SUMMARY OF LEGAL OPINION OF SIR JEFFREY JOWELL KCMG KC & JACK WILLIAMS ON THE RETAINED EU LAW (REVOCATION AND REFORM) BILL

Sir Jeffrey Jowell KCMG KC, Blackstone Chambers and Jack Williams, Monckton Chambers, were instructed by ClientEarth, the RSPB, and WWF-UK due to those organisations’ significant concerns about the implications of the Retained EU Law (Revocation and Reform) Bill (“the Bill”) for the United Kingdom’s constitutional order generally and environmental law forming part of retained EU law specifically. They were asked to opine on the implications of the ‘sunset’ provisions in clauses 1 to 3 and the ministerial powers given (particularly in clauses 15 & 16); and the possible impacts on the UK’s international obligations and devolution settlements.

In advising on these constitutional issues, Sir Jeffrey and Jack take no position on matters of substantive policy (which is ultimately for Parliament, Ministers, and the devolved authorities) as to whether any particular aspect of retained EU law ought to be retained, revoked, restated or replaced. Nor do they express any view on the merits of any substantive decision as to whether any particular retained EU law should be continued or altered.

The following is a summary of their key conclusions. A full copy of their Opinion can be found here.

Summary of conclusions

1. UK governance rests on settled constitutional principles, including parliamentary sovereignty (which includes the accountability of the executive to Parliament), the separation of powers and the rule of law. This Bill, if passed in its current form, would violate all those principles particularly by transferring Parliament’s principal role, law-making, into the hands of Government ministers who will be able to carry this out virtually free of the effective scrutiny of either the electorate or of other members of Parliament (or the devolved legislatures).

2. The claim that the Bill promotes sovereignty is hollow, as it is an exceptional example of Parliament relinquishing its key responsibilities by virtue of:
   (i) the scale of the retained EU law over which the Executive is conferred the power to retain, revoke or amend, within an unreasonable time-frame, thousands of existing laws and principles which govern important areas of public and private life, and
   (ii) the procedures for review and repeal or modification of retained EU law which threaten to subvert the constitutional balance between Parliament and the UK Government and between the Devolved Administrations and Westminster.

3. Insofar as the Bill may be justified by some procedures being in place for the scrutiny of Statutory Instruments by Parliament, this rings equally hollow, since those procedures provide no opportunity to amend the secondary legislation and in practice have rarely been effective in halting its passage.

4. The Bill also offends the rule of law which requires our law to be accessible, clear and predictable. It does so by creating uncertainty as to which retained EU law will or might be retained, repealed or altered, and by the fact that it confers over-broad discretionary powers upon UK Government Ministers and devolved authorities in respect of the vital interests of UK citizens. In particular:
   (i) Clauses 1 to 3 infringe the rule of law because the Bill does not identify the retained EU laws that will be subject to the “sunset provisions”, nor does it impose an obligation for such laws to be identified. To make matters worse, no authoritative index of retained EU law exists. Nor is the implementation of those sunsets certain. The timing of changes is unknown and unknowable; the
Bill provides no protections against Ministers waiting unto the 11th hour to identify whether and, if so, when any change to the default effect of the clause 1 sunset may take place. Likewise, it is silent as to any processes for engagement concerning whether to exempt any measure, or delay its sunsetting. The state and content of the ‘rulebook’ on 1 January 2024 is therefore entirely unpredictable.

(ii) Clauses 1 to 3 also infringe the constitutional principle that the executive is responsible to Parliament. The default time periods for the operation of the sunset clauses create an “artificial emergency” with only months from enactment to the first sunset. This extraordinarily short period gives rise to a ‘ticking timebomb’ with severe time pressure and no time in which Parliament can effectively scrutinise executive action.

(iii) There is no parliamentary safety net or “drain catcher”. Once the law has been sunsetted, there is no provision within the Bill for Parliament to ‘resurrect’ that law for example where the measure has been revoked by mistake or the executive or Parliament changes its mind.

5. The Ministerial Powers in clauses 15 and 16 permit (largely unfettered) discretion for major substantive policy changes. Clause 15, in particular, essentially gives free licence in terms of the nature and scope of the modifications, save that 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. There is therefore no check on any potentially arbitrary decisions.

6. In addition, no opportunity is provided for any outside scrutiny, by experts or through wider public participation. The concern is heightened considering the lack of time before the end of 2023. This is especially concerning in respect of environmental protection where such participation is often legally required.

7. The Bill risks unsettling the devolved settlements. The powers in clauses 15, 16 and 19 can be exercised by UK Ministers, on a UK-wide basis, without consultation or consent from the devolved authorities or legislatures. It is possible for different substantive positions on retained EU law to be taken, creating unwelcome uncertainties and divergences for businesses having to consider the decisions of both Ministers and the Devolved Authorities, and ultimately being required to comply with at least two sets of regulations. The power (clause 2) to delay the first sunset is available only to UK Ministers and not the devolved authorities.

8. The Bill also threatens non-compliance with the UK’s international obligations, with clauses 1 to 3, 15 and 16 putting those obligations at risk. Various UK Government ministers have committed to ensure the operation of the Bill does not jeopardise the UK’s international and environmental commitments. As a matter of law, however, these statements provide no assurances or protections. Of particular note is the UK’s compliance with the Trade and Cooperation Agreement (“TCA”) with the EU, as a range of environmental standards are incorporated directly or indirectly in that Agreement. Divergence from the level-playing field commitments set out in the TCA risks triggering the dispute resolution mechanisms and, ultimately, leading to the potential suspension of certain obligations within the Agreement and retaliatory (trade) measures against the UK.

ClientEarth, the RSPB, and WWF-UK
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