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)

CONTENTS

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

PBC (Bill 156) 2022 - 2023

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

© Parliamentary Copyright House of Commons 2022

This publication may be reproduced under the terms of the Open Parliament licence, which is published at www.parliament.uk/site-information/copyright/.

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