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GENERAL COMMITTEES

Public Bill Committee

RETAINED EU LAW (REVOCATION AND REFORM) BILL

Fifth Sitting

Thursday 24 November 2022

(Morning)

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Monday 28 November 2022

The Committee consisted of the following Members:

Chairs: † Sir George Howarth, Sir Gary Streeter

† Bacon, Gareth *(Orpington)* (Con)
† Bhatti, Saqib *(Meriden)* (Con)
† Blomfield, Paul *(Sheffield Central)* (Lab)
† Creasy, Stella *(Walthamstow)* (Lab/Co-op)
† Evans, Dr Luke *(Bosworth)* (Con)
† Fysh, Mr Marcus *(Yeovil)* (Con)
† Ghani, Ms Nusrat *(Minister for Industry and Investment Security)* (Con)
† 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

Public Bill Committee

Thursday 24 November 2022

(Morning)

[Sir George Howarth *in the Chair*]

Retained EU Law (Revocation and Reform) Bill

Clause 3

Sunset of retained EU rights, powers, liabilities etc

11.30 am

Question proposed, That the clause stand part of the Bill.

The Minister for Industry and Investment Security (Ms Nusrat Ghani): It is a pleasure to serve under your chairmanship once again, Sir George. The clause is a vital part of the Government's retained EU law reform programme and will make sure that EU rights, obligations and remedies saved by section 4 of the European Union (Withdrawal) Act 2018 cease to apply in the UK after 31 December 2023.

Justin Madders (Ellesmere Port and Neston) (Lab): It is a pleasure to see you in the Chair this morning, Sir George. Members will note that I am a little hoarse—please do not give me a sugar cube. I hope that means I will not be quite as lengthy as I was on Tuesday.

Hon. Members: Shame!

Justin Madders: We can try.

I want to say a few words about the clause, which will fit in with the discussion we will have on the following clauses. All these clauses pertain to the future of our law after the removal of the legal effects of EU law. I will try not to repeat myself and to focus specifically on the terms of this clause.

I begin by stating the obvious: as we untie ourselves from the European Union, we will clearly need a new settlement of legal principles. Nevertheless, we ought to treat the clause with some scepticism and scrutinise the impact it will have on our country's legal system. In doing so, we must consider why it was decided to take a snapshot at the end of 2020 in the first place.

When the country entered the transition period for leaving the EU, the potential for a legal vacuum to emerge rapidly became apparent, as the process of preserving EU legislation and EU-derived legislation made under section 2 of the European Communities Act 1972 began. Section 4 of the European Union (Withdrawal) Act 2018 was therefore designed to prevent such a legal vacuum once the 1972 Act was repealed, by catching everything that might have been missed and its legal effects.

I am saying that to highlight an important feature of the 2018 Act, which has been to maintain the smooth operation of our legal system while we formally left the EU. Clearly, it still has importance. Unless the Government are able to use the powers in clauses 12 to 15 to replace the effects of EU law exactly—although it is clear that they do not want to do that—we face the prospect of a legal vacuum.

I have a couple of questions for the Minister. First, does she agree that section 4 of the EU (Withdrawal) Act has provided an important function over the previous years in creating stability and certainty? Secondly, does she recognise the risk of a legal vacuum opening after 2023, and can she provide any assessment the Government have made of that risk?

As a matter of interest, I have just read on the front page of today's *Financial Times* that a wide range of groups, from the TUC to the CBI, have written to the Prime Minister requesting that the Bill be withdrawn. One reason they give is that it will create a vacuum and a great amount of legal uncertainty. I suspect that the Minister has not yet had a chance to discuss the contents of that letter with the Prime Minister, but if she has, will she update us? *[Interruption.]* The Minister's response suggests that she has not had that opportunity.

Such questions naturally lead us to the identification problem that we discussed on Tuesday. My understanding is that the dashboard sought to capture the examples under section 4 of the 2018 Act on retaining

"rights, powers, liabilities, obligations, restrictions, remedies and procedures".

Due to the dashboard's catch-all nature, however, can we be certain that all those have been picked up, given that even the Government admit that not all the regulations have been captured? How on earth can we be certain that serious vacuums will not be left by the removal of section 4 if we cannot be sure that we have identified everything affected by it? That is an important point.

Linking again to our debate on Tuesday about the timeframe in which such legal effects and legislative provisions need to be restated, replaced or revoked under clauses 12 to 15, we must not treat clause 3 in isolation. We must remember that what happens alongside the mountain of other pieces of EU legislation that need to be processed will be key to how the country moves forward. At the very least the Minister must try to offer us some reassurance—or, better yet, a plan that shows—that the Government have the matter in hand and will deal with all the legislative provisions and legal decisions before the 2023 deadline.

Overall, we agree that there has to be an end to EU supremacy in UK law, but we still have concerns about how that will operate in practice. We want to avoid a situation that the Government have known was coming for at least two years. I would be grateful if the Minister could provide some assurances to the Committee that action on the concerns that have been expressed by a wide body of representative groups is in hand.

Stella Creasy (Walthamstow) (Lab/Co-op): Good morning, Sir George. I rise to support the comments made by my hon. Friend the Member for Ellesmere Port and Neston. I also think that the debate on the clause sums up some of the practical challenges with the legislation. The retained EU law dashboard has

identified just 28 pieces of directly effective retained law under section 4 of the EU withdrawal Act—a mere amuse-bouche of laws that will be affected by the Bill overall. Given that the number is so small in comparison with the at least 2,500 that have been identified, and the possible 4,000, why could the Minister not show us what will happen next? After all, our debates on Tuesday were all about what would happen if we deleted every piece of legislation. There are no guarantees about what would happen next. Rather than assuming that all these pieces of legislation should go at the end of 2023, surely Ministers could commit to reviewing the 28 now and showing us the way ahead—whether some will be retained, amended or indeed abolished. Then the clause would not be required.

All of this does make a difference. For example, on Tuesday the Government gave their very first commitment on what will happen to one of the 4,000 pieces of legislation—the Bauer and Hampshire judgments about pensions. To remind Government Members, who may well have constituents coming to them about this, those are the requirements—the pieces of case law—that mean that if a company goes bust, people are entitled to at least 50% of their pension fund. The Government committed on Tuesday to abolishing those pieces of legislation, but they are affected by the clause.

The 28 pieces of legislation are not insubstantial; they could be the way forward for the Minister. Instead of requiring the clause, she could say, "We're going to look at the 28 and tell you what we're going to do with them," so that people can have confidence that we have an administrative process for these pieces of legislation and the suggestion that there has been scaremongering can be put aside. She could say, "Here are 28 examples of what we're going to do, and the fact that they are rights under section 4 of the EU withdrawal Act helps us to contain them as a piece of work."

The Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019 are another of the 28. Given that the Government are getting rid of the Bauer and Hampshire judgments, thereby affecting the pension rights and protections of our constituents, could the Minister set out what might happen on that one? She was very kind on Tuesday to set out an example of what will happen to one of the 28. It would be incredibly helpful for us as a Committee to understand the impact of the legislation and to perhaps start, if not to allay our concerns—I think Opposition Members are concerned when people's pension protections are being not just watered down but, frankly, abolished—then to understand what the Government's intentions are in using these powers.

I simply ask the Minister to use the clause stand part debate to explain why the 28 pieces of legislation could not have been dealt with in advance of the Bill, given that they stand on the EU withdrawal Act, and to tell us a bit about what will happen to them, to give us an indication of what horrors are to come or perhaps to reassure us. Government Members want to use the term "scaremongering". I use the term "accountability". I am looking forward to what the Minister has to say.

Ms Ghani: It is curious that Opposition Members say they do not want to prevent Brexit or accept the supremacy of EU law, but then they come up with every which way to stop these things actually being delivered.

The matters saved by section 4 of the EU withdrawal Act consist largely of rights, obligations and remedies developed in the case law of the Court of Justice of the European Union. Many of those overlap with rights already well established by domestic law, and those overlaps can cause confusion. The Bill allows the Government to codify any specific rights that may otherwise cease to apply if they consider it a requirement.

A question was raised about whether we are ending section 4 rights; that is not the case. Section 4 of the EU withdrawal Act incorporated the effect and interpretation of certain rights that previously had effect in the UK legal system through section 2(1) of the European Communities Act 1972. Section 4 rights largely overlap with rights that are already available in UK domestic law, and it is domestic legislation where they should be clearly expressed. This Bill seeks to rectify that constitutional anomaly by repealing section 4 of the 2018 Act. That does not mean the blanket removal of individual rights; rather, combined with other measures in the Bill, it will result in the codification of rights in specific policy.

Ministers in each Department, which will be responsible for their own elements of the Bill, will work with the appropriate bodies to ensure that they share what they will be assimilating, repealing and updating. All of that will provide additional clarity, making rights clearly accessible in UK law. That is why I recommend that the clause stand part of the Bill.

Question put and agreed to.

Clause 3 accordingly ordered to stand part of the Bill.

Clause 4

Abolition of supremacy of EU law

Question proposed, That the clause stand part of the Bill.

The Chair: With this it will be convenient to discuss the following:

Clauses 5 and 6 stand part.

New clause 8—*Conditions for bringing sections 3, 4 and 5 into force—*

"(1) None of sections 3, 4 or 5 may be brought into force unless all the following conditions have been satisfied.

(2) The first condition is that a Minister of the Crown has, after consulting organisations and persons representative of interests substantially affected by, or with expertise in the likely legal effect of, that section on a draft of that report, laid a report before each House of Parliament setting out, with reasons, the Minister's view as to the likely advantages and disadvantages of bringing that section into force, setting out in particular the effect of that section on—

(a) the rights of and protections for consumers, workers, and businesses, and protections of the environment and animal welfare;

(b) legal certainty, and the clarity and predictability of the law;

(c) the operation of the Trade and Cooperation agreement between the United Kingdom and the EU, and UK exports of goods and services to the European Economic Area; and

(d) the operation of the Protocol on Ireland/Northern Ireland in the EU withdrawal agreement.

(3) In relation to section 4, that report must take into account any regulation made or likely to be made by a relevant national authority under section 8(1).

(4) The second condition is that a period of sixty days has passed since that report was laid before Parliament, with no account to be taken of any time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days.

(5) The third condition is that, after the end of that period, both Houses of Parliament have approved a resolution that that section come into force.

(6) If both Houses of Parliament have approved a resolution that that section should not come into force unless it is amended in a way set out in that resolution, then the Minister may by regulation amend that section accordingly, and that section may not be brought into force until that amendment has been made."

This new clause requires Ministers to analyse, and to explain their analysis of, the effect of the removal of retained EU law rights, the principle of supremacy of EU law, and of the general principles. It also includes opportunity for Parliamentary approval and timeframes for laying reports before both Houses.

Justin Madders: I rise to speak to new clause 8, but before that I will address clauses 4, 5 and 6.

Clause 4 is a Ronseal clause: with regard to abolishing the supremacy of the EU, it does exactly what it says on the tin. However, unlike putting a coat of varnish on a fence, it will not be a case of simply walking away once it is done. It is inevitable that courts will need to consider case law that we have previously regarded as settled, because that law was settled when EU law was supreme, and it no longer will be. The reality is that none of us know where this clause is going to take us.

Most lawyers practising today know no other legal environment. The world has moved on in the last 50 years in ways that we could not have foreseen, and the law has moved with it, so any reinterpretation of the law needs to be done carefully. It must strike a balance between making changes where appropriate, based on our new position outside the EU, and maintaining some consistency and predictability for businesses and individuals who are trying to conduct their working and private lives within the ambit of the law. That is why some of our other amendments have attempted to create stability in terms of what the Government can control with these regulations, because we recognise that not even this Government can control the courts and which issues are litigated.

Section 5(2) of the European Union (Withdrawal) Act 2018 stated that the principle of the supremacy of EU law will continue to apply

"so far as relevant to the interpretation, disapplication or quashing of any enactment...passed or made before exit day."

That means that retained EU regulations would take precedence over pre-existing domestic legislation that is inconsistent with them. It also makes it clear that this does not apply to anything passed after 31 December 2020, so to some extent, supremacy of EU law has already entered history. What analysis has been done on the legal consequences of retrospectively altering the relationship between retained EU law and domestic legislation passed before 31 December 2020? Have the Government have done any analysis of this, and can they anticipate which areas will be prone to more legal challenge on the issue of supremacy?

I suspect that it will be impossible for any of us to say whether the consequences of removing the principle of supremacy would reduce the clarity of the law or change its effect in any particular case. However, the overall effect is that there will be a reduction in certainty and a risk of unpredicted—and perhaps entirely undesirable and unjust—consequences. What assessment has been made of the impact of the new level of uncertainty on business investment?

11.45 am

It is to the Government's credit that they have recognised that there is a risk of unjust or unintended consequences and have retained the power in clause 8 to, in essence, retain the supremacy of EU law over domestic legislation for any EU legislation up to 23 June 2026, but that prompts the question of what happens to any undesirable case law that emerges after that date—indeed, whether there will be any case law at all before that date is an open question, given the current state of court backlogs. There are also important questions about how the powers in clause 8 will be exercised, but we will save those for that clause. Suffice it to say that we do not think things will be quite as straightforward as the clause implies.

Clause 5 raises serious questions about how the abolition of the general principles of EU law will impact on any retained EU law, as it will now inevitably throw into doubt the meaning of all retained European Union law. This will also affect primary legislation that was intended to implement EU obligations and that would have been interpreted in the light of the general principles of EU law and the rights and duties flowing from the EU. Let us remind ourselves what the terrible, unconstitutional principles of EU law are: legal certainty, equal treatment, proportionality and respect for fundamental rights.

I would be interested to hear from the Minister why the Government feel that they can no longer support any of those principles in UK law. Can she also tell us how many pieces of primary legislation will be affected by the clause? What elements of that legislation will be affected, and which Departments are likely to have to reconsider and possibly redraft primary legislation as a result of judicial interpretation? Have any steps been taken at all to assess the effect of the provisions? Again, will we see increased uncertainty and reduced investment, but richer lawyers, as a result of the clause?

I will not ask the Minister how many cases over the last 50 years have been decided in line with the principles of EU law, as I do not think that anyone could reasonably be expected to put a number on that, but she ought to be able to explain how the Bill will affect our constituents. We are talking about half a century of case law being replaced by a vacuum that, because of the way the Bill is drafted, can only be filled by litigation. The lawyers really will be the ones who benefit from the Bill.

Decisions that have been interwoven into our legislation and that affect key workplace rights and protections will now be open for question—for example, protections around discrimination, equal pay, and maternity and paternity have developed a whole line of case law over time. Separating out the decisions that have been made on such pieces of law on the basis of EU-derived principles will have consequences that I believe the Government should look to address. To give one example, the removal of the ability to make claims for equal pay for work of equal value that is done by different sexes is a well-established principle that is at risk as a result of the clause. Of course, the new figures released at the weekend show just how far we still have to go in resolving the quest for equal pay.

How will the Government address those questions? Are they content for the law to be reshaped organically by the courts instead of by Parliament? That will inevitably lead to more delays, as more and more test claims are brought in a court system already beset by backlogs. The Government will need to clarify the law, and such cases will be pursued at a cost to the individuals bringing the claims, along with very high legal fees—running to thousands of pounds—to bring appeals to the appeal courts. In practice, that will mean that the reshaping of the law will be driven by those with the deepest pockets, not those with the most just arguments. That is not the way we should look to reshape our law.

I understand the idea that, if we have the left the EU, the principles of EU law should no longer apply, but if we decide as a Parliament that those are good principles and worth keeping, and that we value factors such as legal certainty, we should be saying that as a Parliament. By tabling new clause 8, we are trying to get some sense of order into all this.

Many of the legal experts we heard from during the evidence sessions spoke about the impact of the Bill. They almost spoke in chorus about the abnormality of, and their concern about, how little opportunity there was for parliamentary scrutiny and consultation. Some of the most knowledgeable people in the country are raising concerns about the impact of providing the Executive with such unchecked powers and about the huge vacuum that the Bill will create. We should listen to those concerns. I wish to move new clause 8 to rectify the lack of scrutiny and consultation in the use of powers afforded by clauses 3, 4 and 5.

We now have nearly less than a year to deal with these crucial matters, which is testament to a weak Government that do not have the confidence to address the practical, legal and various political consequences of our disentanglement from the EU. The most salient question is: why would the Government want to jeopardise important legal precedents in the UK's case law by rushing to remove them without adequate levels of scrutiny or due consideration of the impact?

The terms of the new clause are simple. After stating in subsection (1) that the new clause will place requirements on the proper use of clauses 3, 4 and 5, subsection (2) begins by detailing the conditions on which powers can be legitimately used. In particular, the subsection states that the Government must consult

"organisations and persons representative of interests substantially affected by, or with expertise in the likely legal effect of"

the Government's use of clauses 3 to 5. It mandates that a report from the consultations be produced and laid before both Houses and include the relevant Minister's view on

"the likely advantages and disadvantages of bringing that section into force",

with a particular focus on basic protections for consumers, workers, businesses, and the environment and animal welfare. We have heard already in Committee that there does not seem to be a great deal of support for maintaining those protections.

The report must also focus on legal certainty in terms of clarity and predictability of law, and the operation of the trade and co-operation agreement between the UK and EU, as well as the effect on the exports of goods and services to the European economic area. It must also consider the operation of the protocol on Ireland and Northern Ireland in the EU withdrawal agreement. I hope Government Members recognise that those are all important matters that will impact on our constituents' lives and the prosperity of the whole nation for years to come. The Government should want to know the consequences of the Bill before they enact it.

I cannot see why there would be any objection to taking such a sensible step. Perhaps there will be some grumbling or concern about administrative costs or burdens. Admittedly, there will be some costs in terms of laying reports before both Houses, but it stands to reason that any credible Government would have already carried out such assessments, or at the very least planned to do so in the very near future. Besides, the small costs associated with placing such assessments into the public domain are no doubt good value not just for the sake of transparency, but for the confidence it will instil in businesses about where the future legal landscape will lie.

Neither should there be opposition to the principle of conducting such scrutiny. It is simply due diligence. We are embarking on a process that will completely alter how the law operates in our country. The new clause simply reintroduces a level of scrutiny in the form of consultation and, in later subsections, parliamentary oversight over how the UK's legal system will be altered.

Returning to the point of scrutiny that I began with, and that we have talked about many times, it is one of the more concerning elements of the Bill. We are expected throughout the Bill to submit to unchecked ministerial power in good faith. New clause 8(4), (5) and (6) attempt to address that. Subsection (4) deals with the necessary timeframes. To ensure that there is ample time to understand the implications of the reports laid before the House, subsection (4) states that the reports must stay in Parliament for a period of 60 days when it is sitting. That will not only give both Houses enough time to study the impact of the Government's plans, but will help prevent the Government from using the sunset as a means to rush through unsatisfactory changes—a problem not limited to the use of the powers here.

New clause 8(5) and (6) introduce the parliamentary approval that the Bill severely lacks throughout. Once the 60-day period has been completed, both Houses will have to approve a resolution to bring the relevant subsections (3), (4) or (5) into force. Crucially, under the new clause, if either House finds the subsection to be unsatisfactory, it will simply not come into force. If that is the case, both Houses will need to pass a resolution that includes a recommendation to amend the subsection so that their concerns are addressed to secure approval. The Minister would then need to act on such a recommendation. I believe that that is a reasoned approach. It has been guided by the evidence that we have heard, and would utilise the wealth of knowledge and experience contained within both Houses on the impact of such dramatic changes. We want to ensure that all eventualities have been considered and have gone through the proper channels of consent, especially on an issue as crucial as our law.

This new clause would achieve that, and the only additional cost would effectively be parliamentary scrutiny time. Rather than giving ministerial authority, it would make the decisions more transparent and more accountable. It would see that issues that are important to all of our

constituents, such as consumer rights and workers' protections, are at the forefront of our discussions and debates.

Of course, it would also ensure, as we have said many times, that Parliament actually takes back control of the process and does not give it away, not just to Ministers but to lawyers and judges, who will pursue cases in the interests of their clients. There is nothing wrong with that, but it risks a lopsided development of the law and could bring forward legal principles and developments that we cannot foresee and certainly cannot control.

Paul Blomfield (Sheffield Central) (Lab): I wish to make a relatively brief point, anticipating what the Minister might say on the basis of her response to comments on clause 3. It is worrying, when we are trying to have a serious consideration of the Bill, that serious questions either from our Front Bench or from my hon. Friend the Member for Walthamstow are met with the suggestion that we are, in some way, trying to deny Brexit.

I think we need to be clear on this: we campaigned to remain in the European Union; the majority of Conservative Members campaigned to remain in the European Union; but we lost and we left. There is no going back; none of us is arguing for it—no rejoining the EU, no rejoining the single market, no rejoining the customs union. But there are choices in the way that we manage our future outside of the EU. That is what we are trying to deal with, because we want to make the right choices, and are worried that the Government are not.

I have come to this session from a meeting of the UK Trade and Business Commission, which is a cross-party, cross-industry body looking at the trade opportunities and trade implications of our departure from the European Union. Both the British Chambers of Commerce, which gave evidence to us this morning, and the TUC expressed huge concern about the uncertainty created by the provisions in clauses 4 to 7 and the potential for businesses and workers to get lost in a legal quagmire from which, as my hon. Friend the Member for Ellesmere Port and Neston says, only the lawyers will benefit. Given the current backlog of such cases in our courts, that uncertainty will last for some time.

Will the Minister address the concerns that were raised by the Bar Council, whose evidence I know she will have read? It warns about,

"creating uncertainty as to the meaning and status of such REUL by removing established principles by which it is to be interpreted, altering its status vis-à-vis other law, and nudging the courts towards departing from EU case-law that interprets it."

I hope that the Minister will respond to the questions asked by my hon. Friend the Member for Ellesmere Port and Neston, because the evidence then says:

"We detect no sign that any assessment has been done as to the legal effect of those changes on the regulations concerned (despite their importance) and can therefore detect no policy rationale for those changes whatsoever."

I hope that, in her remarks, the Minister will address those points.

Stella Creasy: My hon. Friend the Member for Sheffield Central is absolutely right. This is not about whether Brexit has happened. We all know that Brexit has happened. We have left the European Union, and, frankly, it reflects an intellectual insecurity about the legislation if that is the only response that the Government can come up with—if they cannot actually engage in defending their proposals but try to take us on to a completely different debate.

That matters because millions of people across the country are dealing with the consequences of Brexit on a daily basis, none more so than our friends and family in Northern Ireland. I rise to ask the Minister to put aside the constant talk about, "Well, if you disagree with this, if you want to ask these questions, it's cos you didn't agree with Brexit," and to do justice to the people of Northern Ireland.

12 noon

On Tuesday, we talked very briefly about the Schleswig-Holstein dispute and the fact that it was a dispute between Denmark and Germany about a territory. History is littered with such instances, whereby people suffer, whereby there are refugees and whereby such disputes define political and geo-diplomatic discourse for generations to come.

In Northern Ireland, there is an incredibly difficult balance, which we know has been unbalanced since Brexit happened. We also know that one of the things that is causing real pain to people in Northern Ireland is having to maintain dual systems, because it is not clear to businesses in Northern Ireland which pieces of legislation they have to follow.

Supremacy, which this clause attacks, is one of the ways in which that situation is resolved. Government Members can dismiss everything that we have to say, but they need to look our friends and neighbours in Northern Ireland in the eye and say, "We are doing everything we can to make sure the peace holds and to uphold the Good Friday agreement." I say that because supremacy is particularly important when it comes to the Good Friday agreement and given that this clause abolishes supremacy of EU law in Northern Ireland as well, we need to understand from the Minister—if she does not answer this question, that would be very serious—what impact the clause will have on the protocol, because the protocol at the moment is obviously under pressure and is clearly a matter that has some real consequences for the lives of people in Northern Ireland.

If the Government are hoping to tear up the protocol, that would be an extraordinary moment in the history of Northern Ireland, so the Minister owes us the justice of a serious response to a set of serious questions, not only about legal uncertainty but about supremacy and how the clause will operate in Northern Ireland. I hope that she will respond with courtesy and dignity. Whatever disagreements and debates we may have had about Brexit—as I say, Labour Members are now perfectly content that that has happened; the argument has been lost and we are moving on—doing the people of Northern Ireland the justice of answering questions about, and engaging directly with, this concept of supremacy and saying what it means for Northern Ireland is important, so that they can start to have some of the certainty about what their future will hold that they desperately require.

The Chair: Before I call the Minister to respond, the hon. Lady prayed in aid the Schleswig-Holstein affair. Without interfering in the politics of the debate, I think

that a more appropriate comparison might be Zollverein in Germany or Risorgimento in Italy, which were all about the assertion of the rights of nation states.

Ms Ghani: This is turning into a very interesting morning indeed, Chairman.

I rise to resist new clause 8. This new clause seeks to set conditions on the commencement of clauses 3, 4 and 5 of the Bill. I will explain to the right hon. Member for Ellesmere Port and Neston why we are making the changes in these clauses.

Each clause is vital to this Government's programme to reform retained EU law. That there are still circumstances where retained EU law takes precedence over UK law is not consistent with our status as an independent nation. The principle of EU supremacy must be ended without delay. These amendments would add further delay by requiring the Government to write reports on items to which we have already committed. As set out already, the Government have committed to ensuring that the necessary legislation is in place to uphold the UK's international obligations, which includes maintaining the UK's obligations under the trade and co-operation agreement or the Northern Ireland protocol. We will come on to consider an amendment that will allow us to spend more time discussing that issue.

This Bill will not lead to legal uncertainty—to have perfect legal certainty would mean that we would forever keep the same laws. Our approach is to improve accessibility and legal clarity by codifying, where necessary, rights and principles expressly into domestic statute.

With regard to the delegated powers in the Bill, the Government are committed to ensuring robust scrutiny for the secondary legislation made under these powers while ensuring the most effective use of Parliamentary time; I believe, Chairman, that we spent many hours discussing this issue just on Tuesday. This means that legislation made using the delegated powers in the Bill will be subject to either the negative or draft affirmative procedure, depending on the legislation that is being amended and the power used. A sifting procedure will also apply to regulations to be made under the power to restate, which affords additional scrutiny of the use of power.

Clause 4 ends the principle of supremacy of retained EU law in so far as it applies to pre-2021 legislation. The clause establishes a new priority rule, which ensures domestic legislation prevails over retained direct EU legislation where there is a conflict. Thanks to the clause, an Act of Parliament will once again be the foremost law in the land. Clause 5 ensures general principles of EU law will no longer be part of the UK statute book from the end of 2023. Clause 6 establishes that after the end of 2023 all retained EU law preserved from the sunset provisions will be known as "assimilated law".

In response to some of the questions raised, I put on the record once again that the rulebook does not seek to remove rights. In most instances, those rights already operate and are available in domestic legislation. The rulebook contains provisions to enable the UK Government and the devolved Administrations to safeguard the rights and protections of citizens of the United Kingdom. The Bill includes a restatement power so that Departments can codify rights into domestic legislation.

On Tuesday, we spoke at length about scrutiny, the sifting process and the role that Parliament will play, so I am not sure what further response I can make today. That programme has been made clear. The Government recognise Parliament's significant role in scrutinising statutory instruments to date and are committed to ensure appropriate scrutiny of any secondary legislation made under the Bill's delegated powers.

Changes in the law can give rise to litigation—that is normal—but we would never change the law if people wanted no change whatsoever. The risk will be mitigated in areas where Departments use the Bill's powers to maintain the effect of our current law, if necessary, for desired policy outcomes. In other cases, proactive management of the removal of retained EU law will allow a controlled and positive introduction of a new legal regime that seeks to mitigate any risks posed by increases in litigation. For instance, the Bill contains powers allowing the Government to retain the current legislative hierarchy between specified pieces of legislation. The effects of repealing supremacy will only be considered relevant to matters arising after the enactment of policy. The change is not retrospective, and cases that have already been concluded will not reopen. Upon finding that pre-2021 domestic law is incompatible with retained EU law, courts may place conditions in the incompatibility order to mitigate the effect of that finding.

Justin Madders: I did posit in my opening remarks the principles of EU law that will be jettisoned. In the example of legal certainty and equal treatment, does the Minister consider that those principles should no longer be part of UK law?

Ms Ghani: That assumes that we would not be treating people equally and fairly, and that is not the case when we legislate in the UK. I do not buy the idea that without EU law we are incapable of governing fairly in the UK. We are all elected to Parliament to represent our constituents, and we want to go home and tell our constituents, regardless of who they are and where they are from, that we are legislating fairly for everybody.

Why are we removing the principle of EU supremacy? That principle means that pre-2021 domestic law must give way to some pieces of retained EU law when the two conflict. That ensured legal continuity at the end of the transition period, but it is constitutionally anomalous and inappropriate, as some domestic laws, including Acts of Parliament, are subordinate to some pieces of retained law. That is the nub of the issue. We either accept the supremacy of the EU or accept the supremacy of this place. We can go round and round, but only one can prevail, and the Government believe that this Parliament should be supreme.

On the protection of fundamental rights and the equality principle, the principle of fundamental rights is generally not the exclusive preserve of the EU. We are proud of the history of the UK legal systems in which common law principles and legislation are well established to protect fundamental rights. For example, the principle of equality before the law is rooted deeply in British law. It was in 1215 that Magna Carta first acknowledged that British people had legal rights and that laws could apply to kings and queens too. The Equality Act 2010 has, to date, brought together more than 116 pieces of legislation into a single Act—a streamlined legal framework

[Ms Ghani]

to protect the rights of individuals and to advance equality of opportunity for all. There is no equivalent to that Act in EU law, which shows how important it is that we are able to express principles such as equality before the law in a UK statute rather than relying on principles of EU law.

Mr David Jones (Clwyd West) (Con): Does my hon. Friend not agree that a particular strength of our domestic legal system is the principle of stare decisis, whereby there is a strict rule that cases are followed in terms of precedent, which does not apply in the case of EU law?

Ms Ghani: Exactly. My right hon. Friend is incredibly knowledgeable on all those issues, and I am more than happy to defer to him; he is absolutely right. We reject new clause 8.

Justin Madders: I will first address the intervention of the right hon. Member for Clwyd West. The point of clause 4 is that it removes the ability of the courts to refer to precedents from any decisions that have been taken in accordance with EU law, so it is worrying that the right hon. Member makes such comments.

The Minister said that we must decide whether we accept the supremacy of Parliament. We absolutely do, which is why so many of the amendments that we have tabled are about giving Parliament back control, not handing power to Ministers or, in the case of this clause, handing power to lawyers and judges to decide how our law moves forward.

I thank the Minister for promoting me to a right hon. Member—that was very kind of her. She also said that new clause 8 would delay matters. It will not. If the Government are on top of things, which I would like to think they were, they should be doing this work anyway. They should be doing this analysis in a way that enables Parliament to scrutinise the effect of the Bill.

Stella Creasy: Does my hon. Friend recognise that the Minister did not utter the words "Northern Ireland", and did not at all address the question of how supremacy will be resolved in Northern Ireland, which follows both EU and UK legislation? I see that she is being given a note, so perhaps she can do us the courtesy of responding to that question.

Ms Ghani *rose—*

Justin Madders: I can allow the Minister to intervene on me.

Ms Ghani: On a point of order, Sir George.

The Chair: The Minister might care to intervene on the hon. Member who is speaking. That does not require a point of order.

Ms Ghani: The hon. Member for Walthamstow was inaccurate. *Hansard* will show that I did mention Northern Ireland; I made that clear. An amendment that we will consider later today will allow us to do justice to the issue.

The Chair: I am grateful to the Minister for the clarification.

Justin Madders: We will be returning to Northern Ireland, as the Minister says. She said that the Bill will not add legal uncertainty. I am afraid that that is exactly what it will do, and it is exactly what the bulk of evidence from every legal representative who has contacted the Committee shows. By abolishing principles that have been in formation for half a century, we will be in a new era and will have to develop new legal principles. That can only create uncertainty.

It is worth reflecting on the letter to which I referred earlier, which is reported in the *Financial Times* today. It was sent by about a dozen organisations, including the Trades Union Congress and the Chartered Institute of Personnel and Development, that have a huge interest in ensuring that the law is fair and certain. The letter warns that the Bill

"would upend 'decades-worth of case law' and create 'a huge risk of poor or potentially detrimental law entering the statute book'".

We should be listening to these people; they know what they are talking about. They have looked at the effect of the Bill and believe it will not do what some think it will. It will not be a rerun of 2019, although the Conservatives would like us to go back to 2019, because they were ahead in the polls then. We have left the EU. This legislation is about how we move forward, but I am afraid that there has been a complete failure to address the consequences of its provisions. We will be coming back to the issue for years to come, because there has been a shocking lack of forethought about the Bill's implications. I will press new clause 8 to a vote.

Question put and agreed to.

Clause 4 accordingly ordered to stand part of the Bill.

Clauses 5 and 6 ordered to stand part of the Bill.

Clause 7

Role of courts

12.15 pm

Alex Sobel (Leeds North West) (Lab/Co-op): I beg to move amendment 79, in clause 7, page 4, line 32, at end insert—

"(d) the undesirability of disturbing settled understandings of the law, on the basis of which individuals and businesses may have made decisions of importance to them;

(e) the importance of legal certainty, clarity and predictability; and

(f) the principle that significant changes in the law should be made by Parliament (or, as the case may be, the relevant devolved legislature)."

This amendment adds further conditions for higher courts to regard when deciding to diverge from retained EU case law.

I will not speak for as long as I did on Tuesday, when I recited many different chemicals and species. I will also disappoint my hon. Friend the Member for Walthamstow by not mentioning killer shrimp. My contributions from now on will be pointed, seeking clarity from the Minister.

Through amendment 79, for which we are indebted to the Bar Council, we seek to expand clause 7 to make clear the important legal and constitutional principles that will be taken into account by the courts. The

amendment directs higher courts, when deciding whether to depart from retained EU case law, to consider the well-established and, we hope, uncontroversial principles of legal certainty and regulatory stability. It would be helpful if the Minister could say whether she and the Government accept those legal principles and, if so, whether she agrees that higher courts should have regard to them when deciding whether to depart from retained EU law.

The amendment aims to safeguard the important constitutional principle that a significant change to the law, including a change to established case law, should be made by Parliament or the relevant devolved legislature. Again, does the Minister accept that fundamental constitutional principle and, if so, that it should guide the courts' decisions under clause 7? She may not be in a position to accept the amendment, but I hope that she can make a simple and straightforward statement that she and the Government agree that the three legal constitutional principles set out in it must be maintained and respected by the courts.

Ms Ghani: I rise to resist amendment 79, which puts in place too high a bar for UK courts to depart from retained case law, including judgments made and influenced by the EU courts. Clause 7 will free our courts to develop case law on retained EU law that remains without being unnecessarily constrained by the past judgments of these new foreign courts. The clause introduces a new test for higher courts to apply when considering departure from retained EU case law. The test gives higher courts greater clarity on the factors to consider, and greater freedom to decide when it is appropriate to depart from retained EU case law. The amendment, however, would reinforce the excessive influence of the European courts and judgments on our domestic courts, and limit judges' ability to decide to depart from retained EU case law, as should be their right and responsibility. I therefore ask the hon. Gentleman to withdraw the amendment.

Alex Sobel: We will not push the amendment to a vote, but the Minister did not give us sufficient clarification. I am sure that when we progress we will continue to hear the opinions of other bodies in relation to retained case law. That is really important as the Bill progresses through the House and into the other place.

Stella Creasy: The Government might not listen to Opposition Members, but they might listen to the Office for Environmental Protection, which, after all, they set up. It said:

"In making it easier for courts to depart from environmental retained case law, the Bill is likely to lead to uncertainty as it will be unclear whether long-established precedents will continue to be followed. This could result in unnecessary, costly legal proceedings. Consideration should also be given to whether this could also result in a reduction in environmental protection (where protections have been established through case law) and how this will be addressed."

Does my hon. Friend agree that those critical points need to be addressed?

Alex Sobel: Absolutely. Agencies such as the Environment Agency, Natural England and the Office for Environmental Protection use these regulations and case law all the time. They have evolved over time in many areas—water, nature and so on. There is now a real danger to those provisions, so I hope the Minister will consult with her colleagues in the Department for Environment, Food and Rural Affairs and ensure we are not unable to undertake regulatory and enforcement action on the environment.

Mr Jones: The hon. Gentleman mentions the danger of departing from precedent, but is that not substantially mitigated by clause 7(2)?

Alex Sobel: Having seen the opinions of different agencies—my hon. Friend the Member for Walthamstow mentioned the Office for Environmental Protection—and heard the evidence of the Bar Council, I am not sure that is the case.

Mr Jones: I hesitate to intervene again, but it is specifically provided for in clause 7(2) that, although precedent may not apply in the case of European decisions, it does in the case of domestic decisions. Of course, European courts are not bound by precedent, so we have a significant safeguard in clause 7(2) against the risks that the hon. Gentleman mentions.

Alex Sobel: I know from my brief in the shadow DEFRA team that some very important enforcement actions are extrapolated from European case law, because we were under the aegis of the European Court of Justice for a very long time. It is important that we are mindful of that.

Stella Creasy: Obviously the Bill also enshrines the idea that protections can only be watered down, because it says that nothing can be brought in that increases burdens. Of course, courts are free to set new precedents, but when this Bill is enacted only precedents that reduce protection can be set. That is why the Office for Environmental Protection is concerned.

Alex Sobel: I fear we may be straying into future debates. I will not take much longer—I take your lead, Sir George. We will have further discussions about burdens and regression, so I will not labour that point. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Brendan O'Hara (Argyll and Bute) (SNP): I beg to move amendment 38, in clause 7, page 5, line 39, after "court)" insert

"in England and Wales or Northern Ireland".

This amendment, together with Amendments 39 to 47 and (a) to Amendment 5, would remove the Scottish courts and Scottish law officers from the case law reference procedure provided for by new sections 6A, 6B and 6C of the EU Withdrawal Act 2018.

The Chair: With this it will be convenient to discuss the following:

Amendment 39, in clause 7, page 5, line 42, leave out from "Court," to the end of line 2 on page 6.

See explanatory statement to Amendment 38.

Amendment 40, in clause 7, page 6, line 35, after "court)" insert

"in England and Wales or Northern Ireland".

See explanatory statement to Amendment 38.

Amendment 41, in clause 7, page 7, leave out lines 4 and 5.

See explanatory statement to Amendment 38.

Amendment 42, in clause 7, page 7, line 19, leave out from "Court," to the end of line 21.

See explanatory statement to Amendment 38.

Amendment 44, in clause 7, page 8, line 40, leave out

", the Advocate General for Scotland".

See explanatory statement to Amendment 38.

Amendment 45, in clause 7, page 9, line 2, after "court", insert

"in England and Wales or Northern Ireland".

See explanatory statement to Amendment 38.

Amendment (a) to Government amendment 5, in line 4, leave out "(b) the Lord Advocate".

Amendment 46, in clause 7, page 9, leave out lines 10 and 11.

See explanatory statement to Amendment 38.

Amendment 47, in clause 7, page 9, line 11, after "legislation" insert

", or to the retained functions of the Lord Advocate (within the meaning of section 52(6) of the Scotland Act 1998)".

See explanatory statement to Amendment 38.

Brendan O'Hara: Anyone sufficiently interested in knowing the list of amendments I am addressing can read them in *Hansard*. As we have heard, clause 7 seeks to relax domestic rules on judicial precedent, which will make it easier for appellate courts across the UK to depart from retained case law. The clause also delivers a mechanism by which courts of first instance can depart from otherwise binding retained case law. I therefore very much welcomed the Labour party's amendment 79, and supported its efforts to tidy up this section of the Bill. Labour Members are right to point out that the Government's proposals are driven by ideology, and that they have not considered the legal uncertainty and complications that will now almost certainly prevail.

We heard from Professor Catherine Barnard in an evidence session, who warned that:

"The way in which the legal system has worked and has run successfully over the decades is on the basis of incremental change rather than this really quite remarkable slash and burn approach proposed"—[*Official Report, Retained EU Law (Revocation and Reform) Public Bill Committee,* 8 November 2022; c. 15, Q26.]

That is exactly what this is: slash and burn. It is another example of how the now-departed brains behind this whole operation were moving with undue haste, total disregard for the consequences of what they were doing, and the obvious fear that a more considered approach would reveal the multitude of problems that will come with this plan.

Indeed, Alison Young, professor of public law at Cambridge University, warned us of the extreme uncertainty that could come from these new legal arrangements, saying:

"Those carrying out business and trade need legal certainty, so that they have an understanding of the rules, now and going forward."

She added that

"the issue is that those carrying out business will not necessarily be 100% sure whether things will be retained in the long term. If so, how they will be retained? Has everything that might be revoked been listed? They are not 100% sure whether it has been revoked or not."—[*Official Report, Retained EU Law (Revocation and Reform) Public Bill Committee,* 8 November 2022; c. 14, Q25.]

That is a recurring theme throughout these proceedings.

It is against that backdrop that we have tabled these amendments, which, although plentiful in number, are all intended to do the same thing: remove Scots law wholly and entirely from this part of the Bill. I make no apology for repeating that this is not our Brexit. Scotland did not vote for Brexit. We did not vote for this reckless piece of legislation and, quite simply, we want nothing to do with it.

Government amendment 5 is another example of the UK Government completely failing to understand Scotland or our legal system. Although I welcome the amendments in so far as they go to repair the poorly drafted first version of the Bill, with the Lord Advocate now having his or her proper place in the functions of it, it pains me that Scotland has been dragged into this mess at all. Indeed, so great is the concern about the impact of the Bill on Scots law that I understand our amendments have been directly communicated to the Secretary of State by the Scottish Government's Cabinet Secretary for the Constitution, External Affairs and Culture, Angus Robertson. I hope that, in that spirit, the Government will now accept them.

Ms Ghani: There is too high a bar for UK courts to depart from retained case law, including judgments made and influenced by EU courts, so I rise to resist amendments 38 to 42 and 44 to 47. Clause 7 will free our courts' developed case law and retained EU law that remains in force, without being unnecessarily constrained by the past judgments of these foreign courts. The clause will introduce new tests for higher courts to apply when considering whether to depart from retained EU case law and retained domestic case law. Lower courts will also be given greater freedom. They will be able to refer points of law relating to retained case law to higher courts for a decision, which, if successful, could result in the lower court departing from retained case law where it would otherwise be bound by it, enabling a faster and more dynamic evolution of our domestic case law away from the influence of EU law.

The clause also provides UK Government Law Officers and Law Officers of the devolved Administrations with the power to refer points of law arising on retained case law to the higher courts where proceedings have concluded. It will give Law Officers the power to intervene in cases before the higher courts and present arguments from them to depart from retained case law. This will ensure the appropriate development of the law as we move away from the influence of EU case law and the rules of interpretation.

The amendments would remove the Scottish courts and Law Officers from the lower to higher court reference procedure and from the Law Officer reference procedure. However, consistent with EU exit legislation, these measures in the Bill will apply to the whole UK. This will give courts in all four of our great nations greater freedom to develop case law unimpeded by the excessive influence of the European courts. In addition, amendment 47 would give Law Officers of the devolved Administrations the power to intervene in reserved matters, which is not constitutionally appropriate.

Proposed new section 6C of the European Union (Withdrawal) Act 2018, established in clause 7 of the Bill, gives Law Officers the power to intervene in cases before the higher courts and present arguments for them to depart from retained case law following the new tests for departure in the Bill. These provisions are framed so that Law Officers may exercise the intervention powers on behalf of their respective Governments in cases where other Ministers or the Government as a whole have a particular view on the meaning and effect of relevant pieces of retained EU law for which they are responsible.

In the light of a new test for departure from retained case law, the powers will allow the Law Officers to bring such matters before a higher court for a decision after hearing the relevant Government's view on the correct interpretation of relevant retained EU law. Consequently, it is right that the intervention power is not available in relation to points of law that concern the retained functions of the Lord Advocate as a prosecutor. Those functions concern legislation that is reserved to Westminster. The structure of the Law Officers' powers is consistent with the established position of the Lord Advocate within the Scottish Government, as in other contexts the structure rightly allows the Lord Advocate to represent the Scottish Government's views on the interpretation of devolved legislation, but not legislation that is reserved to Westminster.

12.30 pm

Peter Grant (Glenrothes) (SNP): It is clearly not for me to comment on the best way for a Department for domestic English affairs to rule on what English courts and English Law Officers can do and must do. Equally, it is not for anybody here, including those of us from Scotland, to change the rules on what the Law Officers and courts of Scotland can do and must do—that is exclusively for the Parliament of Scotland.

Given the importance that the Prime Minister and the Secretary of State for Scotland repeatedly attached yesterday to the need for consensus when considering any change to the relationship between our two nations, will the Minister confirm that the consensus principle works in both directions, and that no changes will be made to the powers and responsibilities of Scotland's Law Officers or Scotland's courts without the explicit consent of the Scottish Government?

Ms Ghani: As I just said, the structure of the Law Officers' powers is consistent with the established position of the Lord Advocate within the Scottish Government, as in other contexts the structure rightly allows the Lord Advocate to represent the Scottish Government's views on the interpretation of devolved legislation, but not legislation that is reserved to Westminster. For those reasons, I ask the hon. Member for Argyll and Bute to withdraw the amendments.

Peter Grant: I do not know whether the Minister fully understood the significance of my question. We have not tabled the amendments because we think that the power is being given to the domestic Law Officers and courts of England—that is not for us to comment on. It is not even that we think that what is being proposed is wrong for the domestic Law Officers and courts of Scotland. However, what is completely wrong is for the domestic Parliament of England to legislate on the legally separate legal system of Scotland against the clear objections of the domestic Parliament of Scotland, which speaks on behalf of the sovereign people of Scotland.

If the Minister is convinced that what is proposed in the Bill is in the best interests of justice in Scotland, and if she can persuade the Scottish Parliament, the Scottish Government and the Scottish Law Officers that that is the case, there is no question but that the Scottish Government and Scottish Parliament will legislate on those terms. However, on the day after the Prime Minister and the Secretary of State for Scotland insisted that the relationship between our nations must be based on consensus, the Minister is proposing to drive a coach and horses through that consensus by insisting that this Minister and this Parliament have the right to interfere in the domestic affairs of another nation in this Union. That is a serious breach of the guarantees contained in article 19 of the Treaty of Union, and it is not acceptable.

I invite the Minister to come back, should she so wish, and advise the Committee. In preparation for the Bill, has she had any advice whatsoever on the application of article 19 of the Treaty of Union? Does she know what it says?

Brendan O'Hara: I absolutely associate myself with the comments made by my hon. Friend the Member for Glenrothes. It is for the Scottish Parliament and the Scottish Law Officers to decide what they can and cannot do and it is not for this place to impose that. I have always imagined that, in a partnership of equals, each partner has their voice listened to and their opinions respected. Clearly, the Union is not the partnership of equals that we have been led to believe it is. Scots law has always been independent, and it ill behoves the UK Government to try to ignore the democratically elected Scottish Parliament and the Scottish Law Officers, but I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Brendan O'Hara: I beg to move amendment 35, in clause 7, page 7, line 4, leave out

", if the point of law relates to the meaning or effect of relevant Scotland legislation".

This amendment, together with Amendment 36, modifies the points of law on which the Lord Advocate may make a reference under the new section 6B of the European Union (Withdrawal) Act 2018 so that it is not restricted to points of law which relate to the meaning or effect of relevant Scotland legislation.

The Chair: With this it will be convenient to discuss the following:

Amendment 37, in clause 7, page 7, line 5, after "legislation" insert

", or to the retained functions of the Lord Advocate (within the meaning of section 52(6) of the Scotland Act 1998)".

This amendment modifies the points of law on which the Lord Advocate may intervene under the new section 6B of the European Union (Withdrawal) Act 2018 so that the power to intervene may be exercised in relation to points of law which concern the retained functions of the Lord Advocate.

Amendment 36, in clause 7, page 8, leave out lines 8 to 21.

This amendment, which is consequential to Amendment 35, modifies the points of law on which the Lord Advocate may make a reference under the new section 6B of the European Union (Withdrawal) Act 2018, omitting the definition of "relevant Scotland legislation" from section 6B.

Amendment 93, in clause 7, page 9, line 10, leave out ", if the argument relates to the meaning or effect of relevant Scotland legislation".

This amendment, together with Amendment 48, modifies the arguments in legal proceedings on which the lord Advocate may intervene under the new section 6C of the European Union (Withdrawal) Act 2018 so that that section is not restricted to arguments which relate to the meaning or effect of relevant Scotland legislation.

Amendment 48, in clause 7, page 9, line 22, leave out "relevant Scotland legislation,".

This amendment, which is consequential to Amendment 93, modifies the arguments in legal proceedings on which the Lord Advocate may intervene under the new section 6C of the European Union (Withdrawal) Act 2018, omitting the definition of "relevant Scotland legislation" from section 6C.

Brendan O'Hara: I will speak briefly about the amendments, which will remove any restraint the Bill would place on Scotland's Lord Advocate in making reference to retained EU law.

As it stands, the Bill restricts the Lord Advocate's power to make reference only to points of law that relate to the meaning or effect of relevant Scottish legislation. There is no corresponding restraint on the power of any other UK Law Officer regarding the law of England or Wales on matters that are reserved. Again, I understand that the message has been communicated directly to the Government by the Scottish Government. On the basis that we take the issue so seriously, I ask that the Government accept our amendments.

Peter Grant: The comments I made in relation to the last group of amendments are equally, if not more, applicable here. I appreciate that many members of the Committee would not have thought that the submission from the Law Society of Scotland was relevant to the interests of their constituents, nor should it be. The legal systems of the two nations are entirely separate. They are required to be in perpetuity by the Treaty of Union. That is not my favourite piece of legislation, but while it is there it is incumbent on this Parliament to comply with it.

The Law Society of Scotland wanted the whole of proposed new section 6B to be deleted in its entirety. It raised a number of serious concerns in principle, many of which will apply to the application of the legislation to English courts and Law Officers as well. Proposed new section 6B changes the way in which some civil law can be challenged in the courts without changing the way in which other civil law can be challenged in the courts, so the concept of the unity of a single body of civil law starts to be weakened. The legal profession will be extremely concerned about that.

The legal profession is also concerned about the idea that after a civil case has been concluded, when the time for any appeal has passed and the case is settled, Law Officers who are not a party to the case can then intervene, effectively to act as an appellant in a case in which they have no direct interest. That process rightly applies in relation to criminal law, because almost every criminal prosecution involves the Law Officers acting in the name of the Crown on behalf of the public interest.

In fact, in Scotland nobody but the Law Officers is allowed to take a prosecution in the public interest. Bodies such as the Post Office and the Health and Safety Executive are not allowed to prosecute cases in Scotland's criminal courts. After a case has been concluded, it is perfectly in order for the Law Officers to appeal against the leniency of a sentence, for example, because they were an interested party in prosecuting the case in the first place. That does not apply if it is a civil case, so there is a legal precedent created here that the Law Society of Scotland has raised serious concerns about, as well as very possibly the Law Society of England and Wales.

The clause again threatens compliance with the Treaty of Union—that is how serious it is, Mr Howarth. Passing the clause threatens to be in breach of article 19 of the Treaty of Union, because it makes the Law Officers of England superior to the Law Officers of Scotland. It makes the domestic courts of England superior to the domestic courts of Scotland. Why do I say that? It explicitly allows the Law Officers of England to step in and interfere in a civil case that applies only in Scotland, between two parties who are resident in Scotland and subject to the law of Scotland, where a case has been considered through due process in the domestic courts of Scotland and settled with finality as a matter of Scottish law. At that point, the Law Officers of England are allowed to wade in and interfere in a legal system that has nothing whatsoever to do with them—not on a matter of reserved legislation or one that is within the remit of domestic law in England.

The equivalent power does not apply to the Law Officers of Scotland. There are no circumstances in which Scotland's senior Law Officers can come in and interfere in a civil case that has been heard in English courts. However, there are circumstances in which the Law Officers of England can interfere after the event in a domestic case in Scotland's court. That is not equal treatment of the two legal systems. That is not recognition of the right of the Scottish legal system to operate independently of interference from this place. I will take advice on that and I will be interested to hear if the Minister has. That would appear to me to be a deliberate breach of one of the articles of the Treaty of Union. As many will be aware, when one article of a treaty is broken, either party has the right to consider the treaty to have been brought to an end.

I expressed my concerns in the previous sitting of the Committee that the Minister might be about to accidentally repeal hundreds of bits of legislation by mistake. I am tempted to say that we should not interrupt our opponents when they are making a mistake. If this place wants to take the risk of repealing the Treaty of Union by mistake, I will not stand in its way. However, I think I should bring it to hon. Members' attention so that at least they cannot afterwards say they did not know what they were doing.

Ms Ghani: I will try to address all the points raised because I know how seriously they are taken by Opposition Members. The Committee should reject amendments 35, 36, 37, 48 and 93 as they would give Law Officers of the devolved Administrations the power to intervene in reserved matters, which is not constitutionally appropriate.

Amendments 35, 36 and 37 concern proposed new section 6B, established by clause 7 of the Bill, which provides UK Government Law Officers and Law Officers of the devolved Administrations with the power to refer points of law arising from retained case law to the

higher courts, when proceedings have concluded, for consideration against the new test for departure set out by the same clause.

Amendments 48 and 93 concern new section 6C, which gives Law Officers the power to intervene in cases before the higher courts and present arguments for them to depart from retained case law following the new test for departure in the Bill. It is right that references and interventions by the Lord Advocate are restricted to the points of law within the devolved competence of the Scottish Government. The provisions are framed so that Law Officers may exercise the reference and intervention powers on behalf of their respective Governments in cases where other Administrations have a particular view on the meaning and effect of a relevant piece of retained EU law for which they are responsible.

The powers allow Law Officers to bring the matters before a higher court, in the light of the new test for departure from retained case law, for a decision after hearing the relevant Government's view on the correct interpretation of a relevant retained EU law. That will allow Law Officers and the Lord Advocate to ensure an appropriate development of the law as we move away from the influence of EU case law and the rules of interpretation. It would consequently be inappropriate for the Lord Advocate, on behalf of the Scottish Government, to exercise the reference and intervention powers where the points of law relate to reserved legislation. That includes points of law that concern the retained functions of the Lord Advocate as a prosecutor, as those functions concern legislation that is reserved to Westminster.

We consider the structure of the Law Officer powers to be consistent with the established position of the Lord Advocate within the Scottish Government. As in other contexts, the structure rightly allows the Lord Advocate to represent the Scottish Government's views on the interpretation of devolved legislation but not legislation reserved to Westminster. For those reasons, we ask the hon. Member for Argyll and Bute to withdraw his amendment.

Brendan O'Hara: I congratulate my hon. Friend the Member for Glenrothes for his very thoughtful contribution. Again, that goes to the heart of the Bill and the bonfire that the Government are setting if they get it wrong, time and again. There are dangers in treating this state as one country—that is what happens when one does not consider the devolution settlement properly. But on that basis, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

12.45 pm

Ms Ghani: I beg to move amendment 5, in clause 7, page 9, leave out lines 5 and 6 and insert—

"(2) The following are entitled to notice of the proceedings—

(a) each UK law officer;

(b) the Lord Advocate;

(c) the Counsel General for Wales;

(d) the Attorney General for Northern Ireland."

This amendment and Amendment 6 leave out the definition of "devolved law officer" from subsection (5) of new section 6C of EUWA and instead mention each devolved law officer in subsection (2) of that section.

The Chair: With this it will be convenient to discuss Government amendment 6.

Ms Ghani: I will be brief. Conservative colleagues will be keen to know that we are accepting amendments 5 and 6, which will remove references to a "devolved law officer" and replace them with the specific titles of the law officers in Scotland, Wales and Northern Ireland where appropriate. This is a policy-neutral change requested by the Scottish Government and tabled by this Government in the spirit of collaboration and co-operation.

Amendment 5 agreed to.

Amendment made: 6, in clause 7, page 9, leave out lines 20 and 21.—*(Ms Ghani.)*

See the statement for Amendment 5

Brendan O'Hara: I beg to move amendment 49, in clause 7, page 9, line 33, at end insert—

"(11) Within three months of the passage of this Act, the Secretary of State must lay before both Houses of Parliament an assessment of the impact of this section on the commitment of the UK enshrined in article 2(2) of the Northern Ireland Protocol."

This amendment has been tabled in my name and in that of my hon. Friend the Member for Glenrothes. A recurring theme with this Bill has been a lack of attention to detail to either the drafting or to fully understanding the consequences—unintended or otherwise—for great swathes of the UK's Governments, the economy and wider society. It is breathtaking. The impact of the massive changes that will be brought about by the Bill has been at best an afterthought, and at worst completely ignored. It is reckless, and some could reasonably argue that it is a dereliction of duty on the Government's part.

This lack of attention to detail will be most acutely felt in Northern Ireland, and in the impact that clause 7 could have on the protocol. Given that the primacy of EU law will be removed by this Bill, but it has been retained and reaffirmed in the Northern Ireland protocol, will the Minister explain how the two pieces of legislation are expected to interact with each other? The Government have committed to there being

"no diminution of rights, safeguards and equality of opportunity"

in Northern Ireland.

What mechanisms have been established to assess and monitor how that is working? The very least that the people of Northern Ireland deserve is a thorough and detailed assessment of the Bill's exact impact on the protocol. That is why we ask the Secretary of State to, within three months of the Bill passing,

"lay before both Houses of Parliament an assessment of the impact"

that the Bill has had

"on the commitment of the UK enshrined in article 2(2) of the Northern Ireland Protocol."

Ms Ghani: The Government have already committed to ensuring that the necessary legislation is in place to uphold the UK's international obligations, including the Northern Ireland protocol. The UK is committed to ensuring that rights and equality protections continue to be upheld in Northern Ireland. I therefore ask the Committee to reject this amendment.

[Ms Ghani]

Article 2's reference to

"no diminution of rights, safeguards and equality of opportunity"

demonstrates the UK Government's commitment to ensuring that the protections currently in place in Northern Ireland of the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Belfast/Good Friday agreement are not diminished as a result of the UK leaving the EU. The provisions in the Bill enable the Government to ensure that the retained EU law that gives effect to article 2 of the protocol is preserved beyond the sunset, or that an alternative provision is created to meet such requirements. The restatement power will also allow the UK and devolved Governments to codify case law and other interpretative effects where it is considered necessary to maintain article 2 commitments.

Clause 7's provisions concerning case law do not apply in relation to obligations under the protocol. Section 6(6A) of the European Union (Withdrawal) Act continues to apply, so that our new test for departing from retained EU case law is subject to the rights and obligations in the protocol. The House already has its usual robust and effective scrutiny processes in place to hold Ministers accountable in relation to the Government's commitments under the Northern Ireland protocol. In addition, these are bespoke arrangements in relation to the EU Withdrawal Agreement Joint Committee where the UK and EU jointly oversee each other's implementation, application and interpretation of the withdrawal agreement, including the Northern Ireland protocol—for example, the publication of the annual report of the Joint Committee to aid Members' scrutiny.

Adequate processes are already in place, and the introduction of a new statutory reporting requirement is not an appropriate use of Government or parliamentary time. I therefore ask the hon. Member for Argyll and Bute to withdraw the amendment.

Stella Creasy: It would be incredibly helpful if the Minister could clarify what she said about bespoke arrangements for Northern Ireland. Under article 2 of the protocol we have an obligation to uphold the institutions, including the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland. Is she therefore saying that there are instances in which EU law will be retained because of the Northern Ireland protocol? Is she committing to upholding EU law where those institutions propose that it is part of upholding the Good Friday agreement? She said they were bespoke arrangements. Can she clarify that? It is quite an important point.

Ms Ghani: The preservation and restatement powers in the Bill or other existing domestic powers, such as section 8C of the European Union (Withdrawal) Act, will ensure that retained EU law that gives effect to article 2 rights is either maintained beyond the sunset or the alternative provision is created to meet such requirements. The delegated powers in the Bill, particularly the restatement powers, will provide the ability to recreate the effects of secondary retained EU law, including the interpretative effects of case law and general principles of supremacy where it is necessary to uphold article 2 rights. That provides a mechanism through which national authorities might implement article 2 obligations. As I said earlier, I asked the hon. Member for Argyll and Bute to withdraw the amendment.

Brendan O'Hara: I will not push the amendment to a vote, but we will return to it on Report. I remain completely unclear, given the timeframe, how EU law will be removed by the Bill, but be maintained and reaffirmed in the protocol. I am unclear how that actually works.

Stella Creasy: The hon. Member is making a fair point. The people of Northern Ireland deserve some clarity because, if the Bill takes away the supremacy of EU law, as we discussed earlier, but the Government are committing that there will be instances in which article 2 rights will be upheld, it would be helpful to understand what those instances are and what the process is. Who will determine what EU law can be retained? The Northern Ireland Human Rights Commission, for example, could be part of that, but it is not clear how the process works. Does the hon. Gentleman agree that we owe it to the people of Northern Ireland to set out that process now?

Brendan O'Hara: I absolutely agree with the hon. Lady. Such muddled thinking and the unintended consequences of pushing it through so quickly go to the heart of the Bill. There are consequences to setting a ridiculously unachievable sunset clause. The thinking time that should have gone into the Bill has not happened. Although I will not push the amendment to a vote now, I strongly urge the Government to work on it to be able to explain on Report exactly how the measure will work. It is far too important to the people of Northern Ireland to let it wither on the vine and hope it does not come back. This is hugely important, but I will not press it a vote.

Amendment, by leave, withdrawn.

Question proposed, That the clause, as amended, stand part of the Bill.

Ms Ghani: The bar for the UK courts to depart from retained case law in the judgments of EU courts is too high, and there continues to be an overriding desire for our judicial decisions to remain in line with the opinion of the Court of Justice of the European Union. Clause 7 will free our courts to develop case law and retained EU law that remains in force without being unnecessarily constrained by the past judgments of these now foreign courts.

Question put and agreed to.

Clause 7, as amended, accordingly ordered to stand part of the Bill.

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

12.56 pm

Adjourned till this day at Two o'clock.