

Retained EU Law (Revocation and Reform) Bill Briefing for Lords Committee on clause 15

March 2023

Introduction

Clause 15 of the bill has been described by some [commentators](#) as a “do whatever you like” provision. It gives ministers extremely wide powers to revoke or replace retained EU law (REUL) and to lay replacement legislation either with “such provision as the relevant national authority considers to be appropriate to achieve the same or similar objectives” or with “such alternative provision as the relevant national authority considers appropriate”. This subjective judgement of appropriateness, accompanied by such a limited link to the objectives of the original legislation, leaves clear potential for sensible, longstanding protections to be replaced by regulations with entirely divergent aims and outcomes.

Without amendment, this power would allow for replacement legislation to change both the content and the objectives of the law without adequate scrutiny and consultation and is designed to further deregulation.

When replacing REUL, ministers must not increase the regulatory burden, which is defined as including a financial cost, an administrative inconvenience and an obstacle to trade, innovation, efficiency, productivity or profitability. The direction of travel that this bill promotes is therefore abundantly clear – deregulatory.

We support amendments which would either remove the clause 15 power or ensure that, if it remains in the bill, it is more appropriately constructed.

The implications of clause 15 for environmental law

The [running total](#) for REUL that falls within Defra’s remit is 1,781, by far the largest share of any Whitehall department, highlighting the hugely significant implications of this bill for environmental law making. The Defra body of REUL contains many regulations of significant public interest, which aim to protect every element of our natural environment and many aspects of human health. These laws are bound together in a complex web, many with significant case law attached to them. The profound risks of disentangling this rich body of law in the manner proposed in the bill – at speed and with little scrutiny or consultation – have been discussed at length throughout the bill’s parliamentary passage. Clause 15 substantially exacerbates these concerns because of its unfettered nature and the ‘burdens test’ in 15(5).

The ‘burdens test’

Ministers have sought to provide more detail on how they envisage the burdens test in 15(5) working in this [‘All Peers’ letter](#). However, this raises more questions than answers, and fails to explain how a department like Defra, which has hundreds of laws covering many subject areas is to apply the “in the round” consideration envisaged in the letter.

For example, if Defra ministers wanted to make changes to one nature regulation which increased one of the regulatory burdens specified in the non-exhaustive list in clause 5(10), does that mean that they would have to bring forward changes to another nature regulation which decreased burdens to ‘balance the books’?

Will the removal of redundant or superfluous laws count as removal of burdens, even if these were not active components of our statute book?

Parliament is being asked to agree to clause 15 without a satisfactory explanation of how it is to be practically applied. Furthermore, given the stipulation in 15(5), there can be no confidence that this power will not lead to a de facto lowering of standards, which is the opposite of what ministers are repeatedly saying they want to achieve.

Amendments 126 and 130

We strongly support amendments 126 and 130.

Amendment 126 would create additional conditions to be satisfied before the powers set out in clause 15 can be exercised where the subject matter of their exercise concerns environmental law. It would set out in legislation the commitments the government has made not to reduce environmental standards through exercise of the powers in clause 15 of REUL which are not (currently) reflected in clause 15 or elsewhere.

Amendment 130 would ensure that the powers to amend important pieces of retained EU environment law on nature, water and chemicals must not reduce the level of environmental protection provided by them. It would also specify that when exercising these powers, authorities must have regard to the conservation and enhancement of biodiversity, improvement of water quality and protection of people and the environment from hazardous chemicals.

Amendment 130 focuses on regulations which have been both earmarked as priorities for review and on which the government already has amending powers. For example, during her [evidence session](#) with the House of Lords Environment and Climate Change Committee, the Defra Secretary of State referred to the goal of the Environment Agency to “change quite a lot of the water framework directive” (page 13).

We would support a sensible consultative approach to strengthening regulations that underpin the Water Framework (and other listed) Directive(s). However, tackling the dire state of our water bodies will not be possible without substantial investment, triggering both the ‘financial cost’ and ‘profitability’ limbs of 15(5). Clause 15 cannot therefore be a route through which the government is able to deliver improved environmental outcomes.

Advice of the Office for Environmental Protection

The Office for Environmental Protection stated in [its evidence](#) to the Public Bill Committee:

“We are also concerned by the absence of a requirement in the Bill to maintain or improve existing levels of environmental protection and meet the UK’s international environmental law obligations. We recommend adding an environmental non-regression safeguard to the Bill as a minimum measure. In line with governments’ ambitions to improve the natural environment, and given such pressing need, we would urge UK and devolved governments going further than this minimum to achieve an overall improvement in the level of environmental protection.”

Amendment 126 would allow this recommendation to be met and also deliver the government’s aspirations which Lord Benyon alluded to during the [debate](#) on Day 2 of Committee, when he said that the government remained committed to maintaining high environmental standards and wanted to see standards improve in the future.

Legal opinion of Sir Jeffrey Jowell KCMG KC & Jack Williams on the bill

ClientEarth, the RSPB and WWF instructed [Sir Jeffrey Jowell KC](#) (Blackstone Chambers) and [Jack Williams](#) (Monckton Chambers), to give an [opinion](#) on the likely constitutional, legal and practical effects of the bill. A summary of the opinion is available [here](#).

The opinion says that the ministerial powers in clauses 15 and 16 permit (largely unfettered) discretion for substantive policy changes. Clause 15, in particular, essentially gives free license for modifications, save they cannot increase the overall burden, impose taxation or establish a public authority. No non-regression clauses are provided. The bill itself is silent as to the standards to be applied in the exercise of the discretion.

Giving legal weight to Defra ministerial statements

These amendments would give legal substance to the voluntary objectives that Defra ministers are [indicating](#) they would use to inform their review of REUL. These include ensuring that environmental law is fit for purpose and able to drive improved environmental outcomes. Defra ministers have also [stated](#) to Parliament that changes to environmental regulation following the review of REUL will need to support the continued delivery of our environmental and international commitments, and will not have the effect of reducing the levels of environmental protection. As a matter of law, however, these statements provide no assurances or protections and, however welcome, are vulnerable to changing political priorities and cannot bind the hands of future ministers.

The government already has powers to amend environmental REUL

Given that powers to amend key environmental REUL already exist in primary legislation, why is the government seeking additional powers in the REUL Bill? For example, the government recently sought – and was granted – powers to amend the REACH regulation under [Schedule 21](#) of the Environment Act 2021, the Water Framework Directive regulations under [section 89](#) of the Environment Act 2021 and the Habitats Regulations under [section 112](#) and [section 113](#) of the Environment Act 2021.

The Environment Act powers are a more appropriate vehicle for amending these regulations. For example, amendments to the habitats regulations must not reduce the level of environmental protection, amendments to the Water Framework Direct Regulations must entail expert consultation and amendments to REACH must respect the precautionary principle. Amendment 130 would provide comparable safeguards.

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On behalf of Greener UK and Wildlife & Countryside Link

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