the '90s. For example, in some cases, transposition has been done by primary legislation in Scotland but secondary legislation in the rest of the UK.

We have all these things that have to be mapped. The mapping itself will take a lot of time, as we know from past SIs work. On the devolved Administration point, a lot of the worry is just going through and potentially making the case that at this point they need to have the right to retain something, although it is perhaps revoked in England. The impression that I have from my engagement with the Administrations is that there are some concerns there. If the UK Government are willing to say, "Don't worry, even if it is the same SI, you can retain it while we revoke it", that will reassure the devolved Administrations a lot.

Michael Clancy: May I say that I do not think that concurrent and joint are the same thing? We talk about powers granted to devolved Administrations being conferred

concurrently and jointly. Concurrently means that they are used either by a UK Minister or by a devolved Administration independently of each another in devolved areas, whereas jointly means that a UK Minister and a devolved Administration are acting together. It is useful to get that kind of distinction on the record.

The Chair: Thank you, that is very helpful.

Charles Whitmore: While we are on the concurrency of the powers, I think this is a significant concern. It is a constitutional anomaly within our legislation that the UK Government can use concurrent powers in the Bill to legislate in areas of devolved competence without any form of seeking consent from relevant devolved Ministers. It is egregiously out of keeping not only with the Sewel convention, which is already under significant strain but with other EU withdrawal-related pieces of legislation.

Sections 6(7), (8), (9) and section 10(9) of the United Kingdom Internal Market Act 2020 require the UK Government to seek the consent of devolved authorities before making regulations and to publish a statement as to—if this is the case—why they are going ahead with that, despite potential devolved refusal. We have mechanisms in the European Union (Withdrawal) Act itself, and an intergovernmental agreement alongside, which provide a consent mechanism so that there is a recognition that this is a jointly shared space. It is quite odd that there is no consent mechanism of that nature in this Bill.

The Chair: Thank you, that is very helpful. I call Justin Madders.

Q145 Justin Madders: Do you think it would be helpful if there was some kind of protocol set out in the Bill to get legislative consent?

Michael Clancy: It might be difficult to get a protocol into the Bill, but if one recollects, in the United Kingdom Internal Market Act it was a long tussle between the Government and the other parliamentary participants in making reference to common frameworks in that measure.

One can say that under the EUWA arrangements for making retained EU law that had to be made by UK Ministers, a protocol was established between the Scottish Government and the Scottish Parliament where Scottish Ministers would indicate to the Parliament certain UK measures that would affect devolved matters. The Parliament would consider them and rank them according to whether they were significant or less so. Something like 83 separate orders were dealt with in that way, in terms of creating retained European Union law at that time over the period from 2018 to 2021.

Dr Gravey: If I can just add to that, of course a consent mechanism would be welcome, although we have seen some issues. What has been put in place for REUL around the withdrawal Act has been intergovernmental, so we are removing oversight in Parliament—both in Westminster and in the devolved Administrations—from the equation. They only come in because it is in the gift of the Scottish Government and Welsh Government to involve them, and because they have decided to involve them, but the agreement is between the UK Government and, for example, the Welsh Government.

Secondly, the absence of an Executive in Northern Ireland raises the question of how we can get consent. Can we have some kind of role for the civil service in Northern Ireland to grant consent? Can we have some role for the Northern Ireland Affairs Committee in the House of Commons to review some of this work? We do not know, but we need to think about it, because the absence of an Executive in Northern Ireland will be a rolling issue, and consent has to be rethought around that.

The Chair: Thank you very much—a final word from Mr Clancy.

Michael Clancy: That is a very important point about the role of intergovernmental relations in all this. We had a long period of reflection on intergovernmental relations, which resulted in the new structure being created earlier this year. One of its key aspects is that the relations should facilitate effective collaboration and regular engagement in the context of increased interaction between devolved and reserved competences in our new relationship with the EU and other global partners. The issue of intergovernmental relations has already anticipated that, and we should not necessarily want to reinvent the wheel. Instead, I suggest that we need to reflect on the structure of intergovernmental relations and see whether there is anything that can be developed or, alternatively, refocused on the issues that arise from the Bill.

The Chair: Thank you very much. There are no further questions, but you have given us a lot to think about. I am sorry for the technical glitch and the delay at the beginning, but thank you for your expert and excellent evidence. We will take it into account as we take forward our Committee proceedings.

Colleagues, I am afraid that brings us to the end of the time allotted—I know you will be upset—for the Committee to ask questions in this sitting. On behalf of the Committee, I thank the witnesses for their evidence. The Whip is about to prepare to move the adjournment, and the Committee will next meet on Tuesday 22 November for line-by-line consideration of the Bill. I cannot wait.

Ordered, That further consideration be now adjourned. *—(Joy Morrissey).*

5.22 pm

Adjourned till Tuesday 22 November at twenty-five minutes past Nine o'clock.

Written evidence reported to the House

REULB 01 Professor Charlotte Villiers, Professor of Company Law and Corporate Governance, University of Bristol Law School

REULB 02 Law Society of Scotland

REULB03 Equally Ours

REULB04 Employment Lawyers Association

REULB05 Bar Council

REULB06 Royal Society for the Prevention of Cruelty to Animals

REULB07 National Farmers Union

REULB08 New Forest National Park Authority

REULB09 Dr Martin Brenncke

REULB10 Civil Society Alliance

REULB11 Professor Maria Lee

REULB12 British Retail Consortium

REULB13 Consumer Scotland

REULB14 Lewis Silkin LLP

REULB15 Wildlife Trusts

REULB16 Hansard Society

REULB17 PETRA Network

REULB18 Harold Shupak

REULB19 Suffolk Coastal Port Health Authority

REULB20 A working mother from Cambridge

REULB21 Catherine Barnard, Professor of Law, University of Cambridge, and Deputy Director, UK in a Changing Europe; and Dr Joelle Grogan, senior researcher, UK in a Changing Europe