

Retained EU Law (Revocation and Reform) Bill Consideration of Commons amendments

20 June 2023

Introduction

The Retained EU Law (Revocation and Reform) Bill has been discussed at length during its passage through Parliament. While a great many concerns and questions have been raised, two important, interlinked matters – parliamentary scrutiny and environmental protection – have been recurring themes and are the subject of two [final amendments](#).

The constitutional implications of the approach to the public order regulations

Setting aside their content, two concerns surrounding the approval of the Public Order Act 1986 (Serious Disruption to the Life of the Community) Regulations 2023 are relevant to consideration of the Retained EU Law Bill.

The first is that the government chose to introduce secondary legislation with the effect of putting in place provisions that had been rejected in the House of Lords during consideration of the parent primary legislation – only weeks beforehand. This forced Parliament to effectively re-make a decision that it had already made. By convention it is not possible to introduce a new bill into Parliament that is identical to one previously rejected within the same session. It seems at the very least problematic that the executive should be able to effectively override the express will of Parliament because it happens to be in secondary rather than primary legislation.

The second is the fact that a precedent now appears to have been set that the Lords are unlikely to use their power to reject affirmative secondary legislation, even under the circumstances described above. In the past, while these powers had always been used sparingly, the occasions on which they had been used demonstrated that the Lords retained the right to act where they judged it to be in the public interest. The decision not to do so on this occasion, despite an apparent consensus view across the House that the regulations were highly problematic from a constitutional perspective, highlights the need for a different process on retained EU law, as proposed in Lord Hope's revised amendment.

As it stands, the government's assurances on the Retained EU Law Bill rely on ministers' assertion that they will not in future act to reduce or undermine environmental protections. This ignores the fact that environmental protections are not always clear cut – they are complex areas of law, especially considering the changes that the bill makes to case law.

It is very conceivable therefore that the government could propose a replacement for a key piece of environmental protection, such as the water framework directive, which in its view was not aimed at reducing protections, but for which the consensus view was it would have that effect.

Given recent events it seems unlikely that the Lords would act to prevent such a change from being made, even when it is in contradiction to the recent opinion and will of the Upper House, and to ministers' previous commitments.

If the Lords is therefore averse to use its powers to stop secondary legislation which involves matters of constitutional propriety, the importance of building stronger protections into secondary powers is even greater than before.

We therefore strongly support the amendments in lieu 15 and 42, which would provide for strengthened parliamentary scrutiny of the Clause 15 power to revoke or replace retained EU law (REUL), and a statutory environmental safeguard.

Amendment 15 (Lord Krebs)

We strongly support replacement amendment 15 which in its amended form would achieve a sensible balance between environmental protection and the government's objectives for reforming retained EU law.

The amendment has been revised from that previously considered to address drafting concerns raised by MPs and the minister. It now contains two elements:

- A legal commitment to **maintain existing levels of environmental protection**. This mirrors a commitment in recent legislation – [section 112](#) of the government's flagship Environment Act 2021. At the time, then Defra minister Lord Goldsmith explained that this "includes a number of safeguards that are designed to retain our existing protections", recognising the importance of underpinning commitments in law.
- A streamlined consultation requirement giving ministers discretion on who they consult but still requiring them to seek **advice from independent experts**. This would help to avoid the [accidental errors](#) encountered during previous major technical legislation programmes. This consultation requirement is consistent with other statutory commitments, for example in section 4(1), of the Environment Act 2021 on consultation on legally binding targets. As consultation on retained EU law has been largely absent thus far – for example, no consultation took place on any of the laws included in the bill's revocation schedule – including this safeguard is of significant public interest.

The inclusion of an environmental non-regression principle is supported by [the Office for Environmental Protection](#), [the Climate Change Committee](#), [the Interim Environmental Protection Assessor for Wales](#) and the [Scottish government](#).

The government has cited the existence of the Environment Act 2021 as reason why this amendment is not necessary. However, this is an 'apples and pears' approach to legislating, as the Environment Act does not directly bite on how ministers may choose to apply the powers in the REUL Bill.

The government has [said](#) it will never downgrade environmental protections but without embedding this commitment in the bill, there is no guarantee that its words will be adopted by future ministers. As a matter of law, these statements provide no assurances or protections and, however welcome, are vulnerable to changing political priorities and cannot bind the hands of future ministers.

Amendment 42 (Lord Hope)

In its updated form amendment 42 would achieve a sensible balance between strengthened parliamentary scrutiny and ministerial discretion.

Clause 15 will give ministers extremely wide powers to revoke or replace retained EU law, creating a risk that sensible, important protections could be removed or replaced by weaker, less effective regulations with little opportunity for parliamentary scrutiny and public consultation.

The government objected to earlier versions of amendment 42 because of what it saw as a novel and untested procedure which it argued was inappropriate.

To address this, we note that the revised amendment proposes that an established scrutiny procedure is used – the super affirmative resolution procedure, based on section 18 of the Legislative and Regulatory Reform Act 2006.

The revised amendment would not create a power to directly amend the regulations, and is being narrowly used for only one delegated power, namely Clause 15, the broadest delegated power in the bill.

It would require the minister to state why replacement or alternative provision is appropriate, to inform the sifting process and to have regard to the recommendations of a House of Commons Committee and resolutions of both Houses.

This would equip Parliament with more rigorous oversight of draft regulations making use of an established process.

Given that over 4,000 laws remain in scope of these unfettered powers, passing this amendment would be in the public interest.

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