

# Briefing by the Northern Ireland Human Rights Consortium on the Retained EU Law (Revocation and Reform) Bill for second reading in the House of Commons



24<sup>th</sup> October 2022

The Human Rights Consortium is concerned that the Retained EU Law (Revocation and Reform) Bill or 'Brexit Freedoms Bill' will have an extremely negative impact on human rights and legal certainty in Northern Ireland. We are particularly concerned with its impact on the non-diminution commitment made by the UK Government in Article 2 of the Protocol on Ireland/Northern Ireland, the Trade and Cooperation Agreement (TCA) between the EU and UK and the principles of devolved governance across the United Kingdom.

We fear that this Bill may be used to undermine hard-won environmental protections, leave workers' rights under threat and have serious knock-on impacts on the stability and regulatory governance of countless sectors across the UK.

In summary, our concerns are as follows:

1. The Government has **not yet conducted a full and comprehensive assessment** of the Retained EU Law (REUL) currently on the statute books, and further has failed to analyse which of these areas of REUL interact with or impact on the **commitments made in Article 2(1) of the Protocol** on Ireland and Northern Ireland, or on the **level playing field provisions** of the Trade and Cooperation Agreement (TCA).
2. The **removal of key frameworks** for interpreting retained EU laws and settlement agreement legislation, including **EU General Principles** (Clause 5) and **retained EU case law** (Clause 7), may have an impact on the **Protocol Article 2(2) 'keeping pace' commitment**.
3. The Bill will cause a significant amount of **legal and regulatory uncertainty** for businesses, environmental governance, workers, and many other individuals across the UK, both due to the potential **cliff edge of rights and regulations** at the end of 2023 and the **deeply convoluted legislative framework** this Bill would establish around retained/assimilated law.
4. A **myriad of wide-ranging powers** are either shared between UK and devolved Ministers or reserved for UK Ministers, including in areas of devolved competence. Further, the **power to preserve REUL past 2023 is reserved for UK ministers**, despite many of the regulations affected by the sunset clause falling within areas of devolved competence. This represents another marked overreach and has the potential to **severely undermine the devolution settlement**.

## Sunset Clause

The first clause of this Bill asserts that all EU-derived subordinate legislation<sup>1</sup>, as well as directly retained EU law<sup>2</sup>, will be revoked from the statute books at the end of 2023. This goes a lot further than originally suggested in previous ministerial statements on the Brexit Freedoms Bill, not just removing all EU law that was newly created as a result of Brexit, but extending this sunset to any regulation made under section 2(2) of the European Communities Act 1972. This would **revoke**

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<sup>1</sup> This refers to UK domestic provisions, both in primary and secondary legislation, which implemented or otherwise related to EU law. This includes implementing regulations (e.g. the Working Time Regulations 1998) and converted EU law (e.g. the Health and Safety at Work Act 1974).

<sup>2</sup> This covers any directly-effective EU legislation (except for Directives) which were saved by section 3 of the EU Withdrawal Act 2018. It includes EU regulations, decisions and tertiary legislation.

**almost every Directive** that has been implemented in domestic law **during the UK's 40 years of EU membership**.

There is a specific exclusion for Northern Ireland law in this clause. Clause 1(5) defines 'domestic subordinate legislation' for the purposes of Clause 1(4) as excluding Northern Ireland legislation. The Bill's explanatory notes does not provide a comprehensive explanation for this approach, but it may be because of perceived interactions with the Protocol, or to protect regulations that were made for Northern Ireland through Westminster during a period without devolved governance. However, it is still unclear which regulations will be kept and which will be removed as the Government has not yet completed a full assessment of the REUL currently in the statute books .

Further, this exclusion is not enough to negate the other impacts of this sunseting of EU regulations across the UK, and will not preserve the full gamut of EU law in Northern Ireland. If the sunseting of rights and regulations are applied differently in Britain compared to Northern Ireland it could well raise concerns regarding **compatibility with the UK Internal Market Act**, while any removal of rights and regulations in Northern Ireland also has the potential to create a **breach of the Protocol Article 2(1) commitment** by the UK Government not to diminish rights in Northern Ireland as a result of Brexit.

Clause 2(1) of the Bill provides for UK Government Ministers to extend the application of particular regulations past the 2023 sunset, when it will become known as 'assimilated law' per Clause 6 and can be held over until June 2026. But this power is reserved for UK Government ministers, despite the fact that **regulations of devolved competence will be automatically sunsetted** under Clause 1 unless preserved. This means that Northern Ireland ministers will not have the power to retain important EU law which interacts with their competencies, and instead must rely on the UK Government to do so.

### **Devolved Competencies**

Many of the powers created under this new Bill – with the exception of the Clause 2(1) sunset extension - are available to ministers in devolved regions to use concurrently with UK Government ministers. This includes the power to **ensure domestic legislation is read compatibly** with any directly retained EU regulations (Clause 8), the power to **'restate' secondary REUL** (Clause 12) and **secondary assimilated law** (Clause 13), the power to **revoke and replace EU regulations without parliamentary oversight** (Clause 15) or to **update those regulations** to keep up with advances in technology or scientific understanding (Clause 16).

These wide-ranging powers and the ability to make changes by regulation without substantial parliamentary oversight is extremely concerning, particularly where UK Government ministers may choose to **utilize these powers in areas of devolved competence**. There is no requirement placed on UK ministers to seek devolved consent in these areas, resulting in them gaining relatively unchecked law-making powers in areas of devolved competence. These powers also cannot be used in a way that **'increases the regulatory burden'**, displaying a clear **preference for the removal of EU rights and regulations** rather than allowing for them to be updated, strengthened, and informed by specific regional considerations.

We have further concerns regarding the application of these powers by ministers in Northern Ireland, with different ministers across different departments having vastly diverging views on the application of EU regulations. The Northern Ireland Executive (when it is in place) is divided on many issues, including the status of EU derived law and post-Brexit arrangements. This could result in wildly diverging approaches to restating, updating or replacing regulations across the different

departments and the Executive, leading to even further legal uncertainty in an already volatile and uncertain time.

## **Protocol on Ireland/Northern Ireland**

As identified above, we have significant concerns regarding the implications of this Bill on the Ireland/Northern Ireland Protocol. From a human rights perspective, we are specifically concerned about the implications for Article 2 of the Protocol, namely the ‘keeping pace’ commitment and the ‘non-diminution’ commitment.

### **Article 2(1) – Non-diminution of Rights**

The Article 2(1) commitment made by the UK Government to ensure **no diminution of rights in Northern Ireland as a result of Brexit** was a welcome protection in the context of Brexit, where many feared that rights could be under threat. However, the Government has proceeded with various legislative undertakings since, including the Elections Act<sup>3</sup> and the Nationality and Borders Act<sup>4</sup>, which have been identified as potentially breaching this commitment by the Dedicated Mechanism (the Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland) tasked with monitoring these commitments.

This Bill has the potential to result in a bonfire of rights and regulations, particularly in the areas of environmental protection and workers' rights, losing many key EU protections which have been enjoyed by individuals across the UK. There has been **no assessment** made by the Government of what **EU regulations are relevant to the rights protected by Article 2(1)** of the Protocol.

There also doesn't appear to be consideration made for the Government's ‘level playing field’ commitments in the Trade and Cooperation agreement (TCA) which covers areas such as workers' rights and environmental protections. Whether by direct deregulatory action or through the ‘sunsetting’ of EU laws and regulations without preservation by the Government ministers, this Bill could lead to a breach of these provisions and retaliation from the EU at a time when it is vital to maintain positive relations.

### **Article 2(2) – Keeping pace**

While the Annex 1 Directives referred to in the **Article 2(2) ‘keeping pace’ commitment** are settlement agreement law, rather than retained EU law, and as such will not be affected by the sunset clause, we are concerned at the potential implications for how these Directives are interpreted and implemented in the legislative framework created by the Bill.

Through the **removal of the general principles of EU law** (Clause 5) and **undermining how domestic courts interpret and implement EU case law** (Clause 7), this Bill creates a more convoluted legal framework for interpreting these equality and non-discrimination directives. This has the potential to dilute the richness of the protections contained within these Directives by **undermining the legislative framework within which they are usually implemented**.

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<sup>3</sup> [Joint ECNI/NIHRC Briefing on the provisions on Voting/Candidacy Rights of EU citizens in Northern Ireland and the Elections Bill](#)

<sup>4</sup> [Joint NIHRC / ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill](#)

The **removal of the supremacy of EU law** (Clause 4), creates further uncertainty as regards to what status these Directives are given in law, and whether they would be superseded by a potentially lower standard of protection if that were introduced following the adoption of this Bill.

In tandem with the consideration of the Northern Ireland Protocol Bill, which states that domestic courts will not be “bound by any principles laid down, or any decisions made, on or after the day on which this section comes into force by the European Court” (Clause 20), it is clear that **the Government has not fully considered the impact of its current legislative proposals on its Article 2 commitments**. The provisions in both of these Bills could constitute breaches of those commitments, or could result in future ‘as applied’ breaches depending on the interpretation and implementation of the Bills.

## **Conclusion**

This Bill is clearly unfit for purpose and confers a wide swathe of powers on Government ministers with very little parliamentary oversight. It has significant implications for Northern Ireland which simply have not been fully considered and accounted for by the Government, and imposes deadlines which would severely limit the ability of civil servants and elected representatives to provide detailed scrutiny and proper impact assessment of these massive legal changes.

While we would encourage and support the development of amendments that limit the impact of this Bill on Northern Ireland, we would more broadly recommend that this Bill be dropped and the existing process for reviewing and/or updating retained EU law with parliamentary oversight is followed.

*For any questions or further information, please contact [info@humanrightsconsortium.org](mailto:info@humanrightsconsortium.org)*