



## **Retained EU Law (Revocation and Reform) Bill**

**House of Lords**

**Second Reading**

**Briefing**

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## Summary

1. JUSTICE urges reconsideration of not *if* but *how* we extricate ourselves from the vast amount of retained EU law still in force in the UK, after decades of it becoming enmeshed in our law and our lives. The current Bill prioritises speed and executive control of the task rather than prioritising accountable, considered and transparent law-making.
2. We highlight **3 key issues**:
  - a. First, the Bill's sunset clauses will rush the huge task of reviewing vast amounts of REUL in various areas. The Bill imposes unnecessary deadlines, placing an unnecessary strain on Government resources and posing an unnecessary risk to individuals and businesses.
  - b. Second, the Bill is a "Skeleton Bill" which:
    - i. gives insufficient information to the public about the policy which will guide decisions to keep or delete law in different areas (e.g. employment law, environmental law), with no obligation to consult the public; and meanwhile
    - ii. gives the Government excessive power to significantly change the objective, substance and impact of the law, with very little Parliamentary scrutiny.
  - c. Third, the Bill seeks to give courts mandatory factors to consider when determining whether to overturn retained case law. These factors are unnecessary and neglect the importance of legal coherence, clarity and certainty.
3. **JUSTICE recommends**:
  - a. The sunset clauses should be removed from the Bill. At a minimum, we support amendments which could minimise the impact of the sunset clauses on Parliamentary scrutiny, legal uncertainty and the inadvertent deletion of law (including of law in areas of devolved competence).
  - b. The use of a "Skeleton Bill" to reform so much law with executive powers should be reconsidered. At a minimum, the excessive powers in clause 15 and 16 must be limited.
  - c. The mandatory factors in clause 7 for courts considering whether to overturn case law should be deleted, or at a minimum legal certainty should be included as a further factor.

## Introduction

4. JUSTICE is an all-party law reform and human rights organisation and the UK section of the International Commission of Jurists. Our vision is of fair, accessible and equal legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law. This briefing is written in advance of Second Reading in the House of Lords of the Retained EU Law (Revocation and Reform) Bill ("**the Bill**").
5. Retained EU law ("**REUL**") is the EU-derived law which was preserved when the UK left the EU.<sup>1</sup> This preservation was never intended to be permanent, but rather to avoid a cliff edge whilst the UK considers what REUL it wants to keep and lose.
6. A vast amount of REUL is within the scope of this Bill,<sup>2</sup> impacting a number of important and disparate areas. These include healthcare-related products, medical technology, food, vast amounts of environmental protections (e.g. to air, water quality, habitat conservation, invasive species) human tissues, blood safety and quality, chemical production, and employment rights (e.g. parental leave, equal pay, holiday pay), to name a few.
7. The task of deciding what law should be kept and lost is a commensurately large and important one – it will probably affect the lives of most, if not all, the individuals in the UK, many of its businesses and other organisations, as well as the UK's environment in which they all exist.

## A. The sunset deadline

8. **The Bill imposes a tight deadline.** Clauses 1 and 3 are sunset clauses and revoke anything which has not been saved by ministers by 31 December 2023 (or a later specified date with a longstop of 23 June 2026).
  - a. Clause 1 relates to EU-derived domestic secondary legislation and retained direct EU legislation (mostly EU regulations).
  - b. Clause 3 relates to rights, powers, liabilities, obligations, restrictions, remedies and procedures which are directly effective, from Treaties or Directives.<sup>3</sup>

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<sup>1</sup> By ss 2, 3 and 4 European Union (Withdrawal) Act 2018

<sup>2</sup> Excluded is EU-derived primary legislation, such as the Equality Act 2010, and some REUL relating to financial services and markets (which is being dealt with separately as a discrete policy area in the Financial Services and Markets Bill). In scope is EU-derived domestic secondary legislation, directly effective EU legislation (mostly EU regulations), and other principles, rights, obligations etc from treaties and developed under treaties through case law.

<sup>3</sup> For example (such as Article 157 TFEU: the principle of equal pay for male and female workers for equal work or work of equal value is applied).

9. This deadline is unnecessary, and concerns JUSTICE for the following reasons:
- a. **There is no evidence that the deadlines are derived from any time estimate of how long the exercise will take**, taking Government capacity and the size of the task into account.
  - b. **The size of the task is ever-growing**. The explanatory notes refer to “over 2,400” pieces of REUL, and the online REUL Dashboard, created to provide a central resource for the public of REUL, catalogues a total of 2,417 pieces of REUL (mostly instruments caught by clause 1; so far only 28 of these relate to the rights, liabilities, etc caught by clause 3). However, as was recognised during the Commons stages, this does not reflect the total REUL identified, with a reported 1,400 pieces of regulation (at minimum) to be added.<sup>4</sup> By the end of Committee, members referred to the almost 4,000 pieces of legislation in scope.<sup>5</sup>
  - c. **Ministers cannot push back the sunset clause to make more time to identify REUL instruments**. The powers to disapply the sunset or to elongate the period before sunset (up to 23 June 2026) both require that the instrument or legislation be specified or described.<sup>6</sup> If an instrument has not yet been identified, it cannot be exempted. There is no power at all to delay clause 3.
  - d. **The result is that the sunset clauses may delete unidentified law, unintentionally**. This would not only be an incompetent and undemocratic way of repealing law but would also cause significant legal uncertainty, impacting individuals and businesses. Legal certainty is a key element of the rule of law, as explained by Lord Bingham: “the law must be accessible and so far as possible intelligible, clear and predictable”.<sup>7</sup> Concern about legal uncertainty has been expressed by more than a dozen organisations including the Institute of Directors, Trade Union Congress and Chartered Institute of Personnel and Development who warned the Bill would “cause significant confusion and disruption” for businesses, workers, consumers and conservationists.<sup>8</sup> As Prof Catherine Barnard stated in her evidence to the Public Bill Committee, it “undermines UK’s international reputation as a stable system for investment and in which to settle legal disputes, at a time when the country is focusing on growth.”<sup>9</sup>

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<sup>4</sup> PBC Deb (Bill 156) 8 November 2022, col. 33.

<sup>5</sup> PBC Deb (Bill 156) 29 November 2022, col 270, 271, 275, 278.

<sup>6</sup> Clause 1(2) and clause 2(1)

<sup>7</sup> Tom Bingham, *The Rule of Law* (2010)

<sup>8</sup> See Daniel Thomas et al, [UK business and unions demand scrapping of planned bonfire of EU rules](#), *Financial Times* (23 November 2022)

<sup>9</sup> Prof Catherine Barnard and Dr Joelle Grogan, [Written evidence for HC Public Bills Committee](#), p2

10. **There has not been sufficient cooperation with devolved Governments nor sufficient thought about the effect of the sunset clauses – and the whole Bill – on devolved nations.** In particular:

- a. The central Government alone created the REUL Dashboard; the cataloguing exercise of REUL has not been done in partnership with devolved governments.<sup>10</sup>
- b. The sunset clause is being imposed unilaterally on devolved administrations, regardless of their capacity to identify, consider and decide what should be revoked, restated or amended.<sup>11</sup>
- c. Devolved authorities cannot extend the sunset up to 23 June 2026; this power in clause 2 is only open to central government ministers.
- d. There is no limitation on the powers of central government ministers to revoke, restate or amend legislation in areas of devolved competence.

11. As a result, both the Scottish and Welsh Governments have withheld consent for this legislation.<sup>12</sup> Angus Robertson MSP, Cabinet Secretary for Constitution, External Affairs and Culture, has stated the Bill is “*a direct assault on devolution*”,<sup>13</sup> whilst Mick Antoniw MS, General Counsel for Wales and Minister for the Constitution, described the bill as giving UK government ministers “*unfettered authority to legislate*”.<sup>14</sup> Meanwhile, Northern Ireland’s position is extremely unclear: the concurrent Northern Ireland Protocol Bill and the failure to form an executive means its position requires careful and separate consideration.<sup>15</sup>

## Conclusion

12. In JUSTICE’s view the sunset provisions should be removed so that any REUL which ministers wish to delete will have to be proactively revoked, rather than being passively deleted through inaction. This will avoid four detrimental impacts:

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<sup>10</sup> The REUL Dashboard explicitly states it is “not intended to provide an authoritative account of REUL that sits with the Competence of the Devolved Administrations.”

<sup>11</sup> Mick Antoniw MS, ‘[Written Statement: The Retained EU Law \(Revocation and Reform\) Bill](#)’ (Wales Government, 3 November 2022)

<sup>12</sup> Letter from Angus Robertson to Grant Shapps (8 November 2022); Mick Antoniw MS, ‘Written Statement: The Retained EU Law (Revocation and Reform) Bill’ (Wales Government, 3 November 2022) <<https://gov.wales/written-statement-retained-eu-law-revocation-and-reform-bill>> accessed 11 November 2022.

<sup>13</sup> PBC Deb (Bill 156) 8 November 2022, col 77

<sup>14</sup> Written statement, 3 November 2022

<sup>15</sup> See Dr Viviane Gravey’s concern that the Bill’s removal of the supremacy of EU law in fact contradicts the Northern Ireland Protocol Bill before the commons PBC Deb (Bill 156) 8 November 2022, col 83

- a. deletion of law by inaction, without any parliamentary scrutiny,
- b. unintentional deletion of law which has evaded identification,
- c. legal uncertainty for the public, and
- d. deletion of law in areas of devolved competency without consent.

**We therefore recommend the removal of the sunset deadlines. This would not stop REUL from being revoked, but it would necessitate it being done proactively, with at least some scrutiny.**

**Notwithstanding our primary position, we alternatively support amendments which will seek to lessen the above detrimental impacts.**

We suggest consideration of:

- Amendments which give more time to identify REUL, benefitting Government departments and devolved authorities who do not have capacity to complete the task by 31 December 2023.
- Amendments which permit devolved authorities to extend the sunset clause in clause 2, rather than only giving this power to ministers of the Crown.
- Amendments which require the Government to inform Parliament explicitly what law it proposes to delete under the sunset clauses. We further suggest such amendments would provide an opportunity for Parliament to scrutinise the proposed law to be deleted, ahead of the sunset date.

## **B. A “Skeleton” Bill**

13. Skeleton legislation is when *“little of the policy is included on the face of the bill”* but nevertheless Parliament is asked *“to pass primary legislation so insubstantial that it leaves the real operation of the legislation to be decided by ministers”*.<sup>16</sup>

14. **Skeleton bills have been widely condemned as undemocratic**, the Delegated Powers and Regulatory Reform Committee (“**DPRRC**”) warned that *“the abuse of delegated powers is in effect an abuse of Parliament and an abuse of democracy”*.<sup>17</sup> In response to the DPRRC’s

<sup>16</sup> House of Lords, Delegated Powers and Regulatory Reform Committee, [Democracy Denied? The urgent need to rebalance power between Parliament and the Executive](#), HL Paper 106 12th Report of Session 2021–22, pp 3 and 26. See further the sister report of the House of Lords’ Secondary Legislation Scrutiny Committee [Government by Diktat: A call to return power to Parliament](#), HL Paper 105 20th Report of Session 2021–22

<sup>17</sup> DPRRC, *Democracy Denied?*, p3. As of June 2022, only 16 statutory instruments have been rejected since 1950 and the House of Commons has not rejected one since 1979. Though forms of scrutiny exist, such as the affirmative procedure for regulations, it has been commented that “Regulations put before the Commons are given the level of consideration which it would be an exaggeration to describe as cursory.” Lord Judge, ‘A

2021 report, then leader of the House of Commons, Jacob Rees-Mogg, agreed that he would “encourage” more minimised use of delegated powers where possible and the Government generally agreed to provide Parliament with more time to assess executive powers.<sup>18</sup> However the current Bill could not be further from this direction of travel, in both the lack of policy on the face of the Bill and the powers it delegates to ministers.

### Lack of policy

15. **Parliamentarians are being asked to grant ministers a “licence to legislate”<sup>19</sup> over thousands of legal instruments, without any clear substantive policy.** Instead, only platitudes have been given – of reforming the law so it is “right” or “fit” for the UK – with no meaningful way in which the public or Parliament can understand what will be reformed by ministers, in areas such as employment, environment, or product safety, and how.<sup>20</sup>
16. As a result, the full impact of the Bill cannot be understood, by the public, parliament, or indeed it seems by the Government itself. The independent Regulatory Powers Committee found that the impact assessment accompanying the Bill is “*Not Fit For Purpose*” (red-rated). The quality of different analytical areas were all found to be either weak or very weak, meaning that they provide inadequate support for decision-making; and the assessment of the impacts on small and micro businesses was also red-rated.<sup>21</sup> It is further concerning that the Public Bill Committee only received the RPC’s report on 21 November, as the impact assessment was only received by the RPC a week after it was laid before Parliament.
17. No reason has been provided as to why it is necessary to reform so much law in one Bill, so rapidly. As has been raised in Committee, financial services are being reformed separately.<sup>22</sup>

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[Judge’s View on the Rule of Law](#)’ (Annual Bingham Lecture London, 3 May 2017). In 2013-2014 sessions the average length of debate on scrutiny of secondary legislation was 26 minutes (see Lord Judge, *ibid*, see Ruth Fox and Joel Blackwell, [Devil is in the Detail: Parliament and Delegated Legislation](#) (Hansard Society 2014), 80). DPRRC report 2021, p4.

<sup>18</sup> [Letter from Jacob Rees-Mogg to Lord Blencathra, Lord Hodgson and Baroness Taylor](#) (19 October 2020)

<sup>19</sup> As condemned by the DPRRC *Democracy Denied?*, (2021), para 59

<sup>20</sup> On the task of reviewing REUL, Lord Frost stated in 2021 that the policy intention was to “amend, replace or repeal all the REUL that is not right for the UK”. What “right for the UK” means, however, is open to an infinite number of interpretations. The policy paper ‘The Benefits of Brexit’, January 2022, provides extremely scant policy which cannot be meaningfully scrutinised by the public. For example, with respect to environmental law, it simply states that “We are reviewing and reforming the estimated 80% of our environmental law that came from the EU to ensure it is rational, cohesive and fit for the UK’s unique economy and natural environment. See Lord Frost, *Brexit Opportunities: Review of Retained EU Law*, HLWS445 9 December 2021; and HM Government, Cabinet Office, [The Benefits of Brexit: How the UK is taking advantage of leaving the EU](#), January 2022.

<sup>21</sup> Regulatory Policy Committee, [Retained EU Law \(Revocation & Reform\) Bill: RPC Opinion \(Red-rated\)](#), 21 Nov 2022

<sup>22</sup> Clause 22 subsection 5 excludes this REUL from the scope of the sunset clause

We agree with Mark Fenhalls KC, then Chair of the Bar Council, in his response to this: “*We cannot understand why financial services are the subject of such a responsible, measured approach, which does not seem to apply to consumer protection, cosmetic and household cleaning product safety, water and air standards, and so forth.*”<sup>23</sup>

### Excessive delegated powers

#### **18. The executive powers in the Bill are extraordinarily broad.**

19. Clauses 12 and 13 give ministers the power to restate REUL in secondary legislation.<sup>24</sup> In the restated law, ministers can use different “*words or concepts*” from the original instrument and make “*any change*” considered “*appropriate*” to: (i) resolve ambiguities; (ii) remove doubts or anomalies; or (iii) facilitate improvement in the clarity or accessibility of the law (including omitting anything which is deemed by ministers to be legally unnecessary).

20. The powers in clause 15 go even further.

- a. Clause 15(1) confers a power to revoke legislation.
- b. Clause 15(2) confers a power to make whatever alternative law a minister “*considers appropriate*” to achieve the “*same or similar objectives*” (note that the objective need not be identical, only similar).
- c. Clause 15(3) goes even further still: a sweeping power to “*make such alternative provision as the relevant national authority considers appropriate*”.
- d. **There is therefore no requirement for legislation made under clause 15(3) to be similar to the REUL it replaces.**

21. Furthermore, the restrictions on clause 15 powers are limited. The overall effect of the changes cannot “*increase the regulatory burden*”;<sup>25</sup> establish a public authority or impose taxation.<sup>26</sup> However ministers can:

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<sup>23</sup> House of Commons, Retained EU Law (Revocation and Reform) Bill (First sitting), PBC Deb (Bill 156) Tuesday 8 November 2022, Col 28

<sup>24</sup> Clause 12 provides the power to restate REUL up to the point of the sunset provisions, whilst clause 13 provides for the power to restate “assimilated law” after the sunset provisions. Assimilated law is a term coined in clause 6 of the Bill, and refers to REUL after 31 December 2023, when any remaining REUL, which is not revoked or automatically deleted by the sunset clause, will cease to have any special status, and will simply be “assimilated” domestic law.

<sup>25</sup> Clause 15(5). The definition of burden is wide, from an “*administrative inconvenience*” to criminal sanctions (Clause 15(10))

<sup>26</sup> Clause 15(4)(f)



- a. create criminal offences or impose monetary penalties as long as they “*correspon[d]*” or are “*similar to*” offences/penalties being replaced.<sup>27</sup>
  - b. confer the power to make subordinate legislation as long as it “*corresponds*” or is “*similar to*” a power being replaced.<sup>28</sup>
  - c. confer any other functions or discretions on any person.<sup>29</sup>
  - d. and while they cannot increase the regulatory burden, **there is no restriction on the extent to which people’s protections or rights can be decreased.**
22. Furthermore, clause 15 replacements can amend primary legislation, if the secondary REUL (or after sunset, secondary assimilated law) being replaced itself amended primary legislation. This means clause 15 can be used as a Henry VIII power.
23. Finally, some replacements are automatically subject to the affirmative procedure: those which amend primary legislation, confer a power to make subordinate legislation or create a criminal offence; or are made under Clause 15(3).<sup>30</sup> Anything else under clause 15(2) can be subject to the negative resolution procedure, subject to a sifting process.<sup>31</sup>
24. **Clause 16 contains an indefinite power to update**, taking account of changes in technology, or developments in scientific understanding.<sup>32</sup> This power:
- a. **Is overly broad:** Ministers can make any changes they “*conside[r] appropriate*”, regardless of how contentious any scientific advancement or change in technology is.
  - b. **Lacks sufficient scrutiny:** it is unclear why clause 16 is only subject to the negative resolution procedure and not the sifting procedure, like clauses 12, 13 and 15.<sup>33</sup>

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<sup>27</sup> Clause 15(4)(c) and (d)

<sup>28</sup> Clause 15(4)(a)

<sup>29</sup> Clause 15(4)(b), subject to clause 15(4)(a) ie the constraints on the power to make subordinate legislation.

<sup>30</sup> Schedule 3 para 7(2) of the Bill

<sup>31</sup> The sifting process, first introduced by the EUWA 2018, allows ministers to propose the negative procedure, whilst providing committees of both houses with a draft of the instrument and a memorandum explaining why the procedure is considered appropriate. However, even if the negative procedure is not agreed by either committee to be appropriate, the minister can proceed in any event. See Schedule 3 para 8 of the Bill.

<sup>32</sup> The indefinite updating power applies to any REUL, any assimilated law, and any replacement/restated law made under the powers contained in sections 12, 13 or 15.

<sup>33</sup> See fn 31 above.

### Example 1: Parental Leave

25. The right to parental leave is contained within REUL.<sup>34</sup> It is different from maternity or paternity leave: it entitles parents, after they have been in their job for one year, to be absent from work for a set period to care for a child.<sup>35</sup> Employers can only postpone it narrow circumstances: when the operation of the business is “unduly disrupted”.<sup>36</sup> As currently drafted, the Bill could be used to change parental leave substantially, with minimal Parliamentary scrutiny.
26. Restatement regulations under clause 12 or 13 could purport to “clarify” the test using different words and concepts, which in practice would weaken the test, e.g. replacing the test with simply “disrupted” or even “caused inconvenience”. This could all be done using the negative resolution procedure.
27. Replacement regulations under clause 15 could go further. Ministers could decide to give employers’ the power to refuse leave, rather than just postponing it, interpreting such change as having a “similar objective” (of creating provision for parental leave whilst protecting businesses from being disrupted). This would reduce the burdens on businesses, and therefore be permissible. Since this would be under clause 15(2), such regulations would not require the affirmative procedure.
28. Ministers could go even further under clause 15(3). They could decide to radically overhaul the right to parental leave under clause 15(3), simply if they “*conside[r it] to be appropriate*”. Alternative provision would not need to have a similar objective; this overhaul could impose limits, restrictions and exemptions, all permissible as long as they reduce the burdens on employers. This is despite the potential for such an overhaul to curtail the rights of employees significantly and indeed go against the best interests of children. These regulations would have to be under the affirmative procedure.
29. Finally, the right to parental leave could cease to exist in UK law due to the sunset provisions, with no scrutiny from Parliament whatsoever.

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<sup>34</sup> The Maternity and Parental Leave etc Regulations 1999 implement the EU Council Directive 96/34/EC (OJ No.L145, 19.6.96, p.4).

<sup>35</sup> Reg 13 of the Maternity and Parental Leave etc Regulations 1999 (MPLR 1999); for up to 4 weeks per year per child, and up to a total of 18 weeks per child, reg 14.

<sup>36</sup> Schedule 2 MPLR 1999

### Example 2: Young witnesses whose age is unclear in criminal proceedings

30. REUL currently secures the protections available to young witnesses in court. Child victims are automatically given protections in court (often known as ‘special measures’, for example giving evidence by video link), however there was previously no automatic eligibility in UK law for those whose age is unclear. Due to EU Directives,<sup>37</sup> domestic law was amended<sup>38</sup> to include a presumption that trafficking victims and victims of sexual abuse can be treated as children for the purposes of special measures, if their age is unclear but there is reason to believe they are under 18.
31. As currently drafted clause 15 would allow a minister to revoke the regulations, removing the above protections (clause 15(1)). Or they could amend the protections to exclude any child who was not proven to be 18 if the minister considered that alternative approach to be “appropriate” (clause 15(3)).
32. Alternatively, clause 16 could be used to impose a requirement for scientific testing of a child’s age, rather than using a presumption of eligibility if their age is unclear.<sup>39</sup>
33. Since this REUL in fact amended a domestic enactment, it should be noted that the sunset clause will *not* automatically delete the provision (see clause 1(3)).

### Conclusion

34. JUSTICE is unaware of a more skeletal bill having been laid before Parliament. There is insufficient clarity on the policy, process and full extent of the law that will be impacted by this legislation, despite the widespread impact it could have on the general public.
35. Nevertheless, **the Bill asks Parliament, pre-emptively, to write the executive a license to legislate at an extraordinary scale with overly broad powers.** JUSTICE considers this to be contrary to the Bill’s stated aim “*to firmly re-establish our Parliament as the principal source of law in the UK*”<sup>40</sup> as well as being a manifestly undemocratic way of changing the law.

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<sup>37</sup> Directive 2011/36/EU and Directive 2011/93/EU on child victims of human trafficking and sexual abuse, respectively.

<sup>38</sup> s. 33 of the Youth Justice and Criminal Evidence Act 1999, amended by the Trafficking People for Exploitation Regulations 2013 and the Special Measures for Child Witnesses (Sexual Offences) Regulations 2013

<sup>39</sup> JUSTICE hopes this is unlikely, however Section 52 of the recent Nationality and Borders Act 2022 included a provision for ministers to themselves deem what scientific methods are appropriate for age assessments and make regulations specifying such methods, This is despite professional organisations expressing significant concern at the reliability of any current scientific testing to determine age, For example, the Royal College for Paediatrics and Child Health, see House of Commons library, [Nationality and Borders Bill](#), p58.

<sup>40</sup> [Memorandum from the Cabinet Office to the Delegated Powers and Regulatory Reform Committee](#), 20 Sept 22, p1

**JUSTICE recommends the Bill’s sweeping approach to reforming REUL using a Skeleton Bill is urgently reconsidered. JUSTICE supports the approach taken in financial services and markets, i.e. taking discrete policy areas separately in primary legislation.**

**In the alternative, JUSTICE supports amendments which safeguard against delegated powers in the Bill making substantial policy changes without any adequate Parliamentary scrutiny, particularly clauses 15 and 16.**

### **Clause 15**

With respect to clause 15:

- we support amendments which seek to prohibit regulations decreasing protections in the legislation, imitating the prohibition against increasing regulatory burdens. Eg *No provision may be made by a relevant national authority under this section in relation to a particular subject area unless the relevant national authority considers that the overall effect of the changes made by it under this section (including changes made previously) in relation to that subject area does not decrease the protections afforded to those who benefit from the original provision.*

- we support the removal of “or similar” in clause 15(2), so the replacement regulations would have to have the same objectives.

- we support the removal of clause 15(3) so completely different “alternative” laws cannot be passed using delegated powers.

### **Clause 16**

With respect to clause 16:

- At a minimum, we recommend that clause 16 statutory instruments be subject to the sifting procedure in Schedule 3, para 8 (1) (a), like clause 12, 13 and 15 instruments.

- We would further suggest that ministers be required to publish a summary statement of any scientific or technological advice they have received on the changes proposed for the purposes of the sifting process.

- We further would support amendments which would prevent clause 16 instruments imposing mandatory technological or scientific change on a sector without consultation

## C. Case law in the courts

36. It is inevitable that the courts will need to reconsider some previously authoritative legal decisions, since the supremacy of EU law is abolished by the Bill (clause 4). Clause 7 subsections (1) to (7) seek to change the current rules for higher appeal courts<sup>41</sup> when considering whether to depart from case law.
37. The higher appeal courts in the UK are already not bound by retained EU case law,<sup>42</sup> and can already depart from case law if it is “right to do so”.<sup>43</sup> This test is well-established, having been set out in a House of Lords practice statement in 1966.<sup>44</sup>
38. The Court of Appeal comprehensively considered the power to depart from retained EU case law in the case of *Tuneln Inc v Warner Music UK Ltd* [2021] EWCA Civ 441. The Court considered several factors were relevant:
- a. changes in the domestic legislation;
  - b. changes in the international legislative framework;
  - c. the experience of the CJEU in confronting the relevant issues, for example having done so in a variety of factual scenarios;
  - d. whether there is a clear basis for departing from the law in academic commentary and criticism;
  - e. If there is any settled and consistent guidance on the question from the case law of courts outside the EU;
  - f. if there is a coherent and consistent way to depart from some of the case law, but not other parts of it; and
  - g. any legal uncertainty which would be created.
39. In doing so, the court made a comprehensive analysis and balanced reasons why the court should and should not overturn settled case law, with regard not only to the proper

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<sup>41</sup> “Relevant appeal courts” are the Court of Appeal, the Supreme Court or the High Court of Justiciary, and other higher “appeal” courts listed in clause 6(7): the Court Martial Appeal Court, the Inner House of the Court of Session, the High Court of Justiciary when sitting as a court of appeal; the court for hearing appeals under section 57(1)(b) of the Representation of the People Act 1983; the Lands Valuation Appeal Court; the Court of Appeal in Northern Ireland.

<sup>42</sup> Section 6(4) EUWA 2018 provided that the Supreme Court and the High Court of Justiciary were not bound by retained EU case law. The Court of Appeal and the other appellate courts listed above at fn 41 were added by The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525)

<sup>43</sup> Section 6(5) EUWA 2018

<sup>44</sup> HL Deb 26 July 1966 Vol 276 col 677. The Supreme Court has confirmed its continued use of it, see *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, paras 24-25.

development of the law, but also to the need to ensure coherence, clarity and certainty of the law.

40. **Legal coherence, clarity, and especially certainty, are not dispensable qualities in a common law jurisdiction.** As was recognised in the House of Lords 1966 practice statement, “precedent [is] an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules but essential elements to good law-making.”<sup>45</sup>
41. They go on to explain the need to balance the need not to “unduly restrict the proper development of the law [...] with too rigid adherence to precedent” whilst “bear[ing] in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.”<sup>46</sup> Legal certainty therefore has a particular value which must not be overlooked.
42. However, that is exactly what the Bill does. For retained EU case law (or *assimilated* EU case law after 2023) the Bill removes the “right to do so” test, and lists new mandatory factors for courts to consider at clause 7(3):
- a. the fact that decisions of a foreign court are not (unless otherwise provided) binding;
  - b. any changes of circumstances which are relevant to the retained EU case law; and
  - c. the extent to which the retained EU case law restricts the proper development of domestic law.
43. For domestic case law which interprets or applies REUL, the test is still if it is “right to do so” but mandatory factors are also listed for the court to consider at clause 7(4):
- a. the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart;
  - b. any changes of circumstances which are relevant to the retained domestic case law;
  - c. the extent to which the retained domestic case law restricts the proper development of domestic law.
44. JUSTICE considers these factors to be unnecessary:
- a. The first “that decisions of a foreign court are not (unless otherwise provided) binding” is strange, since it simply restates s.6(4)(ba): “a relevant appeal court is not bound by any

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<sup>45</sup> HL Deb 26 July 1966 Vol 276 col 677.

<sup>46</sup> *Ibid*

retained EU case law (except so far as there is relevant domestic case law which modifies or applies the retained EU case law and is binding on the relevant appeal court).”

b. The second is common-sensical, since changes in circumstances would be taken into account in any event, as can be seen in *TunelIn*.

c. And the third is already an established factor, as it is included in the House of Lords 1966 Practice Statement.

45. Moreover, they are incomplete. All the listed factors promote overturning case law but miss any reference to the coherence, clarity and certainty of the law. Whilst the mandatory considerations in the Bill are admittedly non-exhaustive and therefore it is open to judges to consider coherence, clarity and certainty, their omission is concerning in light of the prominence given to the mandatory factors. Instead, the section is unbalanced and flawed. We do not agree with the Government’s concerns expressed in the Public Bill Committee, that any additional factors would “reinforce excessive influence of the European courts”.<sup>47</sup> The abolition of EU Supremacy is clear and unambiguous on the face of the Bill, and the courts’ power to depart from case law is similarly clear. A more balanced approach would not reinforce excessive influence, but rather offer the opportunity for full consideration of all elements.

**JUSTICE considers a more balanced approach is required, which does not omit the importance of legal coherence, clarity and certainty, particularly the latter.**

**We recommend the mandatory factors in clause 7(3) and clause 7(4) should simply be deleted.**

The courts have shown they are able to consider all relevant factors in the case of *TunelIn*, thus the mandatory factors are an unnecessary encroachment on the judicial task.

**In the alternative, JUSTICE supports the addition of mandatory factors which reflect the importance of legal coherence, clarity and certainty. At a minimum, legal certainty should be added, given its importance to the public and the rule of law.**

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<sup>47</sup> PBC Deb (Bill 156) 24 November 2022, col 199.