ClientEarth

Retained EU Law (Revocation and Reform) Bill – Written evidence submitted to the House of Commons Public Bill Committee by ClientEarth

Introduction

ClientEarth is an environmental law charity that uses the law to fight climate change, tackle pollution, defend wildlife and protect people and the planet.

ClientEarth considers that Retained EU Law (Revocation and Reform) Bill (the "**Bill**") would, if passed in current form, threaten thousands of laws that provide a suite of protections across a range of areas – protections that benefit both people and nature. The Bill would also give the government significant power to amend or revoke safeguards with little scrutiny by Parliament, which threatens to subvert the constitutional order in this country and undermine the rule of law.

From a practical perspective, as it currently stands the Bill would be unworkable. The total number of items of retained EU law ("**REUL**") is unknown even within government but certainly stands in the thousands. Departments would have to assess each item of REUL and determine whether it should be kept, amended, revoked or allowed to 'sunset'. Defra has the lion's share of REUL to assess and yet, to date, only three full-time equivalent officials have been working on REUL, according to a September parliamentary question. The government will have, at most, little over a year to address each item of REUL before the sunset deadline of 31st December 2023 – at a time when departments are being told to ready themselves for significant budget cuts in response to the current economic situation. The impossible timescale means that important protections are likely to be overlooked and lost, with replacement legislation then executed poorly and in haste – an outcome that will breed uncertainty for individuals, communities and (importantly) business.

Problems with the Bill

We set out below our main concerns with the Bill.

***Problem 1 – Protections lost, through choice or neglect*.** The Bill turns the normal legislative order on its head by determining that an entire category of UK law will pass out of existence at the end of 2023, save for those specific provisions which are chosen for preservation. Significantly, there is no obligation on the government to save any REUL; nor is there any detail in the Bill on what processes will be applied by ministers to determine which REUL survives and which falls away. The question of which REUL remains a part of UK law going forward is a matter of choice for the executive.

And yet, many pieces of REUL may not be assessed at all. The number of items of REUL on the statute book is not clear and there is no authoritative index – the government's 'Retained EU Law Public Dashboard' (described in the guidance as providing an "*authoritative catalogue of REUL*") is missing many significant pieces of REUL – one prime environmental example being the Conservation of Habitats and Species Regulations 2017 (the "**Habitats Regulations**").

It is completely implausible that the government and civil service will, between the enactment of the Bill and the end of 2023 (a period of, at most. 12 months), be able to assess the thousands of pieces of REUL, evaluate what should be allowed to pass with the sunset and make regulations addressing those items which it is judged should be kept or amended. It is almost inevitable that, at the end of 2023, a

ClientEarth

multitude of regulations will, as a result of a lack of time and human error, inadvertently fall victim to the sunset. This is not an academic problem – REUL has been built up over decades and provides fundamental protections. Examples of the kinds of protections that could be lost include:

1. Species and habitats. The Habitats Regulations protect hundreds of species from destruction and wildlife habitats from unsustainable development. The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 require an assessment of the likely environmental impacts of a development proposal in order for decision makers to be fully informed.

2. Air quality. The Air Quality Standards Regulations 2010 set limits on the permitted concentration of a number of harmful air pollutants in outdoor air and impose duties on the government to measure and report pollution levels and provide information to the public. They are the central pillar of air quality regulation in the UK – affording everyone the same minimum level of protection. The National Emission Ceilings Regulations 2018 set national emission reduction commitments for five harmful air pollutants, which apply from 2020 and 2030, to which the government can be held to account.

3. Water quality. The Water Framework Directive (through its implementing regulations) sets objective and deadlines for improving water quality in rivers, by reference to both the ecology of the water and its chemical characteristics. The Drinking Water Directive (through its implementing regulations) sets safety standards for drinking water.

4. Agriculture. The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 (known as the 'Farming Rules for Water') set out provisions to reduce and prevent the pollution of waters from diffuse agricultural sources. Other rules safeguard water quality by requiring farmers to judge when it is best to apply fertilisers, where to store manures and how to avoid pollution from soil erosion.

5. Chemicals. The Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation provides protection for human health and the environment against chemicals and makes companies that place chemicals on the market responsible for understanding and managing the risks associated with their use.

6. Food standards. The General Food Regulation (EU Regulation (EC) 178/2002) requires that: food must not be unsafe; food businesses must be able to trace from whom they sourced food and to whom they supplied; and unsafe food must be withdrawn from sale and/or recalled from the end consumer. EU Regulation (EC) 396/2005 sets limits on maximum residue levels of pesticides and decontaminants in or on food or feed.

7. Employment rights. The Working Time Regulations 1998 set limits on the number of hours employees can be expected to work. The Agency Worker Regulations 2010 work to mitigate discrimination against agency workers by providing protections with respect to pay, holiday and working time conditions. Article 157 of the Treaty on the Functioning of the European Union establishes the principles of equal pay for male and female workers.

8. Consumer rights. The Consumer Protection from Unfair Trading Regulations 2008 are a core consumer protection law that prevent businesses from participating in unfair practices, such as false endorsements, misleading availability and pyramid schemes.

9. Health and safety. The Management of Health and Safety at Work Regulations 1999 require employers to carry out risk assessments and make arrangements to put measures in place to minimise the risk of workplace injury. The Control of Substances Hazardous to Health Regulations 2002 impose a duty on companies to control substances that are hazardous to health and prevent workers' exposure to them.

Problem 2 – Uncertainty and red tape. As highlighted above, the Bill would usher in a period of legislative uncertainty. Ministers and the civil service would be required to assess significant quantities of REUL ahead of the end of 2023 deadline. Even if the total number of REUL was approximately 2,400 (as stated on government's dashboard), the process would occupy huge proportions of the resource of the civil service, leaving them unable to focus on pressing day to day issues, at a time when the country faces a cost of living crisis and a recession.

Further stymying the process will be the major cuts to the civil service indicated by the government. Inevitably, things will fall through the cracks through lack of resource and changes made in haste will have unintended consequences. This will mean that, long after the end of 2023, government departments will be spending a significant amount of time drafting legislation to reintroduce regulations lost or changed by mistake. This is precisely the type of red tape that the Bill is ostensibly aimed at removing.

An additional and related factor is that the processes enabled by the Bill will create uncertainty for businesses and communities. There is currently no indication as to how and when the powers in the Bill will be exercised. Just at the moment when businesses have started properly to adapt to trading rules resulting from Brexit, the Bill threatens to move the goalposts again. Businesses will now be aware that the framework of regulation within which they operate may change dramatically in the next 14 months – yet, they have no way of knowing how extensive the changes might be (i.e., some of the regulations they are subject to might be kept and some might not, but there is currently zero clarity on this point) or when they might take place (i.e., changes might occur before 31 December 2023, at the point of 'sunset' or up to June 2026 by virtue of the extension provision). The uncertainty that the Bill is likely to create will, in all probability, lead to a reduction in corporate investment. Furthermore, many businesses recognise that regulation is an important part of the long-term sustainability of the economy and that their customers expect standards to be maintained in the goods and services they pay for. A BEIS Business Perception survey from 2020 (see here) reported that less than two-fifths (37%) of businesses agreed that regulation is an obstacle to success. The Bill will leave businesses in the dark.

Problem 3 – Constitutional implications and the rule of law. The Bill empowers ministers and devolved administrations to amend, revoke or replace REUL before the 'sunset' date, using secondary legislation. This has repercussions for our democratic process as secondary legislation, unlike an Act, affords Parliament little opportunity for scrutiny. Indeed, the Commons has not voted down a piece of secondary legislation since 1979 and the Lords has not done so since 2000. The effect of the Bill is that it will be possible for ministers to change or revoke legislation in important areas (examples of which are set out above) without proper oversight from the legislature – an outcome that constitutes a threat to the rule of law, as well as to our constitutional structure. A fundamental part of the UK's constitution is the separation of powers, whereby laws are introduced by government but then debated and approved by Parliament, rather than the executive.

Furthermore, the Bill does not provide any information on what processes will be applied by ministers to determine what should be kept, what should be left to expire and what should be amended. In addition,

there is nothing in the Bill about what consultation or public participation will be applied to the exercise of the powers granted by the Bill – there are no guarantees as to any taking place. This undermines the feature of the rule of law that legislation should be publicly promulgated and subject to scrutiny by those persons elected for the purpose.

In this respect, the Bill may also constitute a breach of the UK's international obligations under the Aarhus Convention. Article 8 of the Convention requires that signatory parties promote effective public participation during the preparation of regulations and/or other generally applicable legally binding rules that may have a significant effect on the environment. The Bill allows the government to make rules and regulations that are likely to have a significant effect on the environment and therefore if public participation is not guaranteed under the Bill, it may constitute a breach of the Convention.

Problem 4 – Courts brought into the political sphere. The Bill creates new powers for the courts to depart from existing case law. Significantly, the language of Clause 7 states that a higher court may depart from binding retained domestic case law, "*if it considers it right to do so*" having regard to a number of things, including: (i) the extent to which the case law is determined or influenced by retained EU case law; (ii) any changes in circumstance that are relevant to the retained domestic case law; and (iii) "*the extent to which the retained domestic case law restricts the proper development of domestic law*".

This last provision is opaque but suggests that judges will be asked to make decisions on whether to depart from case law on the basis of whether to do so would be good for the development of "*domestic law*" – a task that appears more appropriately to fall within the functions carried out by Parliament as the legislature.

The provisions allowing for referrals on points of law and the ability of legal representatives of the government and devolved administrations to be admitted as parties to cases that involve questions of retained case law have the potential to create problems:

1. The wording of the Bill makes clear that a referral on a point of law to a higher court is to take place during proceedings – presumably necessitating a stay in the case. This will further slow down an already sluggish litigation process and swell the court backlog, especially given that the other provisions of the Bill are likely to create significant legal uncertainty that courts will look for assistance in resolving;
2. The Bill raises the prospect of the government repeatedly referring points of law arising out of retained case law in order to try and land at an interpretation that suits its political agenda. The ability of the government to be joined to proceedings in cases where a party is arguing that the court should depart from retained case law adds a further political pressure to decisions to be made by the courts.

Problem 5 – Deregulation. Clause 15 gives ministers and devolved administrations the ability to revoke and, critically, replace REUL with regulations that either meet the same or similar objectives or are considered "*appropriate*". The breadth of this power is notable as it gives the executive *carte blanche* to introduce legislation, through statutory instrument, that replaces REUL without any requirement that the replacing legislation performs the same or a similar function – it will be entirely a matter of discretion. More significantly, Clause 15(5) states that no revocation or replacement of REUL may take place unless the minister or devolved administration considers that "*the overall effect of the changes made by*

it…(including changes made previously) in relation to that subject area does not increase the regulatory burden."

'Regulatory burden' is defined at Clause 15(10) as including (amongst other things): financial cost; administrative inconvenience; obstacles to trade or innovation; and obstacles to efficiency, productivity or profitability. This clause builds deregulatory pressure into every decision to be made by ministers as to whether to replace a piece of REUL. Such an outcome (alongside other features of the Bill) threatens the government's ability to satisfy its international obligations, principally under the Trade and Cooperation Agreement ("**TCA**"). The TCA includes a non-regression clause, such that the UK must not reduce levels of environmental or climate protection below those that were in place at the end of the transition period in a manner that affects trade or investment. The 'trade or investment' test is a difficult one to overcome, but one could readily see how removing swathes of REUL and replacing it with weaker regulation might fall foul, on the basis that the issues REUL influences (e.g., environment and employment) go to the competitiveness of UK products and services.

In addition to potentially breaching the UK's international commitments, the provisions of the Bill (and in particular Clause 15(5)) are likely to make it difficult for the government to meet its own targets, including in relation to environmental protection. The achievement of targets such as those under the Environment Act, the 25 Year Environment Plan and the Net Zero Strategy is predicated, in large part, on the continuation of REUL. Should the government proceed to replace REUL with less effective regulation, it will be left with fewer tools to achieve what it has obligated itself to achieve – an outcome which is bad for the environment but also opens the government up to litigation. These points must also be viewed in the context of the current government's failures to meet its own environmental obligations – the most recent and striking example being missing the Environment Act 2021 deadline of 31 October 2022 for the presentation of legally binding improvement targets for air, water, nature and waste to Parliament.

Conclusion

In principle ClientEarth does not, post-Brexit, oppose a review of REUL to determine what works well and should be kept, what could be amended to the benefit of the UK and what should be revoked. Indeed, the process of replacing EU law with new domestic law has been taking place over the last few years, leading to legislation such as the Fisheries Act 2020 and the Environment Act 2021. But what the Bill entails – a chaotic and inefficient inversion of the legislative process that outs at risk a multitude of protections – does not constitute the targeted and structured review that is needed. Furthermore, no convincing reasons have been provided by the Government for why this review and rewriting of REUL needs to take place on an expedited basis without proper oversight from Parliament.

22 November 2022

ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.