Agenda – Legislation, Justice and Constitution Committee

Meeting Venue:
Committee Room 4 – Tŷ Hywel.
Meeting date: 5 December 2022
Meeting time: 13.30

For further information contact:
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Committee Clerk
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1 Introductions, apologies, substitutions and declarations of interest

13.30

2 Evidence session with Lord Bellamy KC, Parliamentary Under-Secretary of State for Justice: Justice in Wales

13.30 – 14.30 (Pages 1 – 26)

Attached Documents:
LJC(6)-32-22 – Paper 1 – Research Briefing
LJC(6)-32-22 – Paper 2 – Letter from Lord Bellamy KC to Legislation, Justice and Constitution Committee: Access to Justice, 3 November 2022
LJC(6)-32-22 – Paper 3 – Letter to the Lord Chancellor, 12 July 2022

Break

14.30 – 14.40

3 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3

14.40 – 14.45

Made Negative Resolution Instruments

Senedd Cymru
Welsh Parliament

3.1 SL(6)286 – The Greenhouse Gas Emissions Trading Scheme (Amendment) (No. 2) Order 2022

(Pages 27 – 28)

Attached Documents:

LJC(6)-32-22 – Paper 4 – Draft report

3.2 SL(6)290 – The National Health Service (Charges to Overseas Visitors) (Amendment) (No. 4) (Wales) Regulations 2022

(Pages 29 – 30)

Attached Documents:

LJC(6)-32-22 – Paper 5 – Draft report

Affirmative Resolution Instruments

3.3 SL(6)291 – The Food and Feed (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022

(Pages 31 – 33)

Attached Documents:

LJC(6)-32-22 – Paper 6 – Draft report

4 Instruments that raise issues to be reported to the Senedd under Standing Order 21.2 or 21.3 – previously considered

14.45 – 14.50

4.1 SL(6)280 – The Renting Homes (Wales) Act 2016 (Saving and Transitional Provisions) Regulations 2022

(Pages 34 – 40)

Attached Documents:

LJC(6)-32-22 – Paper 7 – Report

LJC(6)-32-22 – Paper 8 – Welsh Government Response

4.2 SL(6)282 – The School Teachers' Pay and Conditions (Wales) Order 2022

(Pages 41 – 45)

Attached Documents:

LJC(6)-32-22 - Paper 9 - Report

LJC(6)-32-22 - Paper 10 - Welsh Government Response

5 Statutory Instruments requiring Senedd consent (Statutory Instrument Consent Memorandums)

14.50 - 14.55

5.1 SICM(6)2 - The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022

(Pages 46 - 55)

Regulations

Explanatory Memorandum

Attached Documents:

LJC(6)-32-22 - Paper 11 - Statutory Instrument Consent Memorandum

LJC(6)-32-22 - Paper 12 - Letter from the Minister for Rural Affairs and North Wales, and Trefnydd, 21 November 2022

LJC(6)-32-22 - Paper 13 - Legal Advice Note

LJC(6)-32-22 - Paper 14 - Letter to Minister for Rural Affairs and North Wales, and Trefnydd, 14 November 2022

6 Inter-Institutional Relations Agreement

14.55 - 15.00

6.1 Written Statement from the Minister for Climate Change: The Producer Responsibility Obligations (Packaging Waste) (Amendment) (England and Wales) Regulations 2022 ("the 2022 Regulations").

(Pages 56 - 57)

Attached Documents:

LJC(6)-32-22 - Paper 15 - Written Statement from the Minister for Climate Change, 28 November 2022

6.2 **Letter from the Minister for Education and Welsh Language: Education Ministers Council meeting**

(Page 58)

Attached Documents:

LJC(6)-32-22 - Paper 16 - Letter from Minister for Education and Welsh Language: Education Ministers Council meeting, 30 November 2022

6.3 **Letter from the Health and Social Care Committee to the Deputy Minister for Mental Health and Wellbeing**

(Pages 59 - 61)

Attached Documents:

LJC(6)-32-22 - Paper 17 - Letter from Health and Social Care Committee to the Deputy Minister for Mental Health and Wellbeing, 1 December 2022

7 Papers to note

15.00 - 15.05

8 Motion under Standing Order 17.42 to resolve to exclude the public from items 9, 10, 11 and 13

15.05

9 Evidence session with Lord Bellamy KC, Parliamentary Under-Secretary of State for Justice: Consideration of evidence

15.05 - 15.15

10 Forward Work Programme

15.15 - 15.25 (Pages 62 - 68)

Attached Documents:

LJC(6)-32-22 - Paper 18 - Forward Work Programme

11 Supplementary Legislative Consent Memorandum on the Social Housing (Regulation) Bill

15.25 - 15.35 (Pages 69 - 73)

The Legislation, Justice and Constitution Committee's Report on The Welsh Government's Legislative Consent Memoranda on the Social Housing (Regulation) Bill

Attached Documents:

LJC(6)-32-22 - Paper 19 - Legal Advice Note

Break

15.35-17.05

(Public Session)

12 Legislative Consent Memorandum on the Retained EU Law (Revocation and Reform) Bill: Ministerial evidence session

17.05 - 18.05 (Pages 74 - 192)

Attached Documents:

LJC(6)-32-22 - Paper 20 - Legislative Consent Memorandum

LJC(6)-32-22 - Paper 21 - Research Brief

LJC(6)-32-22 - Paper 22 - Correspondence from Dr Gravey and Dr Whitten, 15 November 2022

LJC(6)-32-22 - Paper 23 - Correspondence from NFU Cymru, 16 November 2022

LJC(6)-32-22 - Paper 24 - Correspondence from Welsh NHS Confederation, 17 November 2022

LJC(6)-32-22 - Paper 25 - Correspondence from RSPCA, 17 November 2022

LJC(6)-32-22 - Paper 26 - Correspondence from UK Environmental Law Association, 17 November 2022

LJC(6)-32-22 - Paper 27 - Correspondence from Public Law Project, 18 November 2022

LJC(6)-32-22 - Paper 28 - Correspondence from Food and Drink Federation Cymru, 18 November 2022

LJC(6)-32-22 - Paper 29 - Correspondence from Food Standards Agency, 18 November 2022

LJC(6)-32-22 - Paper 30 - Correspondence from Marine Conservation Society, 18 November 2022

LJC(6)32-22 - Paper 31 - Correspondence from Wales Governance Centre, and Wales Council for Voluntary Action, 18 November 2022

LJC(6)-32-22 - Paper 32 - Correspondence from Wales Environment Link, 21 November 2022

LJC(6)-32-22 - Paper 33 - Correspondence from Professor Jo Hunt, 21 November 2022

LJC(6)-32-22 - Paper 34 - Letter from Counsel General and Minister for the Constitution to Llywydd, 28 November 2022

(Private Session)

13 Legislative Consent Memorandum on the Retained EU Law (Revocation and Reform) Bill: Consideration of evidence

18.05 - 18.15

Agenda Item 2

Document is Restricted

Ministry of Justice

Lord Bellamy KC
Parliamentary Under-Secretary of State for Justice

Huw Irranca-Davies MS
Legislation, Justice and Constitution Committee
Cardiff Bay
Cardiff
CF99 1SN

MoJ ref: ADR100316

3 November 2022

Dear Huw,

ACCESS TO JUSTICE: SUMMARY OF ENGAGEMENT RESPONSE

Thank you for your letter of 12 July to the then Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice, the Rt Hon Dominic Raab MP, in your capacity as Chair of the Senedd Legislation, Justice, and Constitution Committee, regarding the paper '*Access to Justice: Summary of Engagement'*.

In responding I will take each of the subjects raised in the paper in turn. I shall of course be happy to discuss each of them at the rescheduled evidence session.

Attracting and Retaining Talent

The *Access to Justice Summary* argues that challenges in recruiting and retaining staff are, at least in part, due to the impact of the pandemic on working practices and the increase in choices that this offers to junior and mid-range legal professionals, who are opting for better-paid roles in London rather than ones in Wales. The issue of the impact of market forces is not new, nor unique to the legal profession. However, the UK has a strong legal sector jobs market and there is a large, highly skilled workforce which Welsh firms can draw upon. Welsh legal services benefit enormously from being part of the internationally renowned England and Wales legal system. The Government is committed to promoting the UK-wide legal sector and legal services in all three jurisdictions – boosting jobs and the economy in Wales as well as in England, Scotland, and Northern Ireland.

Impact of the Legal Aid, Sentencing, and Punishment of Offenders Act 2012

Access to justice is a fundamental right. Last year we spent £774m on civil legal aid across England and Wales to support the most vulnerable, ensuring they can access justice effectively. We are spending around £8m on expanding legal aid provision through the Nationality and Borders Act and are injecting more than £10m a year into housing legal aid through our reforms to the Housing Possession Court Duty Scheme.

Regarding the capacity of providers, the Legal Aid Agency monitors capacity in the legal aid market and the provision of services, taking action when gaps appear. Wherever someone is in England or Wales, legal advice remains available through the civil legal advice telephone service, subject to eligibility criteria.

Whilst legal aid is central to access to justice, the Government recognises the vital role that charities in the advice sector play in helping people with their legal problems, which is why since 2020 we have delivered additional investment of over £10m for not-for-profit organisations who provide specialist legal advice, such as the Law Centres Network. This includes in excess of £600k of funding for legal support providers in Wales, allowing them to help those who need assistance with social welfare related legal matters, which has been provided through the Litigants in Person Support Strategy, the Legal Support for

Litigants in Person grant, the Covid-19 Specialist Advice Services Scheme grant and the Sector Sustainability Grant.

The MoJ continues to engage with representative bodies and providers within the sector to increase understanding of the challenges providers currently face and is considering the long-term sustainability of civil legal aid. We recognise that we need to take a whole system approach to these important issues and will say more on this soon.

Courts and Tribunals

It is argued in the *Access to Justice Summary* that significant travel times in parts of Wales and inadequate public transport infrastructure mean that the location of courts in Wales acts as a barrier for people wishing to access justice. The pandemic has demonstrated the need for remote participation in hearings and, going forward, we want the effective use of audio and video technologies to remain an integral part of the justice system alongside traditional in-person hearings. Video and audio technology has the potential to increase the capacity of the courts, make the process less intimidating for vulnerable people, and improve transparency and accessibility.

In June, by means of the Police, Crime, Sentencing and Courts Act 2022, we extended remote observation of all court and tribunal hearings across England and Wales. This measure complements the provision of traditional public galleries to ensure our justice system is even more accessible and transparent. It will particularly benefit court reporting by the media, but this is not indiscriminate broadcasting: those wishing to observe a hearing remotely must request access and be identifiable to the court. A judge will consider the application and decide what is in the best interests of justice on a case-by-case basis. Any observer who tries to record or broadcast a hearing they are watching could face a fine of up to £1,000 or, if found in contempt of court, be sent to prison for up to two years. As well as the news media, remote observation will benefit those who are less able or willing to sit in a physical courtroom.

The *Access to Justice Summary* emphasises the challenges associated with the provision of information in Welsh. We strive to ensure that court staff provide an excellent service in ensuring that people have access to services in Welsh, and HMCTS works closely in accordance with its Welsh Language Unit to translate court documents specifically prepared for proceedings. This also applies to digital applications, which are shared with the Welsh Language Unit by the Courts and Tribunals Services Centre. With regards to issuing matrimonial proceedings in Welsh, the No Fault Divorce Welsh service has been live for several weeks and to date we have had one petition.

Technology

The MoJ sees the growth of lawtech and innovation in the delivery of legal services as vital to a flourishing legal sector. Lawtech has enormous potential to improve the provision of legal services in the UK through greater efficiency, enabling new ways of delivering legal services and being more responsive to users' needs. The Government is supporting the growth and adoption of lawtech through the LawtechUK programme delivered by Tech Nation, launched in 2019 with an initial £2 million investment. We recently announced an additional £4 million of funding to continue this support into 2025 and intend to launch a competitive process shortly to identify a suitable provider. The Government recognises that smaller law firms may face additional barriers to innovating and adopting technology, so the objectives for the second phase of funding include increasing innovation and the adoption of lawtech across UK legal services.

The government has invested £1.3bn across all jurisdictions of the courts and tribunals as part of the HMCTS Reform Programme to transform the justice system, introducing 21st century technology and online services to improve efficiency and modernise the courts. These digital reforms and simplified services are removing simple cases from court as well as cutting down unnecessary paperwork. The completion of the HMCTS reform programme will modernise and raise performance and improve access

to justice in the civil courts. Over 90% of civil claims will be digitised by March 2023. So far, over 330,000 claims have been issued through the Online Civil Money Claims service, with user satisfaction at 95%.

We are aware of course that some service users feel digitally disenfranchised and excluded. The MoJ is taking steps to address this, including by building digital court services around user needs to ensure full accessibility, providing freely accessible support for users who need help to access HMCTS services online, and providing digital support to complete online applications by *We are Digital*, a digital inclusion training provider.

Accessibility of Welsh Law

The MoJ wants everyone across the United Kingdom to have access to justice. We note the issues raised in the paper regarding the online property Q&A tool and are looking into this.

More widely, we recognise the need for a collaborative approach between the MoJ and the Welsh Government to ensure that Welsh law is accessible, and we are keen to work with our colleagues in the Welsh Government to ensure legal rights are clearly signposted for both reserved and devolved powers.

Commission on Justice in Wales

The MoJ has been clear that, notwithstanding the UK Government's difference of position from that of the Welsh Government regarding the devolution of justice, we are keen to work with the Welsh Government to take forward some of the recommendations which have the potential to improve justice outcomes in Wales, provided they do not require a change to the devolution settlement.

The MoJ and Welsh Government have been working closely to identify and address those recommendations which we both see as a priority. With regard specifically to the points made in the paper, the MoJ has always seen as a weakness the fact that the Commission's report was not costed, so the financial implications of its recommendations will need to be assessed properly before any decisions are taken about potentially taking them forward.

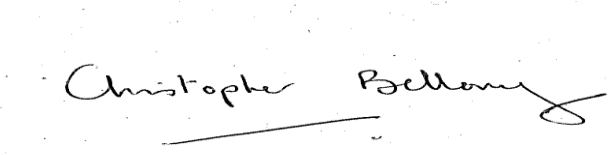
Hybrid Working

Throughout the pandemic, the majority of HMCTS staff continued to attend the workplace to ensure that frontline services were maintained. Some roles were able to continue remotely, either partly in offices or completely from home.

HMCTS has developed guidance and principles to introduce hybrid working across the workforce. These are based on business need but they also balance individual circumstances so that those who would benefit from more flexible arrangements can do so. Every role in HMCTS has a requirement to attend the workplace at least some of the time, whether that be to deliver particular objectives, meet with a team or stakeholder, or for collaborative working purposes. Indeed, for some roles, remote working isn't possible at all. HMCTS has learnt a lot over the last few years and will continue to explore where there is potential to enable remote working whilst continuing to deliver an effective service.

I look forward to meeting you and your colleagues on the Legislation, Justice, and Constitution Committee.

Kind Regards,



LORD BELLAMY KC

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

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Legislation, Justice and Constitution Committee

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Rt Hon. Dominic Raab MP
Deputy Prime Minister, Lord Chancellor and
Secretary of State for Justice

12 July 2022

Dear Dominic

Access to justice: Summary of engagement

In December last year, as part of our remit in relation to justice matters, the Senedd's Citizen Engagement Team undertook some focus groups and a series of one-to-one interviews with legal practitioners and litigants in person in order to gain a better understanding of their experiences of access to justice in Wales.

On 30 June, we published a summary of the outcome of that work. We would welcome any observations you have on the views contained in this summary by 9 September 2022, in advance of Lord Bellamy's appearance before the Committee on 19 September.

I am copying this letter to the Parliamentary Under Secretary of State for Justice, Lord Bellamy QC.

Yours sincerely,

Huw Irranca-Davies

Huw Irranca-Davies
Chair

SL(6)286 – The Greenhouse Gas Emissions Trading Scheme (Amendment) (No. 2) Order 2022

Background and Purpose

The UK Emissions Trading Scheme ("ETS") was established by the Greenhouse Gas Emissions Trading Scheme Order 2020 as a UK-wide greenhouse gas emissions trading scheme, to encourage cost-effective emissions reductions from the power, industry, and aviation sectors. It was designed jointly by the four governments in the United Kingdom. It contributes to the UK's emissions reduction targets and net zero goal, as well as the emissions reduction pathway in Wales.

Earlier in 2022, the UK ETS Authority consulted on "Developing the UK Emissions Trading Scheme (UK ETS)" which contained a number of proposed amendments considered necessary to address technical and operational needs identified during the first year of operation of the UK ETS. These need to be implemented ahead of the 2023 scheme year.

The Explanatory Memorandum states that:

> "*The current amendments cover technical detail that will help strengthen the functioning of the ETS, while also affording increased transparency of the working of the scheme, to the benefit of both participants and general public.*"

The current amendments:

- Respond to impacts on the scheme caused by the Covid-19 pandemic (in particular, by allowing the omission of 2020 Covid year data when calculating activity level changes, for those operators who can demonstrate significant discrepancies in activity caused by the Covid pandemic).

- Strengthen the existing provisions to help improve the effectiveness of the scheme while making it more flexible for participants (for example, by strengthening the evidence base that underpins applications for free allowances by certain industrial operators).

- Regularise the publication of information from the scheme registry to improve transparency.

Procedure

Negative

This Order in Council was made by His Majesty before it was laid before the Senedd, the UK Parliament, the Scottish Parliament and the Northern Ireland Assembly on 16 November 2022.

Any one of those legislatures may annul the Order, in accordance with the negative resolution procedures that apply in those legislatures.

Technical Scrutiny

One point is identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(ix) – that it is not made or to be made in both English and Welsh

We note that the Order in Council was made by His Majesty and was laid before each of the four legislatures in the United Kingdom, and is therefore in English only.

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Welsh Government response

A Welsh Government response is not required.

Legal Advisers
Legislation, Justice and Constitution Committee
30 November 2022

SL(6)290 – The National Health Service (Charges to Overseas Visitors) (Amendment) (No. 4) (Wales) Regulations 2022

Background and Purpose

These Regulations amend the National Health Service (Charges to Overseas Visitors) Regulations 1989 ("the principal Regulations"), which provide for the making and recovery of charges for relevant services provided under the National Health Service (Wales) Act 2006 to certain persons not ordinarily resident in the UK.

Regulation 2 adds Malta and the Bailiwick of Guernsey to the list of countries or territories with whom the UK Government has entered into a reciprocal agreement in Schedule 2 to the principal Regulations.

Procedure

Negative

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. **Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.**

We note there has been no consultation on these Regulations. In particular, we note the following paragraph in the Explanatory Memorandum:

> *"There is no statutory duty to consult prior to making the recommendations. It is considered that the proposed amendments do not require consultation as they are implementing UK international agreements which apply to the UK as a whole and thereby Wales is obliged to implement and observe them."*

2. **Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.**

Standing Order 15.4 requires all laid documents to be bilingual "*so far as is appropriate in the circumstances and reasonably practicable*." We note that the Explanatory Memorandum is not available in Welsh. Could the Welsh Government provide an explanation?

Welsh Government response

Merit Scrutiny point 2:
Explanatory Memoranda for subordinate legislation are prioritised for publication in Welsh (in line with Standard 47 of the Welsh Language Standards). A Welsh language version is published if the subject matter of the Explanatory Memorandum suggests that one should be available in Welsh, or the anticipated audience will expect to see a Welsh language version. In this instance, the Welsh Government deemed that a Welsh Language version of the Explanatory Memorandum was unnecessary due to the the narrow and specific nature of the Regulations and the small target audience (ie. Welsh Local Health Boards).

Legal Advisers
Legislation, Justice and Constitution Committee
28 November 2022

SL(6)291 – The Food and Feed (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022

Background and Purpose

The Food and Feed (Miscellaneous Amendments) (Wales) (EU Exit) Regulations 2022 make amendments to subordinate legislation, which apply in relation to Wales, in the fields of food and feed safety and hygiene.

In particular, these Regulations:

- correct deficiencies in Welsh domestic legislation relating to food and feed hygiene and safety, removing cross-references to EU Directives and transposing certain Annexes to those Directives into domestic legislation;
- correct references within Welsh domestic legislation defining enforcement authorities in relation to animal feed.

Procedure

Affirmative.

The Welsh Ministers have laid a draft of the Regulations before the Senedd. The Welsh Ministers cannot make the Regulations unless the Senedd approves the draft Regulations.

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument:

1. **Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.**

In the preamble on page 5, the European Union (Withdrawal) Act 2018 is incorrectly referred to as the European Union (Withdrawal) Act *2020 [emphasis added]*.

2. **Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.**

Regulation 2(4)(b) amends regulation 12(2) of the Materials and Articles in Contact with Food (Wales) Regulations 2012.

Prior to being amended, the relevant wording in the provision read:

> *"…substances listed in the **first part** of Annex II and subject to the restrictions set out in that **part**." [**emphasis added**]*

Following the amendment the provision reads:

> *"…substances listed in **table 1** of Schedule 6 and subject to the restrictions set out in that **part**." [**emphasis added**]*

Given that the table in Schedule 6 is not split into parts (as opposed to Annex II which is), the remaining reference to "part" left in regulation 2(4)(b) should be replaced with "table".

3. **Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts.**

In regulation 3(2)(a)(ii), in the Welsh text, the corresponding English definition was included in brackets and italics of the existing definition of "*Rheoliadau'r UE*".

However, the amendment made by regulation 3(2)(a)(ii) does not amend the English definition that appears in brackets and italics after the amended definition in the Welsh text. As a result, the new amended Welsh definition will still have the original English definition in brackets afterwards ("*the EU Regulations*") rather the new English definition ("*the retained EU Regulations*"). This will confuse rather than aid the reader by linking the new Welsh definition with the old English definition.

4. **Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts.**

In regulation 3(8), in the Welsh text, the description of the amendment fails to precisely identify where to insert the new text - it states that the new text should be inserted after "***Rh**eoliadau'r UE*" [***emphasis added***] in regulation 19(2) of the 2013 Regulations.

However, it should say "***R**eoliadau'r UE*" [***emphasis added***] as the words appear in a mutated form in paragraph (2) of regulation 19. The (unmutuated) words "*Rheoliadau'r UE*" do not appear appear anywhere in regulation 19(2) of the 2013 Regulations.

5. **Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts.**

In Schedule 3, in Table 1 in the new Schedule 1B, in the Welsh text, "*feed materials*" has been incorrectly translated as "*deunyddiau **blawd***" [***emphasis added***] which means "*meal materials"* in each place the words corresponding to "*seaweed meal and **feed** materials derived from seaweed*" appear in the second column for entry no. 1, Arsenic.

The correct translation for "feed materials" is "*deunyddiau **bwyd anifeiliaid***" [***emphasis added***] as found elsewhere in that Table, and in the existing regulation 15(7)(c) of the Animal Feed (Composition, Marketing and Use) (Wales) Regulations 2016.

Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

Welsh Government response

A Welsh Government response is required.

Legal Advisers
Legislation, Justice and Constitution Committee
29 November 2022

SL(6)280 – The Renting Homes (Wales) Act 2016 (Saving and Transitional Provisions) Regulations 2022

Background and Purpose

These Regulations make saving and transitional provisions in relation to the Renting Homes (Wales) Act 2016 ("the 2016 Act").

On the date that the 2016 Act comes into force (1 December 2022) existing tenancies and licences in Wales will convert to occupation contracts (with certain exceptions as set out in Schedule 2 to the 2016 Act) and will be subject to the provisions of the new legislative regime.

These Regulations make saving and transitional provisions in relation to:

- particular processes relating to existing tenancies and licences (for example possession proceedings) that have been commenced on the date at which the 2016 Act comes into force;
- certain entitlements which exist for particular types of current tenancies (for example a request for improvement) that are preserved so that the parties to these existing tenancies are treated fairly when their tenancy undergoes conversion into an occupation contract; and
- confirmation that certain provisions relating to temporary accommodation will not apply until 12 months after the coming into force of the 2016 Act.

Procedure

Negative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

The following 6 points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

It is not clear why there are some express saving provisions, whilst other similar provisions are not set out in an express saving provision. It would be helpful to understand why certain provisions are expressly saved under the Regulations and whether the Welsh Government are relying on the general saving provision in regulation 19 where there is a difference in approach in not providing an express saving provision.

By way of example, regulations 2(1)(c) to (g) contain saving provisions in relation to the application of section 83A of the Housing Act 1985. This includes regulation 2(1)(f) in relation to section 83A(6), which sets out what a notice served under section 83A(4) must contain. Sections 83 and 83ZA of the Housing Act 1985 contain provisions that specify the requirements of notices in relation to possession proceedings. Although regulations 2(1)(a) and (b) respectively refer to the substantive provision within those sections, there is no express saving provision in relation to the content of notices contained in those sections.

Further, regulation 5(1)(e) saves the whole of section 143G of the Housing Act 1996. In contrast, regulation 4(1)(e) saves section 130(1) to (3) of the Housing Act. Sections 130(4) and 143G(4) make provision in relation to a tenant's right to buy. It is not clear why section 130(4) is not saved but section 143G(4) is saved.

2. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In the Welsh text, in the italics above the preamble, the year "2022" is missing from the date after the words that correspond to "Laid before Senedd Cymru".

3. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Some references do not identify where the provision can be found, namely:

- in regulation 3(1)(f), there is a reference to "Ground 14A", which is contained Schedule 2 to the Housing Act 1988 (in contrast, regulation 2(1)(f) identifies the Schedule and Act where "Ground 2A" is to be found);
- in regulation 3(2)(b), there is a reference to "section 8(1)(a)", which is contained in the Housing Act 1988 (in contrast, other paragraphs in the regulations have identified the Act if it is not already stated in the opening words, for example, regulation 2(2)(c)); and
- in regulation 5(1), the sections that are referred to later in each of sub-paragraphs (a), (b), (c) and (d) have not identified the Act in which they are found for example sub-paragraph (a) states "in accordance with section 143E" (in contrast, regulations 2(1), 3(1) and 4(1) refer to the specific Act).

4. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In regulation 13(2), the inserted words of the modification "contract holder" is spelt incorrectly. The defined term in section 7 of the Renting Homes (Wales) Act 2016 includes a hyphen: "contract-holder".

5. Standing Order 21.2(v) – that for any particular reason its form or meaning needs further explanation.

Regulation 13(2) modifies the Secure Tenancies (Right to Repair Scheme) Regulations 1985 by adding words that are to be read as if they have been inserted after "secure tenant" in each place it occurs. There are references to "the tenant" or "tenant" throughout those Regulations.

It is not clear whether references to "the tenant" and "tenant" should also be modified by inserting "or contract-holder" after them to achieve the legal effect of the modification.

6. Standing Order 21.2(vi) – that its drafting appears to be defective or it fails to fulfil statutory requirements.

In regulation 18(1), there are references to "category of dwelling" that have been specified in paragraph 1 of Schedule 1 to the Rent Officers (Universal Credit Functions) Order 2013. However, that paragraph uses "categories of accommodation" rather than "of dwelling".

Merits Scrutiny

The following 3 points are identified for reporting under Standing Order 21.3 in respect of this instrument.

7. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

The terms defined by reference to the Rent Act 1977 are not clear. A reader would likely benefit from additional clarity from those terms:

- the term "protected shorthold tenancy" is defined by reference to the Rent Act 1977 – although the term is used within that Act, it is not defined under that Act, except by a cross-reference to the definition contained in the Housing Act 1980;
- the term "restricted contract" is defined in section 19 of the Rent Act 1977 (which is saved by Schedule 18 to the Housing Act 1988), but there is no specific reference to where in the Act the definition can be found – this could be confusing for a reader, particularly as section 19 of the Rent Act 1977 has been repealed (subject to the saving).

The Committee notes that these issues could cause problems with the accessibility of the Regulations.

8. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

Regulation 12(2)(b) saves section 99B of the Housing Act 1985 as if section 99B(2)(b) to (f) were omitted. Section 99B(2)(b) to (f) specify persons that qualify for compensation for improvements carried out by a tenant. These include a joint tenant, a person in whom the tenancy was vested, a person to whom the tenancy was assigned and a spouse, civil partner or cohabitee of a tenant that undertakes the improvements (amongst others). This means that the saving provisions will only apply to an improving tenant, and those others identified in section 99B(2)(b) to (f) will lose their rights.

It is noted that in setting out the primary purposes of these Regulations, the Explanatory Memorandum states:

> *"to ensure that certain entitlements which exist in particular types of current tenancies (for example a request for improvement) are preserved so that the parties to these existing tenancies are treated fairly when their tenancy undergoes conversion into an occupation contract, with the correct balance being struck in respect of both parties' rights and obligations"*

Article 1 of the First Protocol to the European Convention on Human Rights protects a person's enjoyment of their property – the courts have recognised that legitimate expectation in connection with property interests are within the scope of this right. The Explanatory Memorandum does not contain any details of a human rights impact assessment.

The Welsh Government is asked to confirm whether it has undertaken a human rights impact assessment in relation to these Regulations and to provide further information as to the outcome of such assessment.

9. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd.

No consultation has been carried out in relation to these Regulations. The Explanatory Memorandum to the Regulations notes that:

> *"As these Regulations are technical in nature and are not intended to make changes to Welsh Government policy a formal public consultation did not take place."*

However, on 15 July 2022 Julie James MS, Minister for Climate Change, announced the publication of the Renting Homes (Wales) Act 2016 (Saving and Transitional Provisions) Regulations 2022 in draft form. In a written statement, the Minister explained that:

> *"Whilst these regulations do not require the approval of the Senedd in plenary, they are being published in draft form today so that they are available to stakeholders in sufficient time ahead of the 1 December coming into force date."*

Welsh Government response

A Welsh Government response is required in relation to points 1 to 8 only.

Committee Consideration

The Committee considered the instrument at its meeting on 28 November 2022 and reports to the Senedd in line with the reporting points above.

Government Response – The Renting Homes (Wales) Act 2016 (Saving and Transitional Provisions) Regulations 2022

Technical Scrutiny point 1: The Welsh Government thanks the Committee for raising this point. The Welsh Government accepts that different approaches have been adopted in relation to the drafting of some of the provisions of these Regulations. However, the Welsh Government is content that the general saving provision (at regulation 19) will achieve the correct legal effect in each instance.

Technical Scrutiny point 2: The Welsh Government thanks the Committee for drawing this to our attention. We are liaising with SI Registrar on the possibility of producing a Correction Slip to deal with this point.

Technical Scrutiny point 3: The Welsh Government thanks the Committee for drawing these issues to our attention. We are liaising with SI Registrar on the possibility of producing a Correction Slip to deal with these points.

Technical Scrutiny point 4: The Welsh Government thanks the Committee for drawing this to our attention. We are liaising with SI Registrar on the possibility of producing a Correction Slip to deal with this point.

Technical Scrutiny point 5: References to “secure tenant” in the 1985 Regulations have been modified to “secure tenant or contract-holder” because the reference to “secure tenant” is to a tenant of a specific type of tenancy which will be abolished by section 239 of the Renting Homes (Wales) Act 2016. That reference to a specific type of tenancy will not, consequently, operate in Wales after the 2016 Act has come into force. However, where the 1985 Regulations refer to “tenant” or “tenancy” generally, those references will operate correctly in relation to occupation contracts and contract-holders which are intended to be captured and, consequently, these references to “tenancy” or “tenant” will continue to operate correctly after the 2016 Act comes into force. As a result, the Welsh Government are of the view that the issue identified in Reporting Point 5 is not an error and no amendment or correction is required.

Technical Scrutiny point 6: The Welsh Government thanks the Committee for drawing this to our attention. We are liaising with SI Registrar on the possibility of producing a Correction Slip to deal with this point.

Merits Scrutiny point 7: The Welsh Government thanks the Committee for drawing this to our attention. We are content that the defined terms operate as drafted but we are liaising with SI Registrar to explore whether any further assistance can be provided to the reader via Correction Slip.

Merits Scrutiny point 8: The Welsh Government has undertaken a thorough assessment of provisions contained within these Regulations to ensure they are compatible with Convention rights.

SL(6)282 – The School Teachers' Pay and Conditions (Wales) Order 2022

Background and Purpose

This Order makes provision for the determination of the remuneration of school teachers (within the meaning of section 122 of the Education Act 2002) in Wales and other conditions of employment of school teachers in Wales which relate to their professional duties and working time.

The Order makes this provision by reference to section 2 of a document entitled "School Teachers' Pay and Conditions (Wales) Document 2022 and guidance on school teachers' pay and conditions" ("the Document"). The Document can be found on the Welsh Government website: www.gov.wales.

The Document provides for a 5% uplift from 1 September 2022 to be applied to all scale points and allowances. It also makes miscellaneous changes such as a change in the number of days and hours that teachers must be available to work as a result of additional Bank Holidays to mark the funeral of Her Majesty The Queen and the coronation of His Majesty King Charles III.

The Order makes retrospective provision to provide that the provisions set out in section 2 of the Document have effect on and after 1 September 2022 notwithstanding that the Order comes into force after that date (article 2).

The Order revokes the School Teachers' Pay and Conditions (Wales) Order 2021, which made reference to the "School Teachers' Pay and Conditions (Wales) Document 2021 and guidance on school teachers' pay and conditions".

Procedure

Negative.

The Order was made by the Welsh Ministers before it was laid before the Senedd. The Senedd can annul the Order within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date it was laid before the Senedd.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

Merits Scrutiny

The following 3 points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

The Explanatory Memorandum ("EM") to this Order contains numerous errors which are likely to lead to confusion as to the effect of both this Order and section 2 of the Document. These include:

a. In one instance, both the English and Welsh language versions of the EM refer to section 2 of the Document having retrospective effect from 1 September **2021** (emphasis added). In fact, article 2 of the Order provides that section 2 of the Document has retrospective effect from 1 September **2022** (emphasis added). The correct date is referred to in other parts of the EM;

b. The EM contains a short summary as to the changes that have been made to the Document since its 2021 predecessor. However, both the English and Welsh language versions of the EM state that teachers must be available to work for **194** days (**1258.5** hours of directed time) (emphasis added). The Document actually provides that teachers must be available to work for **193** days (see paragraph 50.2 of the Document) (**1252** hours of directed time – see paragraph 50.5, or paragraph 50.6 in relation to proportioning for a teacher employed part-time) (emphasis added);

c. The EM does not indicate when the Order comes into force, instead stating *"The order will come into force on **xxxx**"* (emphasis added). This error also occurs in the Welsh language version of the EM;

d. In both the English and Welsh language versions of the EM, it indicates that the Document is a replacement for the "School Teachers' Pay and Conditions (Wales) Document **2020** and guidance on school teachers' pay and conditions" (emphasis added). In reality, the Document replaces the "School Teachers' Pay and Conditions (Wales) Document **2021** and guidance on school teachers' pay and conditions" (emphasis added).

2. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

It is noted that this Order was not laid before the Senedd until 15 November 2022 and does not come into force until 7 December 2022, more than 3 months after which section 2 of the Document has retrospective effect (as provided for by article 2 of the Order).

In the EM, the Welsh Government explains that:

> *"…due to tight timing between each stage in this year's pay process and the need for further discussion around the funding of the pay award it was not possible to lay the Order earlier."*

3. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Dispute between unions and the Welsh Government as to the level of pay award is noted and some unions are currently in the process of balloting their members in relation to associated industrial action.

For example, NASUWT, the Teachers' Union, states on its website that it:

> *"…has confirmed to governments and employers in England, Scotland and Wales that we are in dispute over their failure to pay all teachers a minimum 12% pay award this year.*
>
> *Whilst decisions may be taken by government and employers to implement below-inflation pay awards this year, we will remain in dispute on the basis of the failure to pay a 12% award.*
>
> […] *For the avoidance of doubt, pay awards of less than 12% are not acceptable and our negotiators are not authorised to agree pay awards that do not meet the 12% demand."*

In a Written Statement on 14 November 2022, Jeremy Miles MS, Minister for Education and Welsh Language, stated that:

> *"On 21 July, subject to consultation with key stakeholders, I agreed in principle to accept all of the Independent Welsh Pay Review Body's recommendations for 2022/23 including an uplift of 5% to all statutory salary points on all pay scales and for all allowances from September 2022. I can confirm today that we will be accepting the Review Body's recommendations.*
>
> […] *I accept that some may be disappointed that a higher award could not be provided and recognise the legitimate right of all workers to seek a fair and decent pay rise during this challenging time of inflation and cost of living rises.*
>
> *However, as additional funding has not been made available by the UK Government, we are not in a position to further address these issues over and above what has previously been considered…"*

Furthermore, the Regulatory Impact Assessment (RIA) connected to this Order states that:

> *"Overall, the response to the consultation was generally negative indicating disappointment and concerns that the increase of 5% for 2022/23 (and potential 3.5% for 2023/24) would not be sufficient.*
>
> *A number of consultees also called for the pay award to be reconsidered following significant changes to inflation since the completion of the report by the IWPRB in May 2022 (rate of Consumer Prices Index (CPI) inflation, which is the main measure of inflation, rose to 9.9% in August, compared to 9.1% in May).*

The majority welcomed the other recommendations, such as: an undifferentiated increase for all pay scales and allowances; and proposed amendments to terms and conditions.

Following consideration of the consultation responses, no compelling new evidence was provided that necessitated reconsideration of the Minister's proposals. In particular, the consultation responses did not provide sufficient additional evidence necessary to support a higher pay award across all pay ranges than had already been considered and rejected on grounds of affordability and potential impact on budgets."

Welsh Government response

A Welsh Government response is required in relation to point 1 only.

Committee Consideration

The Committee considered the instrument at its meeting on 28 November 2022 and reports to the Senedd in line with the reporting points above.

Government Response - School Teachers' Pay and Conditions (Wales) Order 2022

Merit Scrutiny point 1: The Welsh Government agrees with the points raised and will make the necessary changes to the explanatory memorandum.

STATUTORY INSTRUMENT CONSENT MEMORANDUM

The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022

1. This Statutory Instrument Consent Memorandum is laid under Standing Order ("SO") 30A.2. SO30A prescribes that a Statutory Instrument Consent Memorandum must be laid, and a Statutory Instrument Consent Motion may be tabled before Senedd Cymru if a UK Statutory Instrument makes provision in relation to Wales amending primary legislation within the legislative competence of the Senedd.

2. The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022 ("the Regulations") is subject to the affirmative procedure and was laid in draft before the UK Parliament on 20 October 2022 and can be found at: http://www.legislation.gov.uk/id/ukdsi/2022/9780348239911

3. The Regulations are due to come into force on 13 December 2022.

4. Copies of the Regulations and associated documentation have today been laid before the Senedd alongside this memorandum.

5. This memorandum has been laid outside the normal three-day SO30A deadline, as a SO30C Written Statement was laid before the Senedd in relation to the Regulations in error on 21 October. It has since been considered the Regulations are a "relevant Statutory instrument" for the purposes of SO30A in respect of one proposed amendment. Therefore, the original Written Statement has been withdrawn and a revised version laid today.

6. The Statutory Instrument contains one provision, in part 5, paragraph 20, that makes a minor amendment to section 29 of the Plant Varieties and Seeds Act 1964 (the 1964 Act), and falls within the legislative competence of the Senedd and therefore requires Senedd consent.

Summary of the Instrument and its objective *(SO30A.4(i) requirement)*

7. The objective of the Statutory Instrument is to amend retained direct European Union (EU law relating to official controls and animal and plant health, to ensure that the laws operate effectively following the withdrawal of the United Kingdom from the European Union.

8. This instrument addresses minor EU Exit related deficiencies, further deficiencies not anticipated at the time of withdrawal from the EU and ensures the functioning of a Great Britain (GB)-wide imports regime. It would seem appropriate for a single set of GB wide amendments to be made as they need to work for the whole of the UK, or Great Britain (where there is freedom of movement), to ensure there are common

standards and to minimise disruptions to traders, local authorities, and inspection agencies alike.

9. These Regulations will apply in relation to Wales, England, and Scotland with the exception of regulations 24 and 25, which apply in England only.

Provision to be made by the Instrument for which consent is sought

10. The Statutory Instrument contains one provision, in part 5, paragraph 20, that makes a minor amendment to section 29 of the Plant Varieties and Seeds Act 1964 (the 1964 Act). The amendment aims to address a policy gap that has been identified within the 1964 Act in relation to a lack of regulation making powers. The amendment extends powers in the 1964 Act to fruit, vegetable, and ornamental planting material.

11. It is the view of the Welsh Government that the provision described in paragraph 10 above, makes provision in relation to Wales amending primary legislation within the legislative competence of the Senedd. It is that provision for which the consent of the Senedd is sought.

Why is it appropriate for the Statutory Instrument to make this provision

12. It is my view that it is appropriate to deal with these provisions in this Statutory Instrument as whilst it is normally the policy of the Welsh Government to legislate for Wales in matters of devolved competence, in certain circumstances there are benefits in working collaboratively with the UK Government and other Devolved Governments where there is a clear rationale for doing so. On this occasion, these Regulations make corrections and address operability matters in relation to, and on behalf of, Wales for reasons of efficiency and expediency, and ensure consistency and coherence of the statute book. Therefore, it is my view that it is appropriate to deal with these provisions in this Instrument as it represents the most practicable and proportionate legislative vehicle to enable these provisions to apply in Wales.

Financial implications

13. There are no financial implications in Wales in consenting to the provisions in the Statutory Instrument.

Lesley Griffiths AS/MS
Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd
Minister for Rural Affairs and North Wales, and Trefnydd

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref MA/LG/3455/22

Huw Irranca-Davies MS
Chair, Legislation, Justice and Constitution Committee

Paul Davies MS
Chair,Economy, Trade and Rural Affairs Committee

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21November 2022

Dear Huw and Paul,

Huw, thank you for your letter of 14 November. As you will both be aware on 18 October, I wrote to inform you I had granted consent for the UK Government to make The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022, (the Regulations) , which were laid in draft before the UK Parliament on 20 October and I laid a Written Statement in respect of the Regulations under Standing Order (SO) 30C on 21 October.

Following, subsequent review of the Regulations, I confirm, it is considered the Regulations are a "relevant Statutory instrument" for the purposes of SO 30A, as the proposed amendments to the Plant Varieties and Seeds Act 1964 contained in one provision in part 5, paragraph 20, of the Regulations, fall within the legislative competence of the Senedd. Accordingly, I also confirm a Statutory Instrument Consent Memorandum (SICM) ought to have been laid rather than the Written Statement in respect of this provision. I offer my sincerest apologies for this error.

I therefore, seek to correct the record and inform you I have withdrawn the original SO 30C Written Statement and have today laid a revised Written Statement under SO30C, and a SICM under SO30A before the Senedd in respect of the Regulations.
The link to the revised Written Statement can be found here:
https://senedd.wales/media/l5rdeu5j/ws-ld15411-r-e.pdf

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The link to the SICM can be found here: https://senedd.wales/media/kxunirmr/sicm-ld15473-reg-e.pdf

In relation to the provisions of the UK SI that you will consider under SO 30C, as originally set out in my letter of 18 October, the Regulations propose amendments to retained direct EU law relating to official controls and animal and plant health, to ensure that the laws operate effectively following the withdrawal of the United Kingdom from the European Union.

It is normally the policy of the Welsh Government to legislate for Wales in matters of devolved competence. However, in certain circumstances there are benefits in working collaboratively with the UK Government and other devolved administrations where there is a clear rationale for doing so.

On this occasion, I am giving my consent to these Regulations, which make corrections and address operability matters in relation to, and on behalf of, Wales for reasons of efficiency and expediency, and to ensure consistency and coherence of the statute book. I do so whilst reserving the ability to diverge in future as per our devolved competence.

This instrument addresses minor EU exit related deficiencies, further deficiencies not anticipated at the time of withdrawal from the EU and ensures the functioning of a GB-wide import regime. It would therefore seem appropriate to exercise these functions jointly as they need to work for the whole of the UK, or Great Britain (where there is freedom of movement), to ensure there are common standards and to minimise disruptions to traders, local authorities, and inspection agencies alike.

Huw, I note the Legislation, Justice and Constitution Committee's comments regarding information provided to the Committee but not in the Written Statement. We will ensure all relevant information provided to committees is included in Written Statements in accordance with Standing Orders in the future.

In accordance with SO 30A any SICM may be considered by "the responsible committee", in this case, the Legislation, Justice and Constitution Committee (LJCC) and such other committees as the LJCC invites to consider the SICM. SO 30A further provides the committee(s) must report to the Senedd within 35 days of the SICM being laid. You will wish to be aware the draft Regulations are subject to the affirmative procedure in the UK Parliament and are expected to come into force on 13 December. In this instance, therefore, given the delay in the laying of the SCIM, there isn't sufficient time before the Regulations are due to come into force for the 35-day reporting period to be observed. I can only apologise again for this. Consequently, I would ask, therefore, should your Committees wish to consider the SICM, you please report to the Senedd no later than 12 December.

I am not minded to table a motion for a debate in plenary about this Statutory Instrument. I reached this decision on the basis that this instrument addresses minor European Union Exit related deficiencies, further deficiencies not anticipated at the time of withdrawal from the EU and ensures the functioning of a GB-wide import regime. It would seem appropriate for a single set of GB wide amendments to be made as they need to work for the whole of the UK, or Great Britain (where there is freedom of movement), to ensure there are common standards and to minimise disruptions to traders, local authorities, and inspection agencies alike. SO30A provides that any Member of the Senedd may table a motion for a debate on this Statutory Instrument after relevant Committees have reported.

I am copying this letter to the Llywydd as Chair of the Business Committee, as well as all Members of the Senedd.

Yours sincerely,

Lesley Griffiths AS/MS
Y Gweinidog Materion Gwledig a Gogledd Cymru, a'r Trefnydd
Minister for Rural Affairs and North Wales, and Trefnydd

Document is Restricted

Y Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad

–

Legislation, Justice and Constitution Committee

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Lesley Griffiths MS
Minister for Rural Affairs and North Wales, and
Trefnydd

14 November 2022

Dear Lesley

The Animals and Animal Health, Feed and Food, Plants and Plant Health (Amendment) Regulations 2022

Thank you for your letter of 18 October 2022 informing my Committee that you had granted consent for the UK Government to make the above Regulations. We considered the Written Statement in respect of the draft Regulations, which you laid under Standing Order 30C on 21 October, at our meeting on 7 November.

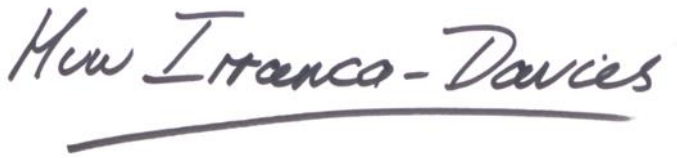
The Written Statement provides that Part 5 of the draft Regulations makes changes to the *Plant Varieties and Seeds Act 1964*. That Part provides that section 29 of the 1964 Act is to be amended, which includes subject matter within the legislative competence of the Senedd. We therefore consider that the draft Regulations are a relevant statutory instrument under Standing Order 30A, and the Welsh Government should lay a statutory instrument consent memorandum in respect of them. Since the normal three-day Standing Order deadline has now lapsed since the draft Regulations were laid in the UK Parliament on 20 October 2022, we believe that a statutory instrument consent memorandum should be laid as soon as possible.

We also found your Written Statement to be lacking the inclusion of practical examples of the changes to be made by the Regulations; it only provided information about the changes in a general and high-level way. Since you had provided your consent to the Regulations, we had expected to see an explanation provided to all Members of the Senedd of their practical effect. While the annex to your letter of 18 October was helpful to my Committee's understanding of their effect, other Members of the Senedd would not have been informed of its contents as it was not a laid document. We

therefore believe that the Welsh Government should ensure that future statements laid under Standing Order 30C include practical examples of the changes to be made by the Regulations to which they relate.

We would be grateful to receive a response to the above matters as soon as possible and by Monday 21 November 2022.

Yours sincerely,



Huw Irranca-Davies
Chair

Llywodraeth Cymru
Welsh Government

WRITTEN STATEMENT
BY
THE WELSH GOVERNMENT

TITLE **SI laid in Parliament, which amends secondary legislation in a devolved area The Producer Responsibility Obligations (Packaging Waste) (Amendment) (England and Wales) Regulations 2022 ("the 2022 Regulations").**

DATE **28 November 2022**

BY **Julie James MS, Minister for Climate Change**

Members of the Senedd will wish to be aware that consent is being given to the Secretary of State to exercise a subordinate legislation-making power in a devolved area in relation to Wales.

In 2019, Ministers across the UK collectively agreed to introduce a new Extended Producer Responsibility (EPR) regime for packaging, which will replace the current regime. As the proposed start date for the new EPR regime is not until 2024, amendments are needed to the current regulations to ensure targets are in place for the interim period. The regulations will roll forward the existing packaging producer responsibility targets for 2023, until the new packaging extended producer responsibility regulations come into force. Agreement has therefore been sought by Victoria Prentis MP Minister of State for Farming, Fisheries and Food to make a Statutory Instrument (SI) titled The Producer Responsibility Obligations (Packaging Waste) (Amendment) (England and Wales) Regulations 2022 to apply in relation to England and Wales.

The above titled SI will be made by the Secretary of State in exercise of powers conferred by section 50 of and paragraphs 1(1) and 2(2) of Schedule 4 to the Environment Act 2021. The SI amends the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (S.I.

2007/871) which impose obligations on packaging producers to recycle packaging waste to meet overall recycling and material-specific recycling targets.

These Regulations set an overall recycling target as well as material-specific recycling targets for 2023 on obligated producers in England and Wales in relation to glass, plastic, aluminium, steel, paper/board, and wood as well as a specific re-melt target for glass.

The regulations were laid before Parliament on 23 November 2022 to come into force on 1 January 2023.

Jeremy Miles AS/MS
Gweinidog y Gymraeg ac Addysg
Minister for Education and Welsh Language

Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru

SeneddLJC@senedd.wales

30 November 2022

Dear Chair

Inter-Institutional Relations Agreement: Education Ministers Council meeting – 9 December 2022

I am writing in accordance with the inter-institutional relations agreement to notify you of a meeting of the Education Ministers Council, which will take place in Cardiff on 9 December 2022.

The in-person meeting will be hosted by the Welsh Government. The meeting agenda will include discussions on the cost of living, qualifications and lifelong learning.

An update will be provided after the meeting.

Yours sincerely,

Jeremy Miles AS/MS
Gweinidog y Gymraeg ac Addysg
Minister for Education and Welsh Language

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Y Pwyllgor Iechyd a Gofal Cymdeithasol
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Lynne Neagle MS
Deputy Minister for Mental Health and Wellbeing
Welsh Government

1 December 2022

Dear Lynne

Food Supplement and Food for Specific Groups (Miscellaneous Amendments) Regulations 2022

Thank you for your letter of 21 November 2022 to provide early notification of the above Regulations, expected to be laid before the UK Parliament on 14 December 2022.

We would welcome clarification of the following issues (including, where appropriate) where the relevant information can be found in the Explanatory Memorandum that we anticipate will be laid alongside the Regulations in December.

Territorial extent

Your letter notes that the Regulations will apply in Scotland, Wales and England. It also states that "Consenting to a UK wide SI ensures there is a single legislative framework across the UK which promotes clarity and accessibility". However, the letter suggests that Northern Ireland will not be included within the extent of the Regulations.

1. Will these Regulations lead to divergence between GB and Northern Ireland? If so, what assessment has been made of whether any divergence could result in barriers to trade or public health matters?

You also state that the UK Government and Welsh Governments are agreed on the policy objectives, and that your rationale for consenting to the UK Government legislating in devolved areas is that "making separate SIs in Wales and England would lead to duplication, and unnecessary complication of the statute book".

2. Is the Scottish Government bringing forward its own Regulations in this respect?

3. Regulations brought forward by the UK Government are made only in English. Regulations brought forward by the Welsh Government must be made in Welsh and in English. To what extent did you consider whether legislation applicable to Wales should be available in both Welsh and English when making your decision on whether to consent to the Regulations?

Nutrition Labelling Composition and Standards Common Framework

4. Was the joint GB approach for these Regulations considered through the mechanisms set out in the Nutrition Labelling Composition and Standards Common Framework?

Rationale for the amendments

5. What is the rationale for making the amendments to be set out in the Regulations? For example, are they for the purpose of keeping pace with changes to EU legislation, or do they reflect developments in the scientific evidence?

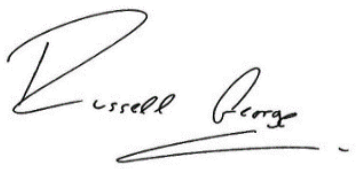
Retained EU Law (Revocation and Reform) Bill

If the Retained EU Law (Revocation and Reform) Bill were to be passed in its current form, then unless these Regulations were to be saved by either UK or Welsh Ministers, they would be repealed automatically on 31 December 2023.

6. What discussions have you had with the UK Government about the potential implications of the Retained EU Law (Revocation and Reform) Bill for these Regulations?

We would be grateful for a response by 5 January 2022.

Yours sincerely



Russell George MS

Chair, Health and Social Care Committee

cc Jayne Bryant MS, Chair, Children, Young People and Education Committee
Huw Irranca-Davies MS, Chair, Legislation, Justice and Constitution Committee

Croesewir gohebiaeth yn Gymraeg neu Saesneg. We welcome correspondence in Welsh or English.

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Agenda Item 11

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LEGISLATIVE CONSENT MEMORANDUM

The Retained EU Law (Revocation and Reform) Bill

1. This Legislative Consent Memorandum ("LCM") is laid under Standing Order ("SO") 29.2(i). SO 29 prescribes that a legislative consent memorandum must be laid, and a legislative consent motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.

2. The Retained EU Law (Revocation and Reform) Bill ("the Bill") was introduced in the House of Commons on 22 September 2022. A date for Commons Committee Stage is yet to be announced. The Bill can be found at: Retained EU Law (Revocation and Reform) Bill publications - Parliamentary Bills - UK Parliament

3. I wrote to the Llywydd on 5 October 2022 to outline that, because significant policy content in the Bill had not been shared with the Devolved Governments before its introduction, there had not been sufficient time to clarify the implications of the Bill for devolution, and more widely, and that it would not be possible to lay the LCM within the normal two-week period.

Policy Objective(s)

4. The UK Government's stated policy objective for retained EU law (REUL) was described in its Benefits of Brexit[1] document of January 2022, outlining that '*Our intent is to amend, replace, or repeal all the retained EU law that is not right for the UK*'. The Queens speech[2] in May 2022 confirmed the UK Government's plan by stating, '*Regulations on businesses will be repealed and reformed. A bill will enable law inherited from the European Union to be more easily amended*'.

5. More specifically, in the Explanatory Notes[3] for the Bill it is said that the Bill's purpose is to provide the UK Government *'with all the required provisions that allow for the amendment of retained EU law (REUL) and remove the special features it has in the UK legal system'*. In the Delegated Powers Memorandum[4] for the Bill, the UK Government goes further, stating, *'The main purpose of the Bill is to remove the precedence given to retained EU law in the UK statute book and to firmly re-establish our Parliament as the principal source of law in the UK, restoring the primacy of Acts of Parliament in UK statute. We will no longer have a two-tiered statute book, with the remnants of our EU membership continuing to have an outsize effect on our domestic law'*.

[1] The Benefits of Brexit: How the UK is taking advantage of leaving the EU (publishing.service.gov.uk)
[2] The Queens Speech - 10 May 2022 - Queen's Speech 2022 - GOV.UK (www.gov.uk)
[3] Explanatory Note - Retained EU Law (Revocation and Reform) (parliament.uk)
[4] REUL_Bill_Delegated_Powers_Memorandum_20-09-22 (parliament.uk)

Summary of the Bill

6. The Bill is sponsored by the Department for Business, Energy and Industrial Strategy.

7. The key provisions of the Bill, cover:

- Repealing (sunsetting) or assimilating REUL by the end of 2023.
- Repealing the principle of supremacy of EU law from UK law by the end of 2023.
- Facilitating domestic courts to depart from retained case law.
- Providing a mechanism for the Law Officers of the UK and Devolved Governments to intervene in cases regarding REUL, or to refer them to an appeal court, where relevant.
- Repealing directly effective EU law rights and obligations in UK law by the end of 2023.
- Abolishing general principles of EU law in UK law by the end of 2023.
- Establishing a new priority rule requiring retained direct EU legislation (RDEUL) to be interpreted and applied consistently with domestic legislation.
- Downgrading the status of RDEUL for the purpose of amending it more easily.
- Creating a suite of powers that allow REUL to be revoked or replaced, restated or updated and removed or amended to reduce burdens.

8. The Bill makes changes to the European Union (Withdrawal) Act 2018 (EUWA), which is a protected enactment under the Government of Wales Act 2006 (GOWA). Various clauses within the Bill (as outlined below) modify the current provisions within EUWA, and as such modify the legislative competence of the Senedd.

Provisions in the Bill for which consent is required

9. The Bill is a relevant Bill within SO 29 as it makes provision in relation to Wales within the legislative competence of the Senedd and modifies the legislative competence of the Senedd and the executive competence of the Welsh Ministers ("relevant provision" for the purposes of SO 29).

10. Consent is required in relation to provisions contained in the clauses identified below in so far as they make provision which is "relevant provision" for the purposes of SO29.

Clauses which confer regulation making powers on the Welsh Ministers and/or a Minister of the Crown

Clause 1 Sunset of EU-derived subordinate legislation and retained direct EU legislation

11. This clause provides for a sunset date of 31 December 2023 for all 'EU derived subordinate legislation'[5] and 'retained direct EU legislation' unless it is (a) specified in regulations (which in the case of legislation within the Senedd's competence can be made by Ministers of the Crown or Welsh Ministers) before that date and assimilated into domestic law (under clause 6); or (b) granted an extension in regulations (see clause 2 below).

12. The Senedd has competence to revoke or 'sunset' REUL applying in Wales (other than in reserved areas) and to confer regulation making powers upon Welsh Ministers in relation to such devolved areas.

13. Therefore, this provision is for a purpose within the legislative competence of the Senedd to the extent that this clause and the regulation making power applies to devolved areas.

14. To the extent that the regulation making power created under this clause is conferred upon the Welsh Ministers, then such provision modifies the executive competence of the Welsh Ministers.

Clause 2 Extension of sunset under section 1

15. This clause provides an extension mechanism for the sunset date to a time not later than 23 June 2026 for a specific piece of REUL or a specific description of REUL, to be set out in regulations. This regulation making power is exercisable by a Minister of the Crown only.

16. This provision is for a purpose within the legislative competence of the Senedd to the extent that this power could be used to make provision within devolved areas.

Clause 8 Compatibility

17. This clause provides a power to enable a 'relevant national authority' (a Minister of the Crown and the Welsh Ministers in areas of devolved competence) to state the legislative hierarchy between specified pieces of domestic legislation and specified provisions of retained direct EU legislation, including that which is assimilated after 2023. As such, where a relevant national authority has exercised its power of retention under clause 1, it will be able to use this power at clause 8 to give priority to certain individual pieces of RDEUL. This power expires on 23 June 2026.

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[5] "**EU-derived subordinate legislation**" is defined to mean any domestic subordinate legislation so far as—
(a) it was made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972, or
(b) it was made, or operated immediately before IP completion day, for a purpose mentioned in section 2(2)(a) of that Act (implementation of EU obligations etc), and as modified by any enactment.
"retained direct EU legislation" is defined within section 20 of EUWA as '*any direct EU legislation which forms part of domestic law by virtue of section 3 (as modified by or under this Act or by other domestic law from time to time, and including any instruments made under it on or after exit day)';*

18. The effect of this clause is that, where such regulations are made, then new section 5(A2) of EUWA (inserted by clause 4, as outlined below) will be disapplied, in order to allow a relevant national authority to maintain the current legislative hierarchy instead after the end of supremacy.

19. This clause modifies a protected enactment. Therefore, the Senedd's consent would be required on the basis that this clause will modify the legislative competence of the Senedd by virtue of modifying a protected enactment, as outlined in paragraph 42 below.

20. To the extent that the regulation making power under this clause is conferred upon the Welsh Ministers, then such provision also modifies the executive competence of the Welsh Ministers.

Powers relating to REUL and assimilated law: clauses 12, 13, 15 and 16:

Clause 12 Power to restate retained EU law

21. Clause 12(1) provides a power for a 'relevant national authority' (which includes a Minister of the Crown and the Welsh Ministers in areas of devolved competence) to restate provisions of 'secondary REUL'.[6]

22. Subclause (3) confirms that restatements will no longer be REUL and subclause (4) provides that the principle of supremacy, retained general principles, and section 4 rights or retained caselaw, will not apply in relation to any restatement, unless specifically reproduced (subclause 6). Subclause 7 confirms that this power expires at the end of 2023.

Clause 13 Power to restate assimilated law or reproduce sunsetted retained EU rights, powers, liabilities etc

23. Clause 13 provides a similar power to clause 12 but is to operate post-2023 on 'assimilated law', when clauses 3 to 6 have taken effect.

24. Clauses 12 and 13 are supplemented by clause 14, which establishes further general parameters of what a restatement can do and how (see below).

Clause 14 Powers to restate or reproduce: general

25. As noted above, clause 14 establishes the general parameters of what a restatement under clauses 12 and 13 can do. To the extent that the regulation making powers within clauses 12 and 13 of the Bill are within the legislative competence of the Senedd, it would similarly be within competence to set out the scope and nature of such powers.

[6] defined in 12(2) of the Bill as (a) any REUL that is not primary legislation; (b) any REUL that is primary legislation the text of which was inserted by subordinate legislation.

Clause 15 Powers to revoke or replace

26. Clause 15 provides a power for a ‘relevant national authority’ (which includes a Minister of the Crown and the Welsh Ministers in areas of devolved competence) to revoke any ‘secondary REUL’ (to be read as ‘secondary assimilated law' after the end of 2023), (i) without replacing it; (ii) replacing it with such provision it considers to be appropriate and to achieve the same or similar objectives; or (iii) making such alternative provision as it considers appropriate. The powers are constrained to revocation or replacement law that a relevant national authority considers does not add to the overall regulatory burden. Any provision made by virtue of this section is not retained EU law, and this power expires on 23 June 2026.

Clause 16 Power to update

27. Clause 16(1) provides a power for a ‘relevant national authority’ (which includes a Minister of the Crown and the Welsh Ministers in areas of devolved competence) to make regulations to modify any secondary REUL (to be read as ‘secondary assimilated law’ after the end of 2023), or any provision made under clauses 12, 13 or 15 of the Bill, as considered appropriate, in order to take account of: (a) changes in technology, or (b) developments in scientific understanding.

28. Clauses 12, 13, 15 and 16 provide various powers for the Welsh Ministers to make amendments to REUL (or assimilated law post 2023), within devolved areas. The Senedd has competence to legislate for REUL that relates to Wales and is not reserved and make such other provision/confer regulation making powers upon Welsh Ministers in relation to such devolved areas.

29. Therefore, these provisions are for a purpose within the legislative competence of the Senedd to the extent that these clauses and the regulation making powers apply to devolved areas.

30. In addition, a Minister of the Crown can also exercise the powers in these clauses within devolved areas, including modifying legislation which is within the Senedd’s competence in certain scenarios. The effect is that such powers could be used to make provision within areas of devolved competence.

31. To the extent that the regulation making powers under these clauses are conferred upon the Welsh Ministers, then these provisions also modify the executive competence of the Welsh Ministers.

Clause 17 Power to remove or reduce burdens

32. This clause amends Part 1 of the Legislative and Regulatory Reform Act 2006 (LRRA) to allow Legislative Reform Orders (LROs) to be used to

amend any retained direct EU legislation.

33. While the Senedd does not have the legislative competence to amend LRRA directly as this applies on a UK wide basis, the effect of this provision is that LROs may be made to amend RDEUL within areas of devolved competence (subject to the existing requirements for consent within section 11 of the LRRA). As such this is provision for a purpose within the legislative competence of the Senedd to the extent that this power could be used to make provision within devolved areas.

Clause 19 Consequential provision

34. Subclause (1) provides that a Minister of the Crown may by regulations make such provision as considered appropriate in consequence of this Bill. Subclause (2) clarifies that the power to make consequential provision includes the ability to modify any enactment (including the provisions of this Bill).

35. This power confers broad powers upon Ministers of the Crown only to make consequential provision. This is provision for a purpose within the legislative competence of the Senedd to the extent such provision could be made within areas of devolved competence, or in such a way as to modify the legislative competence of the Senedd.

Clause 20 Regulations: general

36. This clause makes general provision about regulations that may be made under delegated powers conferred by the Bill. To the extent that the regulation making powers within the Bill are within the legislative competence of the Senedd, it would similarly be within competence to set out the scope and nature of such powers. This provision is therefore “relevant provision” for the purposes of SO29.

37. This clause also introduces Schedules 2 and 3, which make provision on the exercise of powers by the Welsh Ministers and on procedures for making regulations, respectively, and for the reasons outlined below are also considered to require consent.

Schedule 2 - Regulations: restrictions on powers of devolved authorities

38. Schedule 2 (as introduced by clause 20(2)) contains provisions outlining what is meant by ‘devolved competence’ and applies to regulations under the Bill where the power to make the regulations is conferred on a relevant national authority (which includes the Welsh Ministers), pursuant to clauses 1, 8, 12, 13, 15 and 16 (as outlined above).

39. To the extent that this schedule applies to regulation making powers under the Bill which the Senedd would have the legislative competence to create and/or which modify the executive competence of Welsh Ministers, then this schedule would also require consent.

Schedule 3 – Regulations: procedure

40. Schedule 3 (as introduced by clause 20(3)) contains further provision about the procedure for powers under the Bill, and detailed provisions about when devolved governments must consult or obtain consent from UKG before making regulations under the Bill, and about when provision in regulations must be made jointly with Ministers of the Crown. There are also provisions about the kind of parliamentary scrutiny required.

41. To the extent that this schedule provides for the procedure which applies to regulation making powers under the Bill which the Senedd would have the legislative competence to create and/or which modify the executive competence of Welsh Ministers, then this schedule would also require consent.

Clauses which amend the current provisions within EUWA

42. The Bill makes a number of changes to EUWA, by omitting existing clauses and inserting new provision in their place. Any amendment to EUWA (as a protected enactment) will modify the Senedd's legislative competence, by virtue of the content of such protected enactment being modified. This may be the case whether or not the content of that modification falls within devolved areas as the fact that such provision becomes a protected enactment will prevent the Senedd making even consequential amendments to those provisions in the future.

43. Notwithstanding the above, it is in any event considered that the provisions outlined below have regard to devolved matters, because of the wider impact of the changes on devolved areas.

44. For the reasons outlined above, the Welsh Government therefore considers that it is appropriate for the legislative consent of the Senedd to be sought for these provisions of the Bill, which are considered in more detail below.

Clause 3 Sunset of retained EU rights, powers, liabilities etc

45. This clause repeals section 4 of EUWA 2018 on 31 December 2023, so that nothing which is REUL as a result of that section is recognised, available or enforceable in UK law from that date.

46. The particular effect of this clause is that such rights will no longer be recognised and available within domestic law. For instance, such rights, in conjunction with supremacy, will no longer override and lead to the potential disapplication of domestic (including Welsh) legislation (unless specifically maintained via powers under clauses 8 or 12/13 of the Bill).

47. This clause modifies a protected enactment. Therefore, the Senedd's consent would be required on the basis that this clause will modify the legislative competence of the Senedd by virtue of modifying a protected

enactment, as outlined in paragraph 42 above and because of its wider impact on devolved areas.

Clause 4 Abolition of supremacy of EU law

48. This clause makes amendments to section 5 of EUWA which currently applies the principle of the supremacy of EU law in relation to any domestic legislation made on or before 31 December 2020. The clause repeals the principle at the end of 2023 in relation to any domestic legislation, whenever made. This clause also establishes a new priority rule following the repeal of the supremacy principle, requiring RDEUL to be read and given effect in a way which is compatible with all domestic enactments, and, where the two conflict, for domestic enactments to take priority over RDEUL.

49. This provision is altering the relationship between REUL and pre-31 December 2020 domestic legislation, and thus retrospectively altering the effect of domestic legislation within devolved areas and how courts interpret REUL within devolved areas.

50. This clause modifies a protected enactment. Therefore, the Senedd's consent would be required on the basis that this clause will modify the legislative competence of the Senedd by virtue of modifying a protected enactment, as outlined in paragraph 42 above and because of its wider impact on devolved areas.

Clause 5 Abolition of general principles of EU law

51. This clause amends EUWA, so that general principles of EU law are no longer part of UK law from the end of 2023. This provision will alter how courts interpret REUL within devolved areas, as such principles are currently relevant to the interpretation of REUL.

52. This clause modifies a protected enactment. Therefore, the Senedd's consent would be required on the basis that this clause will modify the legislative competence of the Senedd by virtue of modifying a protected enactment, as outlined in paragraph 42 above and because of its wider impact on devolved areas.

Clause 6 "Assimilated law"

53. Clause 6(1) establishes "assimilated law" as a new body of law. At all times after the end of 2023, REUL that remains in force will be known as "assimilated law". Clause 6(1) does not amend EUWA.

54. Clause 6(2) makes clear that consequential amendments made under section 19 allow for amendments to EUWA.

55. Clause 6 makes relevant provision insofar as it is for a purpose within the legislative competence of the Senedd to the extent that this applies to

devolved areas. It also modifies the legislative competence of the Senedd by virtue of modifying a protected enactment, as outlined in paragraph 42 above.

Clause 7 Role of courts in relation to retained EU law

56. This clause amends section 6 of EUWA so that, after 31 December 2023, higher courts (i.e. the Supreme Court or the Court of Appeal in England and Wales) will be granted greater flexibility to depart from retained case law and in so doing, the clause sets out a list of very broad factors that the court may take account of in deciding to do so.

57. Clause 7 also inserts new sections 6A, 6B and 6C into EUWA to establish a reference procedure, which means that lower courts will be able to refer points of law of general public importance on retained case law (on which it is bound) to a higher court (which is not so bound) to decide. Law Officers are also provided with powers to refer cases to the appeal courts or intervene in cases that raise issues relating to retained case law.

58. This clause modifies a protected enactment. Therefore, the Senedd's consent would be required on the basis that this clause will modify the legislative competence of the Senedd by virtue of modifying a protected enactment, as outlined in paragraph 42 above and because of its wider impact on devolved areas.

59. This clause also confers the intervention and reference functions within new clauses 6B and 6C EUWA on the Counsel General for Wales, and so executive competence is also being modified.

Clause 9 Incompatibility orders

60. This clause inserts a new section 6D into EUWA, making provision for courts to make 'incompatibility orders' where the courts are applying the new priority rule for domestic legislation over RDEUL inserted in section 5(A2) EUWA by clause 4(1), or the contrary priority rule applied by secondary legislation made under the power in clause 8(1). An incompatibility order made by the courts under this provision could impact on domestic legislation, including Senedd legislation in devolved areas.

61. This clause modifies a protected enactment. Therefore, the Senedd's consent would be required on the basis that this clause will modify the legislative competence of the Senedd by virtue of modifying a protected enactment, as outlined in paragraph 42 above and because of its wider impact on devolved areas.

Clause 10 Scope of powers

62. Clause 10 provides for amendments to Schedule 8 EUWA so that retained direct EU legislation, and anything retained by virtue of section 4 can be

amended by existing and future subordinate legislation powers (not just those in relation to which there are pre-existing Henry VIII powers).

63. Clause 10 also introduces schedule 1 (see below) to the Bill which makes consequential amendments to provisions of primary legislation containing powers to make secondary legislation amending RDEUL, reflecting the removal of the current restrictions within EUWA by this clause 10.

64. The particular effect of this clause is that all retained EU legislation and section 4 rights within devolved areas will be amendable via existing and future secondary legislation more generally, and so cause the competence of the Senedd and the executive competence of Welsh Ministers to be modified.

65. This clause modifies a protected enactment. Therefore, the Senedd's consent would be required on the basis that this clause will modify the legislative competence of the Senedd by virtue of modifying a protected enactment, as outlined in paragraph 42 above and because of its wider impact on devolved areas.

Clause 11 Procedural requirements

66. Clause 11 repeals the parliamentary scrutiny requirements set out in paragraphs 13 to 15 of Schedule 8 to EUWA, which apply to the amendment or revocation of subordinate legislation made under section 2(2) of the European Communities Act 1972.

67. The particular effect of this clause is that the current scrutiny process which apply to the amendment or revocation of subordinate legislation made under section 2(2) of the ECA is changed.

68. This clause modifies a protected enactment. Therefore, the Senedd's consent would be required on the basis that this clause will modify the legislative competence of the Senedd by virtue of modifying a protected enactment, as outlined in paragraph 42 above and because of its wider impact on devolved areas.

Remaining provisions

Clause 21 Interpretation

69. This clause sets out the meanings of terms used throughout the Bill. To the extent that these definitions apply to clauses within the Bill which require consent, this clause would also require consent.

Clause 22 Commencement, transitional and savings

70. This clause sets out which provisions of the Bill come into force and when. To the extent that this clause provides for the commencement of

other clauses in the Bill which require consent, this clause would also require consent.

Clause 23 Extent and short title

71. This clause provides that the legislation extends to England and Wales, Scotland and Northern Ireland. To the extent that clauses in the Bill apply to Wales and require consent, this clause would also require consent.

Schedule 1

72. Part 1 of Schedule 1 makes consequential amendments to alter the parliamentary scrutiny procedure for certain powers conferred by EUWA or in other statutes, which may be used to amend RDEUL and Section 4 rights. These amendments reflect the removal of restrictions on such powers that are made by clause 10.

73. Part 2 makes consequential amendments to section 7 EUWA and to the Direct Payments to Farmers (Legislative Continuity) Act 2020, to modify references to the provisions of Schedule 8 EUWA that are amended by clause 10.

74. To the extent that Schedule 1 makes changes to various statutes which, in some cases, changes the procedure that applies to regulations made by Welsh Ministers, or otherwise makes consequential amends to the scope/nature of Welsh Ministers' powers, looking at the impact of these consequential amendments overall on devolved areas, Schedule 1 has regard to devolved matters and thus consent is required.

Welsh Ministers' Powers

75. Paragraph 10 of Part 2 of Schedule 3 sets outs the Senedd procedure where regulations are made by the Welsh Ministers under powers in the Bill.

76. The below regulation making powers are exercisable by Welsh Ministers and are subject to the Draft Affirmative Senedd procedure:

    a) regulations under clause 8 which amend, repeal or revoke primary legislation;
    b) regulations under clause 12 or 13 which amend, repeal or revoke primary legislation;
    c) regulations under clause 15(2) which confer a power to make subordinate legislation or create a criminal offence;
    d) regulations under clause 15(3).

77. The below regulation making powers are exercisable by Welsh Ministers and are subject to the Negative Senedd Procedure:

    a) regulations under clause 1;
    b) regulations under clause 8 which do not amend, repeal or revoke primary legislation;
    c) regulations under clause 16.

78. For any other regulation making powers in the Bill that are exercisable by Welsh Ministers (i.e. not outlined above) the procedure could be the Draft Affirmative Senedd procedure or the Negative Senedd procedure, depending on the decision of the Welsh Ministers and the outcome of a sifting exercise, if the Welsh Ministers choose the negative procedure for regulations under clauses 12, 13 or 15.

The UK Government's view on the need for consent

79. The then Secretary of State for Business, Energy and Industrial Strategy, the Rt Hon. Jacob Rees-Mogg MP wrote to the Counsel General and Minister for the Constitution on 22 September outlining the UK Government's devolution analysis of the Bill and how it had within it several provisions which will modify EUWA, which would extend to Wales, with those provisions that triggered the legislative consent process, being clauses 1, 2, 3, 7, 10, 12, 13, 15, 16, 17 and Schedule 3. This broadly (but not wholly) aligns with those clauses for which the UK Government has stated that it considers is required within Annex A to the Explanatory Notes to the Bill, as published on 22 September, being clauses 1, 2, 7, 8, 10, 12-14, 16, 17, and Schedules 2 and 3.

80. Having carried out our own analysis of the Bill our conclusion is that consent is required for all of the clauses of the Bill (as has been outlined above), save for clause 18 (which abolishes business impact target provisions within sections 21 to 27 of the Small Business, Enterprise and Employment Act 2015, which relates to reserved matters).

The Welsh Government's position on the Bill as introduced

81. The Bill has been introduced to address REUL and to realise the UK Government's objectives as outlined in the policy objectives section (see paragraphs 4 and 5 above).

82. These policy objectives are those of the UK Government and are not shared by the Welsh Government, where it is our view that the body of REUL is, in general, functioning well and does not need to be treated collectively in this way. Our position on the Bill has been strongly conveyed through Ministerial and official channels.

83. The Bill as introduced presents a number of legal, constitutional, policy and practical concerns.

Concurrent Powers

84. The bill contains several powers to assimilate, restate, revoke or update REUL that are conferred on a Minister of the Crown and which could result in a UK Government Minister using these powers in devolved areas without the consent of the Welsh Ministers. This represents a very significant constitutional issue for the Welsh Government. Our expectation is, in the first instance, that powers to amend devolved legislation should rest solely with the Welsh Ministers or, if held concurrently with Ministers of the Crown, that there should be a requirement on the face of the Bill for them to seek the consent of Welsh Ministers for their exercise in devolved areas.

Sunsetting REUL

85. The Welsh Government has very significant concerns that the arbitrary sunsetting deadline of the end of 2023 will force all governments across the UK to revisit this large body of law in a very compressed timescale that will likely lead to errors and inoperability issues. The consequence of such a needlessly short period in which to consider all the complex interdependencies in the law could be a dysfunctional statute book.

86. Moreover, the sunsetting provision will mean that parliament and the devolved legislatures will have no scrutiny or oversight role where REUL to sunset automatically and will likely not provide sufficient time for effective consultation on proposed modifications to REUL, which could result in unidentified issues and potential negative impacts, for example on protected groups. The broader impact on the Welsh Government, requiring the redirection of resources at a time when our focus should be on far more important issues, is also of major concern and will undoubtedly impact the legislative programme of the Government and the Government's ability to deliver on other commitments.

87. There is a mechanism in the Bill to extend the sunset date until 2026 for specific pieces, or descriptions, of REUL, though this is provided only to Ministers of the Crown. These powers should also be exercisable by Welsh Ministers in relation to legislation within the scope of the Senedd. The Welsh Government has strongly conveyed this to the UK Government and requested amendments in the Bill to reflect it.

Regulatory Burden

88. The Bill places restrictions on the use of powers within clause 15 to ensure that changes cannot increase the regulatory burden. This could mean that proposals to amend REUL, for example to reflect new scientific information or policy development, could be considered to lead to an increase the regulatory burden and this in turn could limit our ability to make effective changes.

UK Internal Market Act (UKIMA) interactions

89. There is clear potential for the exercise of the powers in the Bill to result in divergence in the law in these areas between the Devolved Governments and the UK Government. The UK Government has made references to its intention to reduce the regulatory burden. The Welsh Government does not support any approach to lower the high quality and standards our consumers, workers and businesses have come to expect.

Intervention/reference powers

90. The Bill provides powers to Law Officers to refer cases to the appeal courts or intervene in cases that raise issues relating to retained EU case law. However, as drafted, the circumstances in which Devolved Law Officers (including the Counsel General) can exercise these powers of reference and intervention are far more limited than those for UK Government Law Officers. To ensure that Devolved Law Officers can protect devolved interests, these powers should be broadened so all matters, even those which are reserved, that have an effect in devolved areas can be referred.

Financial implications

91. It is not possible at this stage to provide an estimate of likely expenditure under powers set out in this Memorandum.

92. The Welsh Government will keep this under review and endeavour to inform the Senedd of any financial implications for Wales later when they are more fully understood.

Conclusion

93. Given the significant concerns we have about the Bill, as detailed above, the Welsh Minsters do not consider it appropriate for the relevant provision in this Bill to be made. I therefore recommend consent for the Retained EU Law (Revocation and Reform) Bill is withheld.

Mick Antoniw MS
Counsel General and Minister for the Constitution
3 November 2022

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Evidence for the Legislation, Justice and Constitution Committee of the Senedd – *LCM* on the Retained EU Law Revocation and Reform Bill

This evidence was drafted by Dr Viviane Gravey and Dr Lisa-Claire Whitten, Queen's University Belfast. It builds on their ESRC-funded research for Brexit & Environment (VG) and Post-Brexit Governance NI (LCW) on the REUL Bill[1][2] and prior evidence to the House of Commons Public Bills Committee[3].

1. the Bill's impact in Wales

The Bill will have three different types of impact on Wales, both direct and indirect, and in the short or longer term. In the short term, the Bill will require a large amount of work from both the Welsh government and the Senedd – the first impact of the Bill is indirect, in terms of opportunity costs for the devolved administrations. While the Bill is a priority for the UK government it is not one for the devolved administrations who are effectively told to put their plans on hold for 2023. In the medium term, the Bill will have a direct impact on the Welsh regulatory landscape, in both reserved and devolved matters falling within the scope of the Bill (REUL SIs) – it remains to be seen who will be making decisions on the future of these instruments. In the longer term the Bill risks fueling regulatory divergence across the UK with as yet difficult to measure indirect impacts on the UK internal market and Wales' place in it.

2. to what extent the Bill might impact Wales' regulatory landscape

The Bill's impact on the Welsh regulatory landscape depends on two separate issues: first, what is the extent of REUL falling within the scope of the Bill? Second, who will be making decisions on the future of these rules, and how?

We do not know the extent of REUL, either at the UK level, or in Wales. At the UK level, the Dashboard is incomplete: key departments such as DEFRA have not yet provided information as to what part of their REUL is built on primary, or secondary (thus within scope) legislation. The Dashboard does not indicate whether rules listed are reserved or not. The Dashboard furthermore does not include the 1400 'new' REUL uncovered by the National Archives. In Wales, beyond requesting that the UK Government expands the Dashboard to devolved matters, mapping or listing of within-scope REUL has been published. Conversely in NI, both DAERA (600) and DFI (500) have conducted initial reviews of REUL within their remit. While the two devolution settlements are different, the NI numbers provide a good proxy for the

[1] https://www.brexitenvironment.co.uk/2022/10/17/ten-questions-for-the-reul-bill-in-northern-ireland/
[2] https://www.brexitenvironment.co.uk/2022/10/10/reul-bill-devolution/
[3] https://publications.parliament.uk/pa/bills/cbill/58-03/0156/PBC156_Retained_EU_Law_1st2nd_Compilation_08_11_2022.pdf

consequent scale of REUL in Wales which would fall within scope of this Bill. But mapping across the four administrations will differ: different choices made at the time of transposing a directive (whether to do so via primary or secondary legislation) are now having a direct impact on whether a piece of REUL is in scope of the Bill or not. For example, the Strategic Environmental Assessment directive was transposed via primary legislation in Scotland (thus not concerned by REUL bill) but via secondary legislation elsewhere (Environmental Assessment (Scotland) Act 2005 (replacing interim SSI 2004/258), and SI 2004/1633 (England), SI 2004/1656 (Wales), SRO 2004/280 (NI)). A decision made by the Scottish Government in 2005 thus puts Strategic Environmental Assessment outside the scope of the REUL Bill in Scotland, while it is in scope for the rest of the UK.

A further uncertainty on the impact is to do with who will be in charge of deciding on the future of REUL in Wales in devolved matters. The Bill as it stands allows for decisions on those items of devolved REUL to be taken either jointly or concurrently by the UK and Devolved administrations. This, as Charles Whitmore (Wales Governance Centre) explained to the House of Commons Public Bills Committee is highly concerning:

> "It is a constitutional anomaly within our legislation that the UK Government can use concurrent powers in the Bill to legislate in areas of devolved competence without any form of seeking consent from relevant devolved Ministers. It is egregiously out of keeping not only with the Sewel convention, which is already under significant strain but with other EU withdrawal-related pieces of legislation."[4]

This is even more of an issue due, once more, to past decisions during transposition. If, for simplicity's sake, a single UK-wide SI was taken to transpose a directive in a devolved area, then there is a real risk that if the UK Government were to revoke this piece of REUL it would do so for the whole of the UK.

As such, it is critical that the UK government commits to not making decisions on REUL in devolved matters without the consent of the devolved administrations (and ideally, of the devolved assemblies). But, if the 2023 sunset is kept, this would then put the onus on the Welsh government to restate all relevant REUL within a very short timeframe.

3. what role should the Senedd have in the revocation and reform of retained EU law in devolved areas
4. implications arising from the potential deadlines introduced by the Bill
5. the Welsh Government's decision not to carry out its own assessment of REUL, including not forming its own view on what is devolved and reserved

The Senedd has managed to carve a role for itself in the Brexit SIs work – an area where consent had been agreed, via the 2018 MOU on an intergovernmental basis. But the 2023 sunset, and the lack of REUL mapping from the Welsh Government create a situation in which there is likely to be a trade-off between on the one hand, parliamentary oversight of policy-making and on the other hand, ensuring no single piece of REUL falls off the 2023 sunset cliff-edge by mistake, or through lack of time to restate it.

As such and because the Welsh Government is not in favour of this Bill and its potential to weaken regulations in Wales, the Senedd may wish to push instead for a blanket policy by the Welsh Government

[4] https://publications.parliament.uk/pa/bills/cbill/58-03/0156/PBC156_Retained_EU_Law_1st2nd_Compilation_08_11_2022.pdf

to *restate* REUL and focus parliamentary work on the cases where the Welsh Government would like to revoke or amend REUL (if any). To do so, however, the Welsh Government must be able to identify REUL that exists within its competence because, under the Bill, 'sunsetting' is the default.

6. the Welsh Government's capacity to carry out such an assessment and to use its powers under the Bill

The finding by the National Archive of 1400 new pieces of relevant REUL is concerning – six months after the publication of the UKG dashboard, more REUL keeps on emerging. This makes the 2023 deadline untenable if it is maintained, even more so in devolved areas where mapping has just started/is yet to start, REUL will fall, and regulatory gaps will occur simply through lack of time.

The Welsh Government's position so far has been to reject the Bill's draw on its resources and to refuse to engage in lengthy mapping: this position, while understandable, means that REUL in Wales may be most at risk out of the four administrations, as it is more likely to not be identified in time. The UKG dashboard is explicitly "not intended to provide an authoritative account of REUL that sits within the competence of the Devolved Administrations"[5] this puts an onus on devolved institutions to carry out specific mapping.

On the issue of REUL mapping, it is worth noting that, during the Common Frameworks initiative, 65 areas of devolved competence in Wales were found to 'cross-sect' with, and be underpinned by, EU law and policy.[6] Findings from the Common Frameworks mapping would be a good place to start mapping the potential scope of REUL that is applicable in Wales but, as yet, 'missing' from related policy debates.

Notably, powers granted Welsh Ministers under Schedule 2 of the European Union Withdrawal Act 2018[7] to amend retained EU law were used to pass 88 Welsh statutory instruments. Any legislation that was amended by these 88 WSIs will likely be subject to REUL sunsetting and may not (yet) feature in any mapping exercise, including that of the UKG dashboard.

7. the Welsh Government's role in, and plans for, the UK Government's joint review, announced alongside the Bill

Notwithstanding the UK Government stated intention to work with "Government Departments and the Devolved Administrations" to carry out a review before the end of 2023 to "determine which retained EU law can be reformed to benefit the UK, which can expire and which needs to be preserved and incorporated into domestic law in modified form" its procedure for doing so is unclear. This being so it is worth noting that alongside powers granted Welsh Ministers to review/revoke/restate REUL within devolved competence the Bill also enables central UK government Ministers to review/revoke/restate REUL in devolved areas. This creates the possibility of conflicting actions being taken in respect of REUL at devolved and central government level and again underlines the key question regarding who will makes decisions about the future of REUL in Wales.

[5] See 'Retained EU Law – Public Dashboard' Available: https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance

[6] See UK Government 'Frameworks Analysis' 2021. Available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031808/UK_Common_Frameworks_Analysis_2021.pdf (accessed 11 November 2022).

[7] https://www.legislation.gov.uk/ukpga/2018/16/schedule/2

Clarifying the process by which the UK government plans to carry out its 'joint review' and determining the extent to which this truly will be *jointly* administered by devolved and central Ministers ought to therefore be an urgent priority for the Welsh Government.

8. the scope of regulation-making powers granted to the Welsh Ministers by the Bill including the scrutiny procedures attached to those powers

The scope should be in line with those of Ministers of the Crown, including revising the sunset date. This is even more the case for Wales where no mapping has been produced and thus where the risk of accidentally sunsetting REUL is the highest. The sunset cliff-edge discourages lengthy scrutiny – considering the breadth of the work that must be done, scrutiny risks being a hurried afterthought.

9. whether the Bill might introduce new limitations for the Welsh Government, which wants to improve pre-Brexit standards, where possible

In line with our answer to question 1, main limitations are those of opportunity costs (Welsh Government having to delay its own agenda, including pre-Brexit standards) to focus on fighting to stand still; and indirect impact of facilitated deregulation in England, which may make improving pre-Brexit standards in Wales more onerous for Welsh businesses (and skew the level playing field in the UK).

10. steps that the Committee could take in future, including with regards to powers exercised under the Bill

The Committee is in a unique position to discuss and comment on the impact that powers under the Bill will have on the broader post-Brexit policy infrastructure, in particular the Common Frameworks and the operation of the UK Internal Market Act. The few provisional Common Frameworks agreed all refer to REUL and will need to be amended. The framework analysis of where Common Frameworks were needed or not was based on both an assumption that there was no significant risk of divergence in many areas (an assumption voided by the REUL Bill) and that pre-existing ways of working between the administrations were sufficient. This Committee should ask that equivalent efforts to cooperate (and at least institute an early warning of any change) is put in place between the four administrations whether the policy topic is covered by a provisional common framework, or pre-existing arrangements.

11. implications for Wales' legal landscape, including the introduction of new categories of legislation, and issues relating to clarity and accessibility

This Bill risks making the already messy post-Brexit legal landscape even messier with reduced clarity and accessibility, and much greater intra-UK divergence, potentially overnight (at the end of 2023).

NFU Cymru Consultation Response

To:	The Senedd Legislation, Justice and Constitution Committee	Date:	16th November 2022
		Ref:	
Cc:		Contact:	
		Tel:	[redacted]
		Fax:	
		Email:	[redacted]

Dear Committee

The Retained EU Law (Revocation and Reform) Bill

NFU Cymru champions Welsh farming and represents farmers throughout Wales and across all sectors. NFU Cymru's vision is for a productive, profitable, and progressive farming sector producing world renowned climate-friendly food in an environment and landscape that provides habitats for our nature to thrive. Welsh food and farming delivering economic, environmental, cultural, and social benefits for all the people of Wales whilst meeting our ambition for net zero agriculture by 2040.

We welcome the opportunity to provide the Legislation, Justice, and Constitution Committee with our thoughts on the REUL Bill. Our views set out in this submission are based on our current understanding of the Bill as introduced, an understanding which is almost certainly imperfect, which will probably evolve further as we develop our knowledge of the Bill and its implications, and as the Bill itself is amended as part of the scrutiny process.

Regulation and agriculture

1. Regulation is something which has become part and parcel of modern agriculture, and over the course of almost half a century of EU membership, agriculture has been more exposed to EU law-making than any other sector of the economy. We recognise the value and importance of sound regulation, particularly as it relates to the safeguarding of the environment, human and animal health and the protection of consumers.

2. Good regulation balances the fundamental value of an economic activity with appropriate controls which ensure that the risk of harm is minimised. In contrast poor regulation imposes burdens on business which are disproportionate to any benefits derived, these burdens add to costs, place businesses under competitive disadvantage, and may deter businesses from undertaking activities which are valuable to society.

3. NFU Cymru has long advocated for better regulation and has been at the forefront of calls to reform and improve poor regulation and regulatory practices. Having left the EU, we see opportunities to review the regulation of the agricultural sector.

4. The regulatory environment within which farmers operate needs to be proportionate in the way it impacts on farm businesses, as well as a means by which intended outcomes are delivered. Regulations must be well designed, clear, accessible, and easily understood, and Government must remain open to reviewing and updating regulations so that they stay current and fit for purpose.

5. As part of our response to the Welsh Government Agriculture (Wales) Bill White Paper in March 2021 we called for a full-scale review of the current regulatory framework that farmers operate within. We said that this should consider areas of duplication, the coherence between different regulations, areas where there is overlap between regulators and the potential for misunderstanding and misinterpretation of regulations. Decisions around regulation should be based on robust evidence with comprehensive regulatory impact assessments, with due consideration of alternative interventions that may shape business behaviours.

6. NFU Cymru does have concerns about the REUL Bill both in terms of what it proposes to do and how it proposes to do it. Good, sound law-making and regulatory reform takes time and should properly engage Ministers, Governments, legislatures as well as encompassing discussion and consultation with stakeholders, interested and affected parties.

7. The conferral of unprecedented powers on Ministers to change the regulatory landscape (with few of the usual checks and balances), coupled with revocation by default of retained EU law invites the creation of legal uncertainty and an incoherent regulatory landscape. We would instead advocate for an incremental approach to regulatory reform and the development of the law in a manner which is clear, predictable, and understood by all.

8. If we are denied the opportunity to properly work through the body of REUL then we run the risk of discarding important regulatory protections, and also incurring the opportunity cost of failing to realise the desired outcome of designing better regulation or regulatory approaches in some areas.

9. Where regulations end up being repealed without due regard to the likely impacts or there is a failure to properly understand the interdependencies of pieces of law then Governments may find themselves fighting hasty rear-guard actions to close legislative gaps which have opened up. Such a scenarios will be damaging for business and consumer confidence and certainty.

10. Regulatory changes and reforms, however desirable they are, need to be trailed as far in advance as possible, and introduced gradually so that implementation, compliance, and enforcement requirements can be aligned to the new regulatory environment and that those impacted may properly prepare for the altered regulatory landscape.

11. At this point we would remind any intending reformers of the cautionary principle of ‘Chesterton’s fence,’ specifically that reforms should not be attempted until the reasoning behind the existing state of affairs is properly understood.

The Bill's impact in Wales and on Wales' regulatory landscape, the role of the Senedd and the implications of the deadlines introduced by the Bill

12. NFU Cymru supports the position that powers to amend legislation relating to devolved matters should rest with Welsh Ministers and where the Bill provides for concurrent powers, UK Ministers should seek the consent of Welsh Ministers before exercising these powers.

13. The Bill as drafted creates concurrent powers for Ministers of the Crown and Welsh Ministers, powers which could be exercised by Ministers of the Crown with or without the consent of Welsh Ministers, or alternatively by Welsh Ministers acting alone.

14. It is therefore difficult to arrive at a view in terms of the Bill's impacts in Wales without knowing exactly what approach might be taken to exercising the powers conferred by the Bill in respect of areas of devolved competence.

15. It is however worth noting of course that retained EU law very often intersects extensively with devolved competencies, for example the volume of legislation relating to agriculture exceeds that relating to any other sector. The exercise of powers contained in the Bill, whether by UK Government Ministers or by Welsh Ministers is likely to place a significant resource demand on stakeholders such as NFU Cymru at the very time when they are properly concerned with matters of first order importance, such as the Agriculture (Wales) Bill.

16. We are also concerned at the resource implication that this opens up for Welsh Government departments which will have to direct resources and capacity away from other important work areas, something which is likely to be exacerbated in light of any future public spending restraints. The creation of an (artificial) sunset deadline of the end of 2023 introduces further resource strain on UK and Welsh Government departments, particularly those departments which are home to large amounts of retained EU law.

17. We would not want any piece of regulation discarded without a proper assessment, including stakeholder consultation, on whether it ought to be retained, amended, or discarded, or indeed whether it would be sensible to prepare an entirely new regulation or regulatory approach. We are concerned that insufficient capacity coupled with a tight deadline heightens the risk of errors and oversights.

18. It is likely that NFU Cymru would need to conduct an extensive analysis of retained EU law and liaise with Welsh Government and UK Government departments in order to help them arrive at views as to what should happen with retained EU law, this is a process which requires time and resource. By removing the sunsetting provisions altogether and not working to a highly truncated timeline, we would be better placed to properly resource such an exercise, and work properly with government on post-Brexit regulatory reform.

19. The December 2023 deadline therefore imports a particular risk. A piece of REUL for which no saving provision is made will fall away at the end of next year at the expiry of the sunset deadline. We point once again to the real possibility that there will be oversights, and pieces of law which it might be desirable to save will simply fall away,

while opportunity costs will be incurred as we fail to properly examine if and how we might better integrate, and reform retained EU law within our domestic legal system.

20. We therefore call on the UK Government to consider extending the sunsetting deadline beyond the end of 2023, or alternatively removing the legislative cliff-edge altogether. A review of REUL can then take place without the backdrop of a hard deadline.

21. We also foresee a potential for significant (and ultimately unnecessary, time consuming and unproductive) disputes about where devolved competence lies, and as such matters become contested then we expect that they will place a further strain on intergovernmental relations.

The lack of Welsh Government assessment of REUL and the Welsh Government's capacity to carry out such an assessment and to use its powers under the Bill

22. Welsh Government is of course best placed to speak to its decision not to undertake an assessment of REUL, and NFU Cymru's discussions with Welsh Government have not given any indication of the reasons behind its decision not to carry out an assessment of REUL.

23. This lack of assessment could be due to capacity issue and may also, in part, be down to the fact that the UK Government may not have held much in the way of pre-legislative discussions with Welsh Government as regards its intentions in relation to the REUL Bill.

24. Owing to where EU law typically intersects with devolved competence this will disproportionately impact certain portfolios, particularly those taking in matters such as agriculture and the environment. These are comparatively small departments in terms of headcounts, which are at the moment engaged with pressing issues such as the passage of the Agriculture Bill.

25. It is certainly the case that any assessment of REUL within various Welsh Government Ministerial portfolios will take time, as will the exercise of those powers conferred on Welsh Ministers under the Bill.

26. If the decision by Welsh Government not to scope out the extent of REUL is indeed due to capacity issues, then this would also indicate that the Welsh Government may also struggle to use the powers conferred upon it in the Bill.

27. Although the UK Government has sought to bring together all REUL as a dashboard, it remains the case that pieces of REUL are still being uncovered. It is quite possible that there are pieces of REUL which have not been populated to the dashboard.

28. Unless these pieces of REUL are all identified, and a decision made on whether they are to be amended, repealed, or replaced, they will fall automatically fall away on the passing of the sunset deadline creating risks of gaps in the law.

The scope of regulation-making powers granted to Welsh Ministers and scrutiny procedures attached to those powers

29. NFU Cymru acknowledges that Welsh Ministers have not sought these powers in relation to REUL for themselves, rather these powers are set to be conferred on Welsh Ministers at the initiative of the UK Government.

30. NFU Cymru believes that there should be oversight and involvement for the Senedd when it comes to the exercise of these powers by Welsh Ministers. We are uncomfortable with the way in which the Bill places democratic oversight of changes to REUL in the hands of UK and Welsh Ministers and not the Westminster and Welsh Parliaments.

31. At Clause 1(2) Welsh Ministers and Ministers of the Crown are granted powers to delay the sunsetting of REUL indefinitely. It therefore seems quite anomalous to us that Welsh Ministers are not granted the power to delay sunset until 23rd June 2026 in the same way as Ministers of the Crown are at Clause 2.

32. We are keen to avoid a situation arising whereby the sunsetting of REUL at the end of 2023 could potentially be leveraged for the purposes of reducing scrutiny of actions to amend or replace REUL. For example, we would be concerned if Ministers in London or Cardiff were to introduce legislation to amend or replace retained EU law late on in 2023, in the full knowledge that if their respective parliaments were to delay its passage, the retained EU law will simply fall away, leaving a gap in the statute book.

33. This would put Parliamentarians in an invidious position whereby they may not be able to press for the scrutiny that they might desire for fear that they would end up with no legislation at all governing a particular field.

34. Similarly, we would be concerned at the prospect of Welsh or UK Ministers making late decisions about whether to save retained EU, amend it or simply let it fall away. This is likely to leave little time for businesses to implement and comply with new regulatory requirements.

35. Clause 15 confers very wide-ranging discretions on Ministers to make such alternative provisions as they might consider appropriate with very few oversight requirements, such as duties to consult which may well have accompanied the original REUL which is being replaced. This could mean significant policy changes with no proper oversight or stakeholder engagement.

Improving on pre-Brexit standards

36. It is worth noting that one legacy of our EU membership is some of the highest environmental and animal welfare standards in the world. The starting point is therefore one of very high standards, standards which have not always been rewarded by the marketplace and which going forward we feel are at increasing jeopardy as a result of trade deals struck with countries operating to lower standards.

37. Our members are proud of these high standards of production which underpin Welsh agriculture, and we would regard the desire to uphold our high standards as commendable. These high standards must however be properly rewarded from the

marketplace, otherwise our producers will simply be placed at a competitive disadvantage.

38. NFU Cymru notes the provisions at Clause 15 which will not permit a relevant national authority to increase the regulatory burden when it replaces secondary retained EU law with another provision, and so in essence REUL represents a regulatory ceiling. As a Union we fully recognise how this forecloses on what might otherwise have been legitimate devolved policy choices directed at improving on pre-Brexit standards, within the competence of the Senedd and Welsh Ministers.

39. Setting aside the impact of Clause 15, when it comes to making decisions around standards expected of their producers, Welsh Ministers cannot be naïve to what might be happening in England, the other UK home nations, the EU27 and further afield. If they chose to pay no attention to standards in other jurisdictions whilst increasing the standards demanded of their own producers, then they will end up putting their own producers at a competitive disadvantage.

40. In this context we would also point to the provisions of the Internal Market Act 2020 which prevents Welsh Government from being able to exclude products produced to different (lower) standards from being marketed and sold within Wales' borders.

41. We recognise that the Clause 15 provision introduces new limits on devolved competence in relation to standards and we urge Welsh Government to continue to work with Governments in the other UK home nations to advocate for high standards and resist any race to the bottom when it comes standards.

42. The interrelationship between domestic regulation and international trade must be properly taken into account as part of any regulatory review process to avoid the introduction of unnecessary barriers to trade for our agri-food products.

43. We are very much of the view that over the coming years and decades, Governments in London and Cardiff will need to work together to strike the correct balance between desirable regulatory reform and regulatory stability whilst also being mindful of our obligations at international law.

Welsh NHS Confederation
Conffederasiwn GIG Cymru

	Welsh NHS Confederation response to the Legislation, Justice and Constitution Committee on the Retained EU Law (Revocation and Reform) Bill
Contact for further info	[redacted]
Date:	7 November 2022

1. The Welsh NHS Confederation welcomes the opportunity to respond to the Legislation, Justice and Constitution Committee's consultation on the Retained EU Law (Revocation and Reform) Bill.

2. The Welsh NHS Confederation represents the seven Local Health Boards, three NHS Trusts, Digital Health and Care Wales and Health Education and Improvement Wales (our Members). We also host NHS Wales Employers.

Introduction

3. The scope of the Bill is broad and could represent an enormous capacity challenge to UK and Welsh Government, due to the fact that they will have to repeal, amend or replace over 2400 pieces of retained EU law (REUL).

4. There are substantial grounds for concern over the potential level of resources it will take Welsh and UK Governments to achieve this task before the 'sunset' date at the end of 2023.

5. There is also a risk that important pieces of legislation which protect public health could be unintentionally lost due to the restrictive timescale set out in the Bill. This would be due to Welsh Government, the Senedd and other stakeholders being unable to properly consider each affected piece of legislation.

Public Health

6. Of the over 2400 REUL, many intersect with areas which are important for protecting and improving public health. These include employment law, environmental law and food standards. Some specific examples are:
   - Regulation (EC) No 1924/2006 - ensures that nutrition and health claims made about a food product are based on scientific evidence so that consumers are not misled.
   - Regulation (EU) No 1169/2011 – regulates the information provided to consumers, including on allergens and nutritional content, as well as other labelling requirements.
   - Regulation (EU) 2019/631 - sets CO2 emission performance standards for new cars and vans.
   - Regulation (EU) 459/2011 – sets out vehicle requirements that improve the protection of pedestrians and other vulnerable road users involved in collisions.
   - Regulation (EU) 2017/2177 - ensures fair and equitable access to stations, depots and other rail related services.

7. The Bill could also hinder efforts for the UK to go further and faster on legislation which protects public health. Clause 15(5) of the Bill outlines that Ministers in the UK or Welsh

Governments can only use the powers in the Bill to replace existing EU law if it "does not increase the regulatory burden". This includes anything that brings additional "financial cost", "administrative inconvenience", or "obstacle to trade or innovation… efficiency, productivity or profitability". This indicates a strong preference towards deregulation, even where that may relate to areas of public health concern.

8. Without the ability or adequate time to properly ascertain which REUL needs to be preserved on the grounds of public health, we could see vital progress on the aims outlined in Welsh Government policy and legislation, such as A Healthier Wales and the Well-Being of Future Generations Act, impeded.

Trade

9. Trade and health are linked in many ways, affecting many wider determinants of public health, from the food we eat to our healthcare services, job market and ability to invest in public services. For example, the future ability of Welsh Government to introduce effective public health regulations may be hampered by new trade agreements and related legislation. Public Health Wales has explored the link between trade and health further in its report What could post-Brexit trade agreements mean for public health in Wales?

10. The Bill does include powers which can be used jointly or by a UK Minister, or by Ministers in the devolved administrations in areas of devolved competence. Ministers may wish to make different use of the powers in the Bill and consequently, consideration is needed around the Bill's interaction with the existing post-Brexit legislative infrastructure, particularly the Internal Market Act. For example, how might it affect the standards that goods available in Wales must adhere to, such as food products?

11. Similarly, further clarity would be welcome on whether changes to public health relevant regulations could affect their status under international trade agreements. Departure from the current shared standards could trigger EU challenges and lead to disputes over alleged breaches of the UK's Withdrawal Agreement/Trade and Co-operation Agreement.

Conclusion

12. Without a clear indication from the UK Government as to how the aims of the Bill will be accomplished, we believe it will be difficult to achieve within the timeframes it sets out, without comprising robust consideration of each REUL and its potential impacts on public health.

13. It is therefore imperative that there is engagement between UK and Welsh Government for concerns around public health to be properly considered when making decisions on REUL. Important pieces of legislation, such as those outlined in this response, cannot be allowed to be sunseted due to a lack of oversight. Further provisions must therefore be made for the Welsh and UK Governments to effectively identify any regulations which fall under or impact devolved areas of competence.

14. Assurances will be needed that the Bill will retain and improve legislation which impacts on public health. Ministers who are seeking to use the powers within the Bill to replace existing EU law must ensure consideration is given to long-term implications for population health and wellbeing.

RSPCA RESPONSE TO THE SENEDD LEGISLATION, JUSTICE AND CONSTITUTION COMMITTEE ON THE RETAINED (EU) LAW (REVOCATION AND REFORM) BILL

Summary
There are 44 animal welfare laws that have come across under the European Union (Withdrawal) Act 2018 that need to be filtered and assessed or these will no longer apply. 31 are devolved to Wales including the battery hen ban, cosmetics testing on animals and the labelling of eggs. The RSPCA has three major concerns with the REUL Bill on its impact on devolution and Wales. While the majority of the 44 laws are devolved, the Bill is unclear as to how the Welsh Government can ensure that any laws with reserved powers are carried over and not lost. Also with animal welfare laws that are devolved the Senedd is given a very tight time period to assess all these laws (December 2023) and could see laws being lost due to time constraints. In addition, the filtering process to ascertain if a retained EU law should be maintained is unclear.

Defra, with responsibility for 570 laws which contain the UK's high animal welfare and environmental standards, has the hardest task. It will have to decide which are reserved before negotiating with the Welsh Government which ones they wish to keep. Defra and the Welsh Government will have to agree which ones are devolved and under the competence of Wales. Budgetary reductions now about to be imposed will make this task more difficult. Finally there is clearly a split between the Welsh Government position, of trusting and wishing to keep the devolved EU derived animal welfare laws and the UK Government view of mistrust of EU derived laws so that each needs to be assessed. This could lead to a large widening of standards between the two countries, and conflict on the Common Frameworks process and the interpretation of the Internal Markets Act 2020. The Government has already recommended withholding of consent on this Bill.

1. The RSPCA is pleased to respond to the Legislation, Justice and Constitution Committee on the Retained (EU) Law (Revocation and Reform) Bill and its impact on Wales. The RSPCA is the oldest and largest animal welfare organisation in the world and writes the standards used by RSPCA Assured, the UK's only animal welfare assurance scheme. RSPCA Assured accounts for over 85% of egg production in Wales and 23% of pig production in the UK. The RSPCA undertakes around 85% of enforcement effort under the Animal Welfare Act 2006 in Wales for animal welfare investigations and prosecutions. The RSPCA set up Eurogroup for Animals in 1980 to act as its European coordination office to campaign for and influence European legislation on animal welfare. Since 1980 Eurogroup for Animals has acted as the Secretariat of the Intergroup for Animal Welfare in the European Parliament and has worked on and influenced all 44 pieces of animal welfare legislation that are part of the acquis and were transferred over to UK law under the European Union (Withdrawal) Act 2018.

    - *What is the Bill's impact in Wales*
2. Enormous. All EU derived legislation was carried over into UK and Welsh legislation

by a series of primary or secondary laws depending on whether they were Regulations, Directives or Decisions. When the UK left the EU on 31st December 2020 all the animal welfare legislation in Table 1 (below) had been carried over into Welsh and UK legislation and was only amended from a technical perspective, such as deleting language relating to the European Commission. Legislation was transferred under the principle that it was part of the legislative library, in some cases for nearly 50 years, and was therefore relevant and important to maintain. The Retained EU Law (Revocation and Reform) Bill works in the opposite principle. It deletes all legislation that has been transferred across unless it is proven to be useful. It also does so within a prescribed timetable and without any clear vetting or transparent audit process.

3. There are 570 pieces of legislation that are managed by Defra[1], responsible for the largest number of EU derived laws and so has the greatest burden in sifting and assessing these laws. 44 of these laws promote the welfare of animals. Thirteen of the 44 were Directives that are devolved and so have been implemented into Welsh legislation subsequent to their adoption and 31 were Regulations and Decisions. 18 of these could be devolved, 13 fall into reserved legislation. Legislation was transferred across on a piecemeal basis by Defra and the Senedd between 2018 and 2020 and it is fair to say that the quick time period did result in technical small legislative mistakes being made, some of which were correct in the past two years. Ironically this two time period is longer than the 12 month period prescribed under this Bill.

4. The largest body of animal welfare legislation concerns farm animals with 18 relevant EU laws adopted. All except the animal health ones are all devolved. For instance the five laws setting standards on the way farm animals are reared and produced such as laying hens, veal calves, meat chickens and pigs and the laws on how animals are transported and killed. Legislation covering consumer information, such as mandatory labelling of the provenance of eggs and beef, is also devolved. The legislation setting standards on the management of wildlife is devolved such as the hunting, trapping and protection of habitat and legislation.

5. However there is a large body of animal welfare legislation that is reserved. The RSPCA estimates these as 13 laws. For instance the bans on use of veterinary products such as the use of hormones in cattle, including BST, is reserved. Other EU derived animal welfare laws that are reserved include those part of international treaties such as the law to prohibit the import of wild caught birds, the import ban on seal products due to welfare concerns on the manner in which these animals are kept and killed. The use of animals in research and testing is also reserved.

- *to what extent the Bill might impact Wales' regulatory landscape;*

6. The Bill's impact on Wales' animal welfare regulatory landscape is huge. The 44 animal welfare provisions that are being considered under the REUL Bill brought in some of the most totemic and important changes in animal welfare in Wales such as the prohibition of the conventional battery cage for laying hens, the sow stall ban, the veal crate ban, the end of cosmetics testing on animals and the banning of GMOs and cloned animals. EU retained laws brought in standards and protection for the management of wild animals, stopping the imports of wild caught birds and ending the use of growth promoters in farming. These could all be at risk under this process.

[1] https://public.tableau.com/views/UKGovernment-RetainedEULawDashboard/REULMap?%3AshowVizHome=no

7. The Welsh Government and Senedd have made clear in their LCM that they do not share the policy objectives of the UK Government and that "it is our view that the body of REUL is, in general, functioning well and does not need to be treated collectively in this way."[2] The RSPCA believe that there are four main issues impacting on the Welsh regulatory landscape. Firstly the devolved animal welfare laws that the Senedd will have to carry over if they wish to, which has to be completed by December 31 2023. The time issue will be very pressing to get all the devolved legislation through the Senedd in time. The Bill makes no postponement of that deadline which seems to be penalising the devolved Governments. Secondly, the impact the Welsh Government can have on those animal welfare laws that are reserved to the UK Government so that these are carried over. The date for this could be extended to December 2026 but it is unclear how the Welsh Government will engage in this process. If it is through the Common Frameworks process but there is no agreement on process between the two Governments, it is unclear how this will be resolved. Thirdly the REUL Bill could have large constitutional consequences on devolution itself (LCM note para 83 footnote 2). Many of the powers in the REUL Bill are solely for Ministers of the Crown not Ministers of the Welsh Government. For instance the extension of the sifting deadline from 2023 for a further three years is not a power given to the Welsh Government who have to complete their sifting by December 2023. Finally the REUL has large implications on how products are produced and moved within Great Britain and it is not clear how it works with the Common Frameworks programme[3] and the Internal Markets Act 2020.

    - *what role should the Senedd have in the revocation and reform of retained EU law in devolved areas*

8. The Senedd should have a role in the revocation, reform or retention of all devolved EU retained legislation. As the UK Government may agree a different view and position on devolved animal welfare legislation in England it is important for the Senedd to sift all legislation relevant to Wales and within its competence.

    - *implications arising from the potential deadlines introduced by the Bill;*

9. Clause 1 of the Bill sets out that the filtering process to assess the legislation will stop on 31 December 2023. Clause 2 allows for it to be postponed no later than 31 December 2026. However this power is only for the UK Government not the Welsh Government which has to complete all its filtering process by 2023. As Defra has over 570 laws to be sifted and it is envisaged that the majority of these are devolved, the Senedd will have to sift all those in under 13 months. 44 of these are animal welfare laws (Table 1). There are only around 170 parliamentary sitting days before the first deadline for the Senedd to consider which works out as a rate of over three pieces of legislation a day to meet that deadline. This is clearly not feasible and could result in relevant legislation being lost due to time constraints and lack of proper scrutiny. However if the Welsh Government intends to restate all EU retained legislation, which seems probable from its LCM[2] , there may be a fast track solution to the time issue. There have been indications at 2nd Reading in Westminster that the Government will consider extending the sunset clause but this would only apply to reserved issues[4]. The RSPCA would support this as an interim measure, as it believes that it is practically impossible to filter and assess all the legislation in the

[2] Para 82 https://senedd.wales/media/wu0fwcny/lcm-ld15434-e.pdf
[3] https://www.gov.uk/government/collections/uk-common-frameworks
[4] https://hansard.parliament.uk/commons/2022-10-25/debates/246DE276-1887-475F-8016-DB81309C6D81/RetainedEULaw(RevocationAndReform)Bill

allocated time frame and this risks good legislation being lost.

- *the Welsh Government's decision not to carry out its own assessment of REUL, including not forming its own view on what is devolved and reserved;*

10. The RSPCA would recommend the Welsh Government undertook its own assessment of REUL particularly on which of the 2,417 laws that come under the REUL are devolved. Should this not be undertaken the Government risks leaving that decision to the UK Government which may have a different view. There have been instances in the past few years on what animal welfare legislation is devolved and what is reserved so it is important that there is not a land grab by the UK Government on legislation.

- *the Welsh Government's capacity to carry out such an assessment and to use its powers under the Bill;*

11. This will be difficult from a time and financial perspective but if this process is not completed the concerns raised in para 10 could occur.

- *the Welsh Government's role in, and plans for, the UK Government's joint review, announced alongside the Bill;*

12. The Welsh Government should fully participate in the UK's joint review but to do so will need a position on which laws are devolved and which reserved which indicates they will need to form a view on the 2,417 laws and the RSPCA would recommend certainly to undertake on the 570 covered by Defra which include the 44 animal welfare laws. 13 of these are reserved.

- *the scope of regulation-making powers granted to the Welsh Ministers by the Bill including the scrutiny procedures attached to those powers;*

13. The Minister of the Crown has no limits under this Act in their power to bring in Regulations that are consequential from the Act (Clause 19). The process of tabling secondary legislation is clearly laid out under Schedule 3 but there is no clear process laid out for how each individual Ministry will approach the pieces of reserved legislation that come under it. As Defra has 570 relevant pieces of legislation, 13 of which are relevant to implementing our animal welfare and health standards and are reserved, a clear and transparent process is needed and followed.

14. There are no clear scrutiny processes laid out for Welsh Ministers for devolved legislation but the RSPCA would propose that Welsh Ministers clearly lay out which legislation they believe are devolved and a timetable for considering these laws. Should the Welsh Government wish to simply restate all these laws, which is in their power to do so, this could be completed in a timely manner by December 2023. The Welsh Government could then agree if there is any devolved legislation they wish to amend or reject and fully involve the Senedd in discussion on these laws.

15. The Welsh Government will need to agree a position on those animal welfare laws that are reserved to the UK Government so that these are carried over. The date for this could be extended to December 2026 but it is unclear how the Welsh Government will engage in this process. If it is through the Common Frameworks process but there is no agreement on process between the two Governments, it is unclear how this will be resolved.

16. The REUL Bill could have large constitutional consequences on devolution itself (para 83 footnote 2). Many of the powers in the REUL Bill are solely for Ministers of the

Crown not Ministers of the Welsh Government. For instance the extension of the sifting deadline from 2023 for a further three years is not a power given to the Welsh Government who have to complete their sifting by December 2023. Finally the REUL has large implications on how products are produced and moved within Great Britain and it is not clear how it works with the Common Frameworks programme[5] and the Internal Markets Act 2020.

- *whether the Bill might introduce new limitations for the Welsh Government, which wants to improve pre-Brexit standards, where possible;*

17. The Bill does not have any impact on those devolved areas of animal welfare legislation that the Welsh Government may want to improve post Brexit but where those intervene with the operation of the internal GB market these may interact with the Internal Markets Act 2020 and the Common Frameworks Programme where those products are circulated to other countries in Great Britain.

- *steps that the Committee could take in future, including with regards to powers exercised under the Bill;*

18. Clause 2 of the Bill states the measures do not apply to any law specified in regulations from a national authority but it is not clear from the Bill how the UK Government will undertake this process or for measures that are reserved, such as the import ban on dog and cat fur, how they will ensure that the views of the Welsh Senedd are taken into account as the process of filtering the legislation occurs. The Welsh Government should clarify this process with the UK Government.

- *implications for Wales' legal landscape, including the introduction of new categories of legislation, and issues relating to clarity and accessibility.*

19. There are large implications for the Welsh legal landscape. Even if the Welsh Government decided to restate all the devolved pieces of legislation huge questions remain for the future Welsh landscape on reserved laws. For instance the Welsh Government has been clear that they have no wish to allow the use of growth promoters or the marketing of products made from them. This legislation (the Animals and Animal Products (Examination for Residues and Maximum Residue Limits) (England and Scotland) Regulations[6] would fall under the Bill. The provisions about allowing in meat treated with growth promoters has become an important issue for the UK in pursuing trade deals with countries that use these promoters such as Canada and Mexico. The UK has always maintained that such meat cannot enter the UK market as there is legislation to stop this happening. The Bill has the powers to revoke this legislation. As this decision is a reserved issue, the Welsh Government could find such products being sold in Wales despite its objections.

[5] https://www.gov.uk/government/collections/uk-common-frameworks

[6] https://www.legislation.gov.uk/uksi/2015/787/contents

Table 1 Summary of the 44 pieces of retained EU animal welfare laws and which are reserved and devolved

	EU Legislation *Directives*	International agreements	Devolved ?	Main goals
Farm Animals				
• General protection	98/58		Yes	Baseline standards on welfare of farm animals
• Laying hens	1999/74		Yes	
• Meat chickens	2007/43	OIE Guideline	Yes	Prohibits battery cage for laying hens
• Veal calves	2008/199		Yes	Minimum standards on chickens
• Live transport	1/2005	OIE Guideline	Yes	Prohibits veal crate and white veal
• Pigs	*2008/120*		Yes	Maximum transport times for farmed animals
• Slaughter	*2016/336*	OIE Guideline	Yes	
• Bans on BST	1099/2009		Yes	Prohibits sow stalls
• Farm subsidies	1305/2013		Yes	Standards on slaughter of farmed animals
• Country labelling	1307/2013		Yes	Stops use of growth promoting hormones
• Poultry meat	1169/2011		Yes	Agriculture Act 2020: animal welfare schemes
• Beef labelling	543/2008		Yes	
• Egg labelling	566/2008		Yes	Labels products on country of origin
• Organic Production	1097/90		Yes	Sets terms for poultry labelling
• Horse identification	5/2001		Yes	Sets terms for beef labelling
• Feed and food law	834/2007		Yes	Mandatory labelling of eggs Sets standards for organic food production Identification of equines Controls on the production of food and feed
Wildlife				
• Trade in endangered species	338/97	CITES	No	Implements CITES to manage and regulate the trade in endangered species and products
		IWC	No	
	812/2004		Yes	
• Whaling	*92/43, 82/72*	Bern Convention	Yes	Bans trade in whale products
• Habitat protection, hunting and trapping	*2009/147*	Bern Convention	No	Sets rules on wild animal protection, humaneness of hunting and trapping animals
			No	
• Wild birds protection	1239/98		Yes	Protects and regulates hunting of wild birds
	2015/1850		Yes	
• Driftnet bans	*1999/22*		No	
• Seal import ban	3254/91		No	Bans use of driftnets to protect marine life
• Zoos	139/2013	Bern Convention	Yes	Bans seal products due to inhumaneness Licensing and management of zoos
• Traps management	1143/2014			Regulates use of traps for wild animals
• Wild bird import ban	1007/2011			Stops imports of wild caught birds
• Invasive alien species				Prevents import & spread of alien species
• Fur labelling				Labels fur products
Animals in science				
• The use of animals in research, testing	2010/63	OIE Guideline	No	Regulates use of animals in laboratories for research, testing and education
• EC party to ETS 123	1999/575	Council of Europe	No	Makes UK member of Council of Europe's Convention on the use of animals in laboratories
	2003/584		No	

● Updates ETS 123 ● REACH ● Plant Protection Products ● Biocidal Products ● Cosmetics ● Novel foods	1907/2006 1107/2009 528/2012 1223/2009 258/1997*		No No No No Yes	Sets rules on testing using animals for chemical production and use Sets rules using animals for biocidal/plants Bans the use of animals in testing for cosmetics and the marketing of such products Regulates the production of GMO animals
Pets ● Non commercial trade dogs, cats, ● Pet Imports ● Commercial trade ● Imports on dog and cat fur	576/2013, 577/2013 2013/31 92/65 1523/2007		Yes Yes Yes No	Manages the cross border movement of pet cats and dogs Limits the commercial trade in cats and dogs Bans the import of dog and cat fur and its sale

UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) WALES WORKING PARTY SUBMISSIONS IN RESPONSE TO CALL FOR EVIDENCE BY THE LEGISLATION, JUSTICE AND CONSTITUTION COMMITTEE OF SENEDD CYMRU ON THE RETAINED EU LAW (REVOCATION AND REFORM) BILL

Introduction

1. UKELA (UK Environmental Law Association) comprises over 1,500 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.

2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. These submissions on aspects of the Retained EU Law (Revocation and Reform) Bill are in response to the call for evidence by the Legislation, Justice and Constitution Committee of Senedd Cymru. They have been prepared by UKELA's Wales Working Party and Governance and Devolution Group. This evidence does not necessarily, and is not intended to, represent the views and opinions of all UKELA members but has been drawn together from a range of its members.

Overview; the Bill's Impact in Wales and on Wales's Regulatory Landscape

3. UKELA is submitting evidence to this inquiry in light of the extensive amount of Welsh and UK legislation that is derived from the EU . Indeed, this has created a vast body of environmental law over the last 40 years. The stability of environmental law therefore depends on a robust and thoughtful approach to retained EU law. As such, this Bill will have a hugely significant impact on the state of the environment in Wales.

4. Environmental policy is a devolved matter in the UK, but when the UK was an EU

Member State, environmental law across the UK remained relatively unified due to the common EU environmental law framework. This existed without the need to draw sharp lines around devolved policy competence for environmental matters domestically. During this time, the UK Government and devolved administrations often relied on secondary legislation to implement EU environmental law. This led to many 'primary' regulatory obligations in environmental law being contained in secondary legislation (such as those relating to environmental permitting or habitats protection). As noted in UKELA's 2012 report on The State of UK Environmental Legislation, this led to a degree of complexity and fragmentation in environmental law, with some divergence across the devolved administrations, overlaid with secondary legislation transposing EU law.[1] Crucially, it raised important issues regarding scrutiny and democratic accountability for environmental legislation.

5. Since the UK's exit from the EU, these issues of complexity and the impact on scrutiny and the democratic accountability of environmental law have been significantly exacerbated. Post-EU, UK environmental law has been repatriated across the constituent parts of the UK, with divergent new UK environmental law being created on top of the existing legislative picture. This creates difficult legal issues around the interaction between retained EU environmental law and subsequent 'post-Brexit' domestic environmental legislation. This complexity is also the result of the impact and interrelation of UK Parliament and Senedd powers to amend EU retained law as well as the operation of Common Frameworks and the Internal Market Act 2020.

The role of the Senedd in the revocation and reform of retained EU law in devolved areas

6. Our essential position is that if retained EU environmental law is to be fundamentally changed, it should only be done following full and comprehensive domestic scrutiny by Senedd Cymru in devolved areas. 'Full scrutiny' means that the Senedd will be adequately involved and there will be timely participation of relevant institutional committees, civil society and expert stakeholders. EU environmental law did not appear overnight, it was the subject of detailed discussions between Members States over many decades. Similarly, the transposition of EU environmental law was most often subject to public consultation and evaluation. EU environmental law, as

[1] UK Environmental Law Association, King's College London, Cardiff University, The state of UK environmental law in 2011-2012: Is there a case for legislative reform? (May 2012).

transposed in the UK, forms a critical and coherent layer of our legal and policy framework for environmental protection and governance.

The implications arising from the potential deadlines introduced by the Bill

7. The Bill aims to 'sunset' most retained EU law at the end of 2023, subject to provision for: (i) UK and devolved ministers exercising powers to exempt pieces of retained EU law from the sunsetting; and, (ii) the ability to 'restate' retained EU law that has been 'sunsetted'. There is also a reserve power (for UK ministers only) to delay the deadline for sunsetting until 23 June 2026. The effect of the Bill is therefore to create a 'cliff-edge' situation for EU-derived environmental law, the predominant source of domestic environmental law, at the end of 2023.

8. Unless specific action is taken to the contrary, whole areas of environmental law such as waste, water and air quality, nature conservation, and the regulation of chemicals will be removed from the statute book overnight.

9. The approach of the UK government to the Bill stands in stark contrast to the approach taken to the European Union (Withdrawal) Act 2018, under which directly effective EU legislation was converted and incorporated into domestic law and preserved following Brexit (as the new concept of "retained EU law"), along with EU-derived domestic legislation. The rationale for this approach was explained by government in the following terms:

> *"This maximises certainty for individuals and businesses, avoids a cliff edge, and provides a stable basis for Parliament and, where appropriate, devolved institutions to change the law where they decide it is right to do so."*[2]

10. The proposals contained in the Bill represent a radical departure from this approach and will undermine each of those objectives:

    a. The Bill would not provide individuals and businesses with certainty, as it would not be clear at the point that it is enacted which (if any) pieces of retained EU law may be exempted from the sunsetting or possibly restated or replaced

[2] Government factsheet on European Union Withdrawal Bill https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714373/2.pdf

subsequently, and therefore what domestic environmental law will look like after 2023.

b. The Bill would impose a hard cliff-edge for EU-derived domestic environmental law, giving rise to a wholescale change in domestic environmental law overnight.

c. Far from providing a stable basis for Parliament and the devolved administrations to change retained EU law where they may decide that it is right to do so in the future, the Bill will remove the bulk of retained EU law in one fell swoop.

The Welsh Government's decision not to carry out its own assessment of REUL, including not forming its own view on what is devolved and reserved; and the Welsh Government's capacity to carry out such an assessment and to use its powers under the Bill

11. The key issue here is that under the Bill's proposals, none of the democratic institutions of the UK will be able to consider retained EU law in the forensic and systematic way that Parliament anticipated would be the case when it passed the European Union (Withdrawal) Act. It will not enable these institutions to embark upon a detailed consideration of whether particular pieces of retained EU law should be removed from the statute book or replaced with new legislation to reflect the desires of government post-Brexit (in each case underpinned by a clear policy direction for each area of retained EU law, of which environmental law is only one part). This is essential to the future effectiveness of environmental law across the UK.

12. The bluntness of the Bill's central feature is compounded by a paucity of policy direction from government as to how a review of retained EU law would be carried out within the narrow window before the end of 2023 to inform the UK and devolved governments' consideration of whether any pieces of retained EU law should be kept on the statute book, and if so which pieces, so that regulations may be made to exempt those pieces of retained EU law from the general sunsetting provision.

13. There is no indication that the UK government has considered how a programme of reviewing all EU-derived environmental law should be conducted, and the principles and objectives that would guide such a review. In relation to environmental law as a whole, the approach proposed under the Bill to retained EU law therefore lacks a coherent underpinning in policy.

The Welsh Government's capacity to carry out such an assessment and to use its powers under the Bill

14. The assessment of REULs in the area of environmental law and policy including decision making and governance and in particular, who is responsible for 'saving' these provisions is a monumental task that will take a significant amount of resource. This is at a time when the global community is focused on addressing the climate and nature emergencies that are the real challenge for Wales and the rest of the UK. Diverting such considerable resource to this task in the environmental context is, therefore, particularly significant.

Implications for Wales's legal landscape, including the introduction of new categories of legislation, and issues relating to clarity and accessibility

15. It is widely acknowledged that Welsh law is already in a state of complexity and confusion as a result of the incremental nature of devolution. Environmental law has been identified as one of the key areas of Welsh law in need of codification. This is important because accessibility is at the heart of the democratic process for environmental protection in Wales. The introduction of EU retained law has added an additional layer of complexity to this situation along with the impact of other elements of the post-Brexit legislative framework as outlined above (e.g. common frameworks and the Internal Market Act 2020). The current proposals for the creation of a new category of 'assimilated law', and associated complications over UK Ministers and Welsh Government powers in this respect, will not achieve greater certainty but actually complicate the state of legislation further.

Summary

16. In summary, UKELA considers that the overall approach proposed under the Bill will lead to a significant risk that the substance as well as the coherence of environmental law and policy in Wales (and throughout the UK) will be undermined and weakened.

UKELA Wales Working Party

16 November 2022

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Public Law Project
Senedd Briefing

Retained EU Law (Revocation and Reform) Bill

November 2022

Contents

1. Summary and Recommendations

1. This is a Bill about a particular category of UK law that covers a vast range of everyday topics. The Government is seeking broad powers to amend laws falling within the category of 'retained EU law', and to allow currently unidentified swathes of these laws to disappear at the end of 2023 unless specifically 'saved' by a minister. We consider this constitutionally inappropriate, practically unfeasible, and potentially deeply harmful.

2. The Bill's complex and opaque provisions would:
   i. Undermine parliamentary sovereignty by transferring vast legislative powers to ministers to exercise with minimal parliamentary oversight or control;
   ii. Place vitally important and valued rights on a cliff-edge. There is a very real risk, given the tight time constraints, of important rights and protections being overlooked or otherwise falling foul of the tight deadlines set by the Bill, and so disappearing from the statute book;
   iii. Create large quantities of otherwise unnecessary work for UK ministers, devolved ministers, and civil servants, without a clear case for why this should be prioritised over other acutely pressing issues;
   iv. Create considerable legal uncertainty, which will put individuals' rights at risk and make it more difficult to enforce those rights.

3. The European Union (Withdrawal) Act 2018 (EUWA) is, broadly speaking, operating satisfactorily. EUWA creates the space for Parliament to legislate as it wishes, whilst also maintaining certainty for individuals and businesses. It is our view that EUWA works; for now, there is no clear reason why this arrangement should be altered so dramatically.

4. PLP's primary recommendation is that this Bill should be scrapped in its entirety. However, should the Bill proceed, PLP makes the following recommendations:

   i. Remove clauses 10 to 16;
   ii. Include provision for meaningful consultation and debate on the proposed exercises of ministerial powers.
   iii. Amend the condition for the exercise of delegated powers.
   iv. Limit the power of UK ministers to legislate in areas of devolved competence without the consent of devolved authorities.
   v. Prevent EU-derived legislation that is equivalent to Acts of Parliament in substantive content and importance, such as the GDPR, from being amended as if it were a technical statutory instrument.
   vi. Remove clause 12(2)(b) of the Bill, since it allows the amendment of primary legislation by secondary legislation.
   vii. Insert a power to extend all the sunset provisions in the Bill.
   viii. Insert clear limits on the types of provisions that can disappear at the sunset.
   ix. Reverse the operation of the sunset.

x. Provide that nothing shall be allowed to disappear at the sunset without consultations, impact reports, and parliamentary approval.
xi. Insert a reporting and consultation requirement.
xii. Amend clause 7 to protect legal certainty.
xiii. Amend the new subsection (A2) to be inserted into section 5 of the EU (Withdrawal) Act 2018 by clause 4 of the Bill. This should be done in the interests of legal certainty. Consequentially, remove clause 8.

5. The following sections contain indicative samples of the kinds of amendments that could be made to the Bill. Committee members are welcome to use them, with the caveat that members may wish to refine the text and consider the amendments' mutual compatibility.

2. Taking Control from Parliament

6. The Bill contains a suite of broad delegated powers to change UK domestic law that has an EU link (known as EU-derived legislation). The most notable, in terms of their breadth, can be found in clause 15. These powers would expire on 23 June 2026.

   i. Clause 15(1): the power to revoke any secondary retained EU law (this term is described below) without a replacement provision.

   ii. Clause 15(2): the power to revoke any secondary retained EU law and replace it with an 'appropriate' provision that 'achieve[s] the same or similar objectives' as the provisions being revoked.

   iii. Clause 15(3): the power to revoke any secondary retained EU law and make 'alternative provision' for the revoked retained EU law. The replacement could pursue different objectives to the revoked law.

7. The clause 15 powers may not increase the overall 'regulatory burden'. Accordingly, these powers may only be used for a deregulatory purpose. They are not capable of being used to enhance rights and protections enjoyed by individuals; they are only capable of being used to reduce or remove rights and protections.

8. There are at least two major problems with these powers.

Problem 1.1: Handing a Blank Cheque to Ministers

9. These powers would confer on ministers a blank cheque to rewrite or repeal valued rights and protections.[1]

10. Below is a table of provisions of retained EU law that would (a) disappear at the sunset unless 'saved' and 'restated' by a minister, and (b) be vulnerable to modification, revocation, or replacement by ministers.

Retained EU Law	Description
General Data Protection Regulation (GDPR)	The source of important data protection rights, such as the right to be informed, the right of access, the right to rectification, and the right to erasure
Working Time Regulations 1998 (SI 198/1833)	Maximum weekly working time and right to holiday pay (including case law on

[1] Lord Anderson of Ipswich KBE KC, Notes for Remarks on the Retained EU Law (Revocation and Reform) Bill at the Bar Europe Group – Matrix Chambers (19 October 2022), paragraph 3 (https://www.daqc.co.uk/wp-content/uploads/sites/22/2022/10/RETAINED-EU-LAW.pdf [Accessed 20/10/2022]).

	formula for calculating holiday pay)
Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE)	Protects the rights of workers whose jobs are outsourced or transferred to another business
Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551)	Protects part-time workers from being treated less favourably than full-time workers just because they are part-time
Information and Consultation of Employees Regulations 2004 (SI 2004/3426)	Require employers to establish arrangements for informing and consulting their employees
Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513)	Employers have a duty to consult with their employees, or their representatives, on health and safety matters
Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034)	Protects fixed-term workers from being treated less favourably than full-time workers just because they're part-time
Agency Workers Regulations 2010 (SI 2010/93)	Agency workers are entitled to the same or no less favourable treatment for basic employment/working conditions
Habitats Directive 92/43/EEC (& implementing regulations)	Protects special habitats and/or species, e.g. through the designation of Special Areas of Conservation
Environmental Impact Assessment Directive 2011/92/EU (& implementing regulations)	Development projects that are likely to have a significant environmental impact must be identified and have their environmental impact assessed
Strategic Environmental Assessment Directive 2001/42/EC (& implementing regulations)	Public plans and projects are subject to an assessment of their environmental impact

11. The UK's system of scrutiny of delegated legislation does not have the capacity to provide proper parliamentary oversight for powers of wide breadth and scope. Delegated legislation in the UK is 'virtually invulnerable to defeat'.[2] Only 17 statutory instruments (SI) have been voted down in the last 65 years and the House of Commons has not rejected a SI since 1979.[5] Not a single SI was defeated during the process of legislating for Brexit and Covid-19. Since SIs are unamendable, MPs and peers feel they cannot vote down an SI with problematic provisions because the instrument in its entirety will be lost.

12. If Parliament enacts clause 15, it will be giving away control over rights and protections that MPs' constituents value and rely upon every day.[3]

Problem 1.2: Lack of Scrutiny and Consultation

13. As the Bill stands, there is no requirement for ministers to consult on proposed changes to retained EU law. EU-derived legislation continues to regulate complex areas of the economy and society. Consultation is vital to ensure mistakes are not made and unintended consequences not brought

[2] Adam Tucker, 'The Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), Parliament and the Law (Hart Publishing, 2018).
[3] According to polling conducted by Opinium for the TUC, 71% of voters support retained EU-derived workers' rights like holiday pay, safe limits on working times, and rest breaks. See https://www.tuc.org.uk/news/government-risks-voter-backlash-if-it-follows-through-plans-rip-key-workers-rights-tuc-warns [Accessed 20/10/2022].

about.

14. Part of the difficulty of understanding the breadth of the blank cheque being handed to ministers is the terminology of retained EU law. The Bill labels the laws subject to clause 15 'secondary' and 'subordinate' legislation. This implies that there are of a technical nature, rather than the basis for important rights and protections. The difficulty with this terminology is that EU-derived legislation does not neatly slot into UK categories of law. In the EU, the treaties are primary legislation, and 'legislative acts' are secondary legislation. Despite being 'secondary legislation' in the EU legal order, legislative acts are the equivalent of UK acts of Parliament in substantive content and importance. It is therefore a category error to treat 'EU secondary legislation' (legislative acts) in the same way as 'UK secondary legislation (statutory instruments).

15. The GDPR is an example of a piece of retained EU secondary legislation. This Bill would treat the GDPR and other EU legislative acts as if they were technical UK statutory instruments in terms of the ease with which ministers will be able to amend them. The GDPR took several years of consultation and gestation before being implemented, time in which businesses and stakeholders were able to provide their views. Businesses and civil society had two years of lead-in time to prepare for its coming into force. The GDPR is a detailed piece of substantive legislation, on par with the Data Protection Act 2018 in importance, and a source of important data protection rights. Clause 15 would allow ministers to tweak, substantially change, or even completely rewrite GDPR with no consultation, very little parliamentary debate, and no opportunity for amendment.[4]

Recommendations

16. We recommend that the Senedd and Welsh Ministers call for the following changes to the Bill:

    i. **Remove clauses 10-16, page 10, line 5 to page 18, line 27.** The point of this change is to prevent the transfer broad and unconstrained legislative powers to ministers. The clauses that would transfer such powers should be removed.

       If these clauses are not removed, they should be significantly tightened along the following lines.

    ii. **Include provision for meaningful consultation and debate on the proposed exercises of ministerial powers.** Meaningful sectoral consultation should be a condition for the exercise of the delegated powers in the Bill. Parliament should be guaranteed an adequate amount of time to consider and debate proposed exercises of said powers (clauses 10-16):

        a. Insert a new clause between clauses 17 and 18, between page 18, line 38, and page

[4] The maximum time for debates on statutory instruments is 90 minutes. In practice, debates rarely last this long. See: Alexandra Sinclair and Joe Tomlinson, '*Plus ça change*? Brexit and the flaws of the delegated legislation system' (Public Law Project, 2020), p. 8 (https://publiclawproject.org.uk/content/uploads/2020/10/201013-Plus-ca-change-Brexit-SIs.pdf [Accessed: 20/10/2022]).

19, line 1, entitled ‘Requirement of Consultation and Debate’;

b. Under this heading, insert the following text or some equivalent:

(1) Any regulations made under sections 12 to 16, or made under powers and procedures amended by sections 12 to 16, shall not come into effect until:

(a) a consultation paper has been laid by the relevant national authority in the relevant national legislature;

(b) the consultation paper states the relevant national authority’s intention to proceed with the making of the regulations subject to the consultation;

(c) the relevant national legislature has had reasonable time to debate a motion on the consultation paper; and

(d) the relevant national legislature has, in the course of the debate under section 18(a)(ii), voted to approve the relevant national authority’s decision to proceed with the making of the regulations subject to the consultation.

(2) The relevant national authority shall publish a call for evidence and conduct an analysis of the evidence submitted to the relevant national authority in response to the call for evidence. The relevant national authority shall provide a reasonable time to respond in any calls for evidence.

(3) In the consultation paper, the relevant national authority shall provide a reasonable analysis of the outcome of any consultation process conducted and shall provide reasons for the relevant national authority’s decision to proceed or cease to proceed, as the case may be, with the proposed exercise of the powers under clauses 12 to 16.

(4) ‘The relevant national authority may only lay a consultation paper in the relevant national legislature after three months from the date on which the relevant national authority published a call for evidence from relevant stakeholders.

(5) 'The relevant national authority shall set aside reasonable time for the relevant national legislature to debate a motion on the consultation paper.

(6) 'For the purposes of this section, the "relevant national legislature" is:

(a) The UK Parliament where the relevant national authority is UK ministers;

(b) The Scottish Parliament where the relevant national authority is Scottish ministers;

(c) The Senedd Cymru where the relevant national authority is Welsh ministers;

(d) The Northern Ireland Assembly where the relevant national authority is Northern Irish ministers.';

iii. **Amend the condition for the exercise of delegated powers.** The test for the exercise of these powers should be one of necessity, not the less onerous test of appropriateness. In the following clauses, the word 'appropriate' should be removed and replaced with the word 'necessary'.

a. See clause 12(6); clause 13(5)-(6); clause 14(3); clause 15(2); clause 15(3); clause 16(1); clause 19(1); clause 22(4).

b. In clause 15(1), substitute for the current wording: '(1) A relevant national authority may by regulations revoke any secondary retained EU law without replacing it where it considers it necessary and proportionate to do so.'

iv. **Limit the power of UK ministers to legislate in areas of devolved competence without the consent of devolved authorities.** The Bill should limit the power of UK ministers to legislate in areas of devolved competence without the explicit consent of devolved authorities;

a. Insert a new clause between the new clause 18 (see above) and the current clause 18 (Abolition of business impact target), between page 18, line 38, and page 19, line 1, entitled **'Consent Mechanism'**:

(1) Where UK ministers make regulations under any power contained in this Act where the regulations fall within the scope of devolved competences, the regulations have effect only to the extent that they do not fall within the scope of a devolved competences unless the

"Condition" is satisfied.

(2) The "Condition" is defined as follows:

The relevant devolved authority expressly communicates to the UK ministers its consent to the UK ministers making the specific regulations in question to the extent that the regulations in question would have effect, but for subsection (a) above, in relevant devolved areas of competence.

(3) For the purpose of subsection (2), the "relevant devolved authority" and the "relevant devolved areas of competence" are:

(i) Scottish ministers for Scottish devolved competences;

(ii) Welsh ministers for Welsh devolved competences; and

(iii) Northern Irish ministers for Northern Irish devolved competences.'

v. **Prevent EU-derived legislation that is equivalent to Acts of Parliament in substantive content and importance – such as GDPR – from being amended as if it were a statutory instrument.** In other words, limit the power of relevant national authorities to exercise the clause 15 powers in relation to EU-derived 'legislative acts'.

a. Insert into clause 15 a new subsection (12) at page 18, between lines 18 and 19:

(12) Regulations made under this section shall not have any effect in relation to secondary retained EU law that was classified as, or derived from, EU legislative acts, as defined under the Treaty on European Union and the Treaty on the Functioning of the European Union before IP Completion Day.

vi. **Remove clause 12(2)(b) at page 14, lines 42 and 43.** This provision allows ministers to use clause 15 to rewrite certain provisions of primary legislation.

3. Cliff-Edge for Rights and Protections

17. Clauses 1, 3, 4, and 5 place important rights and protections on a cliff-edge. If Parliament enacts these provisions, it will be entirely powerless to prevent the disappearance of rights at the end of 2023, even if it wishes to ensure that this does not happen. The Bill makes no provision for a confirmatory parliamentary vote, provides no constraints on the types of rights that could disappear, and gives ministers complete discretion over whether to extend the 'sunset' period to 23 June 2026.

Problem 2.1: State Capacity and Encroaching on Devolution

18. The sunset provisions in clauses 1, 3, 4, and 5 will create a very considerable amount of work for ministers and civil servants. Ministers and their civil servants will need to find the time to carefully review and consider over 2,000[5] pieces of retained EU law to decide which of their many different powers under this or other legislation to use in relation to each. It is important to note that ministers and civil servants will be forced to go through this process even for provisions of retained EU law that they deem to work satisfactorily, because without action they would simply disappear. The Government has not made a clear case for why this massive bureaucratic exercise is necessary.

19. Clause 2 empowers UK ministers to delay the sunset in clause 1. **It does not empower devolved ministers to delay the sunset in clause 1.** This asymmetry is an unnecessary encroachment on the autonomy of devolved institutions to control the status of retained EU law within their areas of competence. **The clause should be amended to enable devolved ministers to delay the sunset in clause 1** (see recommendation (i) below at pages 12 and 13).

Problem 2.2: Risk of Mistakes

20. There is a real risk of mistakes being made given the tight turn-around required by the sunset provisions and the amount of preparatory paperwork necessitated by the Bill. For example, when the Government had two years to prepare the statute book for Brexit, there was a significant increase in mistakes in SIs. Ninety-seven 'wash-up' SIs (SIs that correct mistakes in other SIs) were laid up until Exit Day. This amounts to 16% of the total number of Brexit SIs laid in this time. This should be compared to the figure for the 2015-2016 parliamentary session: 4.6% of all SIs were wash-up SIs. This increase in mistakes, produced in haste, occurred against the backdrop of the Article 50 two-year timer. This Bill would give ministers even less time than they had to prepare the UK for Exit Day.

Problem 2.3: Limited Power to Delay the Sunset

21. These mistakes, even if just the result of oversight, could have serious consequences. For example, the Bill would place important rights retained by section 4 of EUWA at risk of intended or unintended repeal.

[5] Graeme Cowie, Research Briefing: Retained EU Law (Revocation and Reform) Bill 2022-23 (House of Commons Library, 2022), paragraph 2.4, p. 20.

22. There is a crucial difference between the sunset of EU-derived legislation (clause 1) and the sunset of section 4 rights (clause 3). Clause 2 of the Bill would empower ministers to delay the former sunset. If ministers get to the end of 2023 and find they have not been able to restate enough pieces of retained EU legislation, they can delay the sunset.

23. By contrast, there is no power to delay the sunset for section 4 rights. This is all the more concerning given the nature of rights retained under section 4 of EUWA. By their nature, these rights are not contained in pieces of legislation, but are derived from case law. There is a real risk of certain section 4 rights being missed and allowed to lapse.

Case Study: Article 157 TFEU (right to equal pay for equal work and work of equal value)

Section 4 of EUWA retains the directly effective right to equal pay for equal work and work of equal value. This free-standing right is derived from Article 157 of the Treaty on the Functioning of the European Union (TFEU).

This right is more powerful than the right to equal pay under the Equality Act 2010, since it does not entail the Equality Act's more restrictive approach to comparators. The Article 157 right allows women to compare themselves to men with respect to pay if their pay is determined by the same single source (*K v Tesco Stores* [2021] IRLR 699). This is particularly useful for supermarket workers, since under this retained EU rule supermarket shop workers (mostly female) can compare themselves to distribution staff (mostly male).

Unless specifically 'reproduced' (I.e., codified) by a minister before the end of 2023 using the power contained in clause 13(8), the Article 157 right to equal pay will disappear at the end of 2023. The minister may choose to make any change they consider appropriate for 'resolving ambiguities' or 'removing doubts or anomalies' (clause 14(3)(a)-(b)). This power may allow ministers to choose between different interpretations of the right, narrowing the right in question.

Recommendations

24. The following changes should be made to the Bill:

i. **There should be a power to extend all the sunset provisions in the Bill.** Clause 2 allows for the extension of the sunset in clause 1, but not the sunsets in clauses 3-5. The same arguments for allowing the extension of the sunset in clause 1 (time constraints, legal certainty, risk of unintended consequences) apply to clauses 3-5. **Another issue with clause 2 is the exclusion of devolved ministers from the decision to delay the sunset.** This proposed amendment would enable all of the sunsets in the Bill to be delayed and confer on devolved ministers the power to extend the sunsets to the extent that they apply to retained EU law within devolved competences.

   a. Amend clause 2 to enable the extension of the sunsets in clauses 3-5. A suggested amendment is below.

   b. Remove the current clause 2 and replace it with the following new clause 2 with the following heading: 'Extension of sunset provisions'

‘(1) A relevant national authority may by regulations provide that section 1, section 3, section 4 and section 5 have effect from a later specified time.

(2) The reference to the end of 2023 in section 1(1) is subject to regulations made under section 2(1).

ii. **There should be clear limits to the types of provisions that can disappear at the sunset.** EU-derived subordinate legislation implementing EU legislative acts (e.g. the Working Time Regulations) should be shielded from the sunset. Retained direct EU legislation of equal importance to statutes in substantive importance should also be shielded (for example, the GDPR).

a. Insert into clause 1 a new subsection (6) at page 2, between lines 3 and 4:

(6) Subsection (1) shall not have any effect in relation to EU-derived subordinate legislation and retained direct EU legislation that was classified as, or derived from or implementing, EU legislative acts, as defined under the Treaty on European Union and the Treaty on the Functioning of the European Union before IP Completion Day.

iii. **Reverse the operation of the sunset.** The purpose of this proposed amendment is to reverse the operation of the sunset, so that only identified legislation is revoked at the end of 2023. This would ameliorate one of the current problems with the Bill, which is that no one knows what exactly will be revoked at the end of 2023. It is highly unsatisfactory that the Bill would have such an uncertain and unascertained effect on so many regulatory regimes. Accordingly, in the interests of parliamentary sovereignty, transparency, and certainty, the sunset should only apply to a list of legislation approved by Parliament. This new sunset clause should operate subject to the requirements set out in recommendation (iv) below.

a. Remove clause 1, from page 1, line 1, to page 2, line 3, and replace with the following new clause 1:

(1) A Minister of the Crown may lay in the House of Commons a “Revocation List”.

(2) In the Revocation List, a Minister of the Crown may list:

(a) specific provisions of EU-derived subordinate legislation; and

(b) specific provisions of

retained direct EU legislation.

(3) In this section, “EU-derived subordinate legislation” means any domestic subordinate legislation so far as--

(a) it was made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972 or

(b) it was made, or operated immediately before IP completion day, for a purpose mentioned in section 2(2)(a) of that Act (implementation of EU obligations etc),

and as modified by any enactment.

(4) In subsection (3), “domestic subordinate legislation” means any instrument (other than an instrument that is Northern Ireland legislation) that is made under primary legislation.

(5) The provisions listed in the Revocation List under subsection (2) are revoked at the end of 2023, subject to subsection (6).

(6) The revocation under subsection (5) of legislation listed under subsection (5) shall not have effect until—

(a) four months have elapsed since the Revocation List was laid in the House of Commons,

(b) the House of Commons has voted to approve the Revocation List; and

(c) the House of Lords has voted to approve the Revocation List.

(7) The revocation of an instrument by subsection (5) does not affect an amendment made by the instrument to any other enactment.

iv. **Nothing should be allowed to disappear at the sunset without consultations, impact reports, and either a parliamentary vote in favour or the opportunity for Parliament to remove items from a list of what the Government wishes to repeal.** Parliamentary oversight should be guaranteed. A practical example of this would be a provision that clauses 1-5 will only come into force following a parliamentary vote.

a. Insert into clause 3, page 2, line 12, the following new subsection (3):

(3) Subsections (1) and (2) shall not have effect until:

(a) the House of Commons has voted to approve the coming into effect of the sunset in section 3; and

(b) the House of Lords has voted to approve the coming into effect of the sunset in section 3.
b.

b. Insert into clause 4, at page 3, line 10, the following new subsection (4):

(4) Subsections (1), (2), and (3) shall not have effect until:

(a) the House of Commons has voted to approve the coming into effect of subsections (1), (2) and (3); and

(b) the House of Lords has voted to approve the coming into effect of subsections (1), (2) and (3).

c. Insert into clause 5, at page 3, line 36, insert the following new subsection (8):

(8) Subsections (1), (2), (3), (4), (5), (6) and (7) shall not have effect until:

(a) the House of Commons has voted to approve the coming into effect of subsections (1), (2), (3), (4), (5), (6) and (7); and

(b) the House of Lords

has voted to approve the coming into effect of subsections (1), (2), (3), (4), (5), (6) and (7).

v. **Insert a reporting and consultation requirement.** Amend the sunset clauses (clauses 1 and 3-5) such that they only come into force following:

a. The carrying out and reporting of proper analysis of the effect of the sunset provisions and the effect of the revocation of individual measures and principles subject to the sunset provisions;

b. The laying of an impact report of the effect of the coming into force of the sunset provisions and the effect of the revocation of individual measures and principles subject to the sunset provisions; and

c. The carrying out of meaningful consultation on the laws that ministers propose to allow to lapse.

4. Legal Uncertainty

25. The Bill contains many provisions with uncertain effects, which will probably need to be litigated to determine what they mean and what they do. These include:

    i. Clause 4 (abolition of supremacy and the creation of a new rule of interpretation that goes beyond the orthodox UK constitutional rule of later laws repeal earlier laws (see new subsection (A2));

    ii. Clause 5 (abolition of general principles, which are used as a tool for interpreting retained EU law);

    iii. Clause 7 (which seeks to lower the threshold for departing from precedent, creates a novel EU-style system for references on points of law to higher courts, and creates a mechanism for government law officers to intervene in private disputes relating to retained EU law);

    iv. Clause 14(2) (which provides that restatements may 'use words or concepts that are different from those used in the law being restated'; this could, presumably, have the effect of changing the meaning of the restated law).

26. Where parties have, in the past, lost cases on points of retained EU law, the Bill might allow them to re-open settled matters to seek their desired outcome. This is undesirable for two reasons:

    i. **Firstly**, where the courts depart from precedent, this has retrospective as well as prospective effect. If courts depart from precedent too liberally, this can have the effect of unsettling contracts, employment arrangements, and regulatory arrangements.

    ii. **Secondly**, the unsettling of the law will increase costs for individuals and businesses.

        a. Legal advice will need to be sought where before the law was certain. Settled matters may need to be litigated.

        b. Where there has been some dispute over the proper interpretation of retained EU law (for example, with respect to holiday pay), individuals and businesses will need to anticipate the re-litigation and potential reversal of the interpretations under which they have been operating.[6]

        c. The effect of this uncertainty will be increased costs, which will impact growth and the attractiveness of the UK as a location for investment. It will also mean greater stress, anxiety, and expense for individuals who will not be clear where they stand in

[6] E.g. see *British Gas Trading Ltd v Lock & Anor* [2016] EWCA Civ 983.

relation to their retained EU rights.

Recommendations

27. We recommend the following changes to the Bill:

i. **Amend clause 7, page 4, in particular lines 24 to 32 and lines 34 to 41.** Insert a provision requiring that courts must have regard to legal certainty and the principle that significant changes to the law should be made by Parliament before departing from retained EU case law;

ii. **Amend the new subsection (A2) of section 5 of the EUWA 2018, inserted by clause 4 of this Bill, at page 2, lines 27 to 31.** Amend this new subsection such that the phrase 'all domestic enactments' is changed to 'domestic enactments enacted after the enactment of the relevant provision of retained direct EU legislation'.

iii. **As a consequence of recommendation (iii) (and only if that recommendation is adopted), remove clause 8 at pages 9, lines 34 to 38, and page 10, lines 1 to 13.**

Contact

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Research Fellow
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FDF Cymru Submission

Legislation, Justice and Constitution Committee

18 November 2022

Introduction

The Food and Drink Federation (FDF) Cymru[1] represents the food and drink manufacturing industry in Wales. We are Wales' largest manufacturing sector, accounting for over 12% of total manufacturing turnover. Our gross value added to the economy is £1.7 billion, representing over 15% of Welsh manufacturing value added. We have 555 food and drink manufacturing businesses, employing 22,500 people, which represents 16% of the Welsh manufacturing workforce. In 2021, manufactured food and drink exports from Wales increased by 20.1% to £558 million from 2020.

Food and drink manufacturers are proud to make a wide variety of great-tasting, safe and nutritious products which are available to, and affordable by everyone. Food and drink are essential for people's lives and brings pleasure and joy to millions. Food and drink are deeply embedded in our history and our culture. Our relationship with food and drink goes way beyond its intrinsic nutritional value; eating and drinking and the occasions that surround them are part of what defines us.

Overview

In relation to the EU Retained Law Bill currently going through parliamentary scrutiny, in principle, the FDF can see the benefit in the domestication and consolidation of all retained EU law to ensure we have a functioning UK statute book, now that we are outside of the EU.

It remains unclear however as to why such an exercise is required to be carried out at such pace with a very concerning sunset date having been set as the end of 2023. With this, it could be easy for legislative mistakes to be made.

This is also compounded by the sheer scale of legislation to review and then for considered decisions to be taken to either keep, amend or lose. Such a process is further complicated by there being no full authoritative list of all EU law in scope.

1 FDF Cymru is a division of FDF representing the food and drink manufacturing industry in Cymru.

The specific Welsh context is yet to be completely understood, particularly in terms of its impact on future law making in areas of already devolved policy. This has the potential to drive through significant divergence if changes are not aligned on a UK basis and this would then put additional burdens on Welsh businesses, particularly smaller enterprises.

The FDF would echo the Food Standards Agency's already aired concerns with this Bill's challenging timeframe and potential to erode consumer protections. We therefore would prefer the creation of a roadmap with more appropriate timeframe to allow due process to be followed. This would allow all UK authorities time to working together, in collaboration with industry stakeholders, to identify areas of suitable reform that would continue to maintain consumer protection, business compliance and trade.

In terms of the specific questions raised by the committee we would respond as follows

- To what extent the Bill might impact Wales' regulatory landscape;

From the UK Governments public dashboard, of the 2,400 pieces of legislation that form the estimated scale of Retained EU Law (REUL) required to be adopted into UK law, 723 items can be initially identified as potentially within the devolved powers of Welsh Government. This assessment combines 570 for Department of Environment and Rural Affairs (Defra), 137 for Department of Health and Social Care (including FSA and 16 for the Department of Education.

For food and drink manufacturers, our focus is on the close to 30% of the overall total that are identified as under the remit of Defra and FSA. At this stage we have not been able to complete a detailed review and impact assessment, however the scale of this impact is potentially of a very significant nature to the food and drink supply chain in Wales.

Unfortunately, for the remaining questions we are unable to take a view, as we are unclear of how the Westminster Bill will impact the regulatory landscape in Wales.

This in itself is a cause of serious concern as an industry we pride ourselves on the integrity and safety of the food and drink we produce in Wales.

Asiantaeth Safonau Bwyd
food.gov.uk
Food Standards Agency

Oddi wrth / From Professor Susan Jebb
Cadeirydd yr ASB / FSA Chair

E-bost / E-mail [redacted]

By email: seneddLJC@senedd.wales

18 November 2022

Ref: MC2022/00298

Annwyl Weinidog / Dear Mr Irranca-Davies

I am writing in response to your request for stakeholder comment on the provisions in the REUL bill to inform scrutiny of the Bill and subsequent Welsh Government legislative consent memoranda.

Devolution transferred responsibility for food and feed safety and hygiene from the UK government to Wales, Northern Ireland and Scotland. This means that the FSA has the function of developing policies and advising Welsh Ministers on these areas. Our commitment to four-country working ensures that we can effectively protect public health and consumer interests across England, Wales and Northern Ireland, working with Food Standards Scotland.

As you will be aware, the Bill intends to automatically sunset Retained EU Law (REUL) at the end of 2023, unless Ministers agree to extend, preserve, reform or restate them. The Bill also includes the option to extend REUL to allow reform in the period until 2026.

In the FSA, we are clear that we cannot simply sunset the laws on food safety and authenticity without a decline in UK food standards and a significant risk to public health. While I'm sure this is not the Government's intention with these plans, the current timeframe does cause me some concern. We will need to work through more than 150 pieces of retained EU law, 39 of which are specific to Wales very quickly and to advise ministers on how best to incorporate important rules that safeguard food safety and public health within our domestic legislation.

Ensuring that people have food they can trust remains our number one priority. We also recognise this is an opportunity to review and reform these laws so that businesses have the right regulation to enable them to provide safe and trusted food, to trade internationally and to grow.

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SGÔR HYLENDID BWYD
FOOD HYGIENE RATING

In due course, we think a new UK Food and Feed Bill would provide the best opportunity for a comprehensive rethink, tailored to the needs of the UK. Our experience tells us that developing policy in an evidence-based, open and transparent way is better for consumers and for businesses, but this takes time to get it right.

Food law is devolved and we support devolved decision making on food and feed safety and standards. We will continue to work with Welsh Government officials on the bill's impacts in Wales and will consider any reforms in line with commitments in the common framework agreements for Food and Feed Hygiene and Safety and Food Compositional Standards and Labelling.

Yn gywir

Yr Athro / Professor Susan Jebb OBE, PhD, FRCP (Hon), FMedSci

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FOOD HYGIENE RATING
food.gov.uk/ratings

Legislation, Justice and Constitution Committee response evidence REUL

Provided in addition to points raised in the WEL evidence submission.

The changes proposed by the Retained EU Law (Revocation and Reform) Bill (REUL) have the potential for significant impacts to cross border and Welsh Marine Protected Areas (MPAs).

There are risks of two-tier system for cross border sites, potentially hindering delivery of the biodiversity deep dive recommendations. The introduction of new categories of legislation could create issues relating to clarity and accessibility. Especially for marine developments that span more than one jurisdiction, e.g. Impacts resulting from offshore developments, for which Wales does not have devolved competency such as oil, gas, marine renewable energy.

The implications are twofold; firstly, degrading the current, often underperforming, legislation hindering Marine recovery ambitions even further and, secondly the REUL proposals could also limit Welsh Governments ability to enhance existing legislation in line with achieving the biodiversity deep dive recommendations.

For example, the *British Energy Security Strategy* is the UK Government's response to rising energy prices. With both areas not fully devolved to Wales and with proposals either within Welsh waters (Offshore Wind), or adjacent to the Welsh Sea Area (Oil & Gas). With respect to offshore wind energy and oil/ gas production the strategy calls for:

- Offshore Wind: 50GW by 2030 from offshore wind, with 5GW from floating offshore wind in deeper seas. Underpinned "*by new planning reforms to cut the approval times for new offshore wind farms from 4 years to 1 year and an overall streamlining which will radically reduce the time it takes for new projects to reach construction stages while improving the environment*"[1].

- Oil and gas: "*a licensing round for new North Sea oil and gas projects planned to launch in Autumn, with a new taskforce providing bespoke support to new developments – recognising the importance of these fuels to the transition and to our energy security, and that producing gas in the UK has a lower carbon footprint than imported from abroad".*

UK Government announced a Growth Plan (2022), with an aim of *accelerating the construction of vital infrastructure projects by liberalising the planning system and streamlining consultation and approval requirements* [i] reflects the objectives of the Energy Security Strategy towards the Planning Act (2008) and Habitats Regulations.

Section 3.36 of the Growth Plan (2022) indicates that reform will be via:

- reducing the burden of environmental assessments
- reducing bureaucracy in the consultation process
- reforming habitats and species regulations
- increasing flexibility to make changes to a Development Control Order (DCO) once it has been submitted.

The list indicates that reform will extend past the Habitats Regulations to the Planning Act (2008) and EIA Regulations. Losing or downgrading this assessment framework impacts the accuracy of supporting information to enable planning and marine licensing decisions that protect marine habitats and species. Considering some sites are cross border and that mobile features of Welsh Marine Protected Area (MPAs) may rely on UK MPAs outside Welsh waters, reduction in

[1] Possible link with Net Gain.

protection outside of Wales may have serious implications to the ability of Welsh Government to deliver the outcomes of the Biodiversity deep dive.

The proposals from UK Government policy pose a threat to the natural capital of the UK, and the MPA network, through their stated objective of removing the protections provided by EU derived regulations. It is unclear how such an approach would be applied to sites with shared management plans such as Liverpool Bay SPA or the Severn Estuary SAC. However, changes should not be limited to erosion of existing power or the lowering of standards. Below are some examples of risks and potential opportunities;

The Conservation of Habitats and Species Regulations 2017: The basis of the Habitats Regulations is to prevent impacts from developments, to protect sites and indirectly, our Natural Capital. The Conservation of Habitats and Species Regulations (2017) enables the designation of, and provides protection to, all European Special Protection Areas (SPA) and Special Areas of Conservation (SAC) within 12 miles of the UK coastline. If a plan or project, including energy or infrastructure proposals, are being considered within or adjacent to one of these European sites, the regulations require a Habitats Regulations Assessment (HRA) to be undertaken to assess the effect of such proposals on the integrity of the site's features (habitats and species). Such an assessment can be required to also consider the "in-combination" impacts of other plans and projects. Importantly, the regulations require HRAs to be undertaken as part of marine licensing under the Marine and Coastal Access Act 2009 and for development consent under the Planning Act 2008, including Nationally Significant Infrastructure Projects such as offshore wind developments.

Removal of the Habitats Regulations would take away the protections afforded to habitats and species within the UK inshore MPA framework based upon SPAs and SACs**.** Replacement legislation to establish and manage the existing and future SACs, SPAs or an alternative designation would be required. A key point is that the regulations form the legal basis that underpin the existing SAC and SPA sites within the UK MPA network, and Welsh waters.

While a possible replacement could be via the Marine Conservation Zone (MCZ) designation under the Marine and Coastal Access Act (2009) alongside with the MCZ assessment procedure, these would not be a like for like replacement. The Habitats Directive that forms the basis to the Regulations, has a huge amount of casework and legal decisions from the European Court of Justice (ECJ) and UK law that define the interpretation of the legal framework with respect to the designation and protection of SPAs and SACs. However, the HRA process will not necessarily lead to habitat improvement and recovery: i.e., the regulations may be adequate for development control, but a future revision could be further enhanced to enable proactive improvement of the sites designated under the regulations.

Conservation of Offshore Marine Habitats and Species Regulations 2017: The Conservation of Offshore Marine Habitats and Species Regulations 2017 provides similar statutory duties and protection to that of the Habitats and Species Regulations (above) but extends these powers offshore from 12 nautical miles of the coast. Regulations 28 and 29 of the Regulations are like those of the Habitats Regulations (above) with respect to assessment of plans and projects and overriding public interest. Removal of the Habitats Regulations would take away the protections afforded to habitats and species within the UK offshore and the MPA framework based upon SPAs and SACs.

Marine Works (Environmental Impact Assessment) (Amendment) Regulations 2017: The regulations amend those of 2007, providing the UK enabling legislation for the EU EIA Directive 2011/92/EU and the amendments of Directive 2014/52/EU. These amendments link to Part V (Marine Licensing) of the Marine and Coastal Protection Act (2009) and Part II (Deposits in the Sea) of the Food and Environmental Protection Act 1985 with respect to licensing. The regulations set out the requirements for undertaking an Environmental Impact Assessment (EIA), documented within an Environmental Statement (ES). Removal of the Marine Works (Environmental Assessment) Regulations would in effect undermine the ability of the UK marine licencing system to protect the marine environment from development and disposal activities.

Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015: The Offshore Petroleum (Offshore Safety Directive) Regulations 2015 enact the Directive 2004/35/EC. Regulation 10 places financial liability for the prevention and remediation of environmental damage resulting from offshore petroleum operations on the licensee. Environmental damage within the regulation's references, but does not document within the UK regulations, the definition used within Directive 2004/35/EC: "*damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favorable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;*"

Article 5, Article 6, Article 7, Annex I and Annex II of the Directive sets out preventative and remedial actions to address environmental damage from offshore petroleum licensing. These too have not been clearly defined within the UK regulations, nor the Environment Act (2021).

Removal of the Offshore Petroleum (Offshore Safety Directive) Regulations 2015 would take away a legal definition of Environmental damage, together with the framework to prevent and remediate impacts to marine habitats from oil and gas development. While Welsh Government has made clear that no further oil and gas developments will occur in Welsh waters, Uk government has set out proposals in adjacent waters – located near to the cross-border Liverpool Bay SPA. Therefore, erosion of protection in English waters could have implications for protection in Wales.

The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001: Provides the basis for undertaking appropriate assessment of oil and gas plans and projects with respect to the Habitats (Council Directive 92/43/ EEC) and Birds (Directive 2009/147/EC). Regulation 5 sets out the requirements for appropriate assessment, with Regulation 6 specifying the conditions for overriding public interest. Removal of these regulations would have a similar impact to those of the other Habitats Regulations (see above).

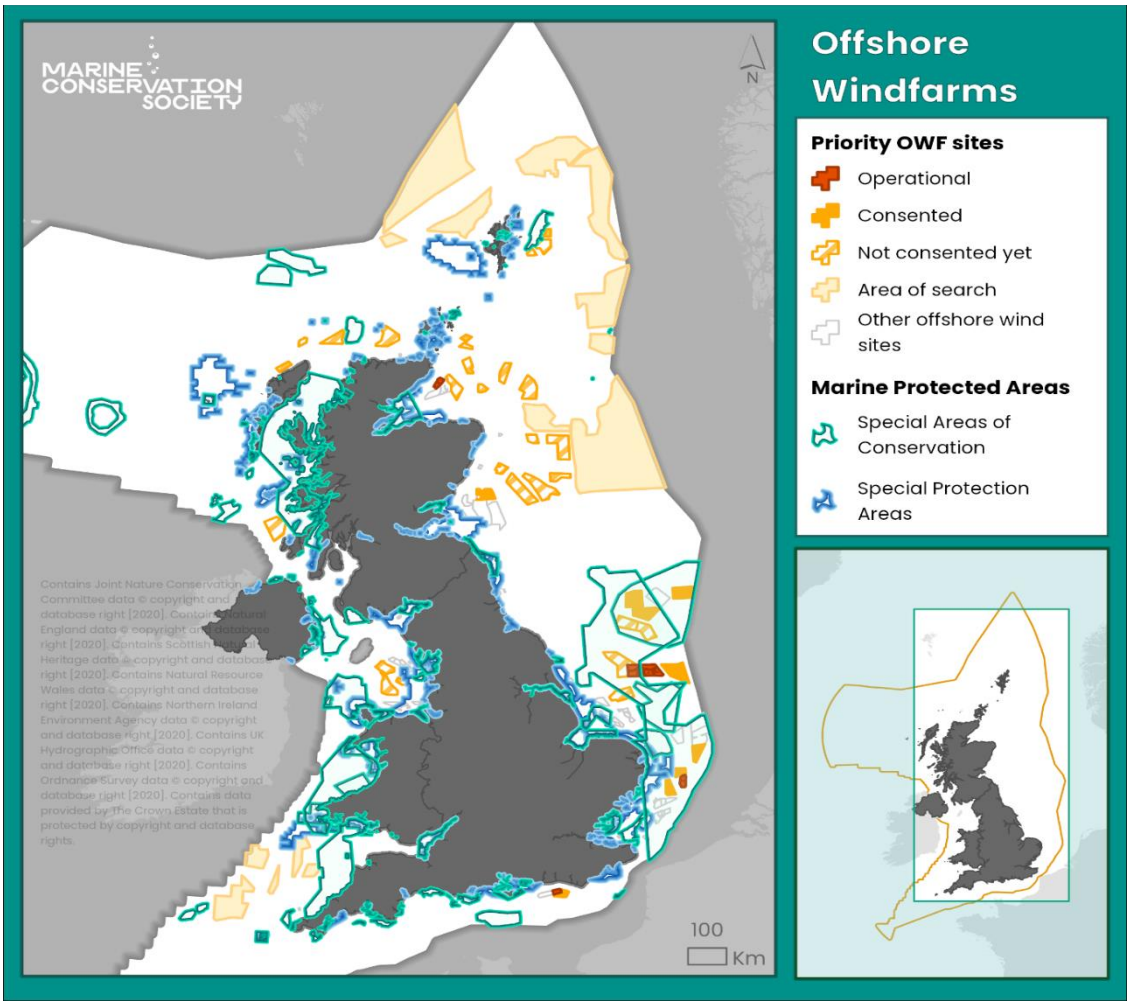
CASE STUDY: OFFSHORE RENEWABLES LICENSING

Annex B of the UK Government Growth Plan (2022) identifies groups of offshore wind projects[2] as priorities for reaching renewable energy targets. Map 1 (below) shows operational, consented and priority not consented/ proposed/ search areas for offshore wind. Many adjacent to Welsh MPAs, and likely to have some impact on the mobile features of these sites. Despite the protection supposed to be provided by MPA designation, sites (SACs, SPAs, and MCZs) in Wales may be impacted by a number of presently unconsented and proposed sites included in the Growth Strategy (2022).

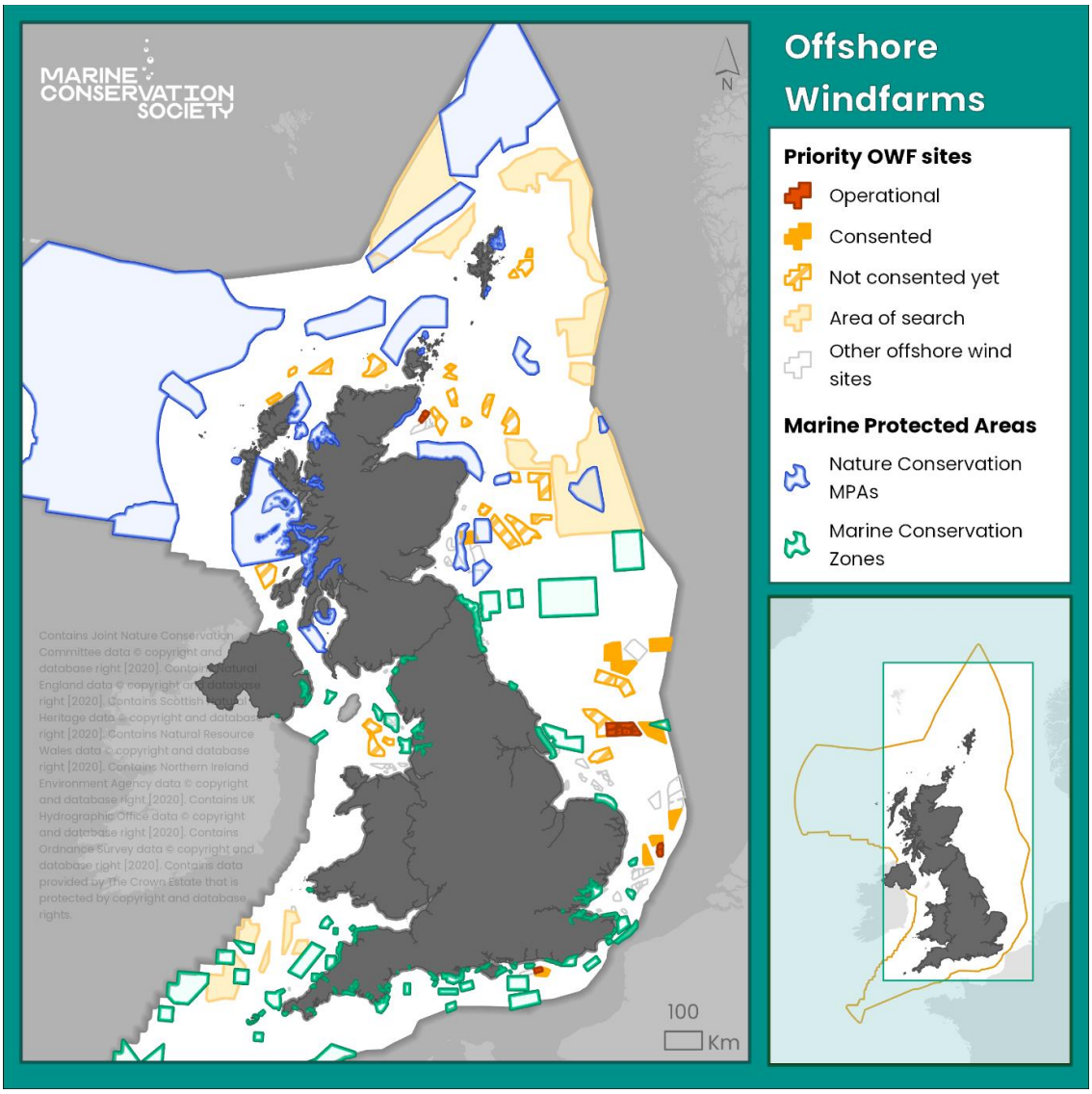
The development of offshore renewables to address climate change is essential, provided such developments *fully take into account the impacts on marine ecosystems and provide appropriate mitigation to eliminate or minimise to a negligible level such damage to these ecosystems.* Current technology enables static turbines to be placed in waters <60m deep, with Floating Offshore Wind Turbines (FOWT) able to be placed in deeper waters (>100m). The following sections define the potential impacts to marine ecosystems and the implications of losing EU derived legislation.

Noise and Electromagnetic Fields: construction of static turbine foundations, using pile driving results in extreme noise over large areas. For marine mammals this can cause avoidance behaviour, whilst fish species may suffer mortality from tissue damage. In extreme cases, piling has been cited as a cause of hearing loss in marine mammals. Associated activities of seabed preparation, drilling, dredging or intensified vessel traffic may cause marine mammal and fish species to leave the locality of construction. Long-term, the impact is potentially limited as species may return to the area once construction activity has ceased. As turbines increase in size, generation power and number; corresponding noise levels are likely to increase. The existing Habitats and Environmental Assessment Regulations require developers to consider the implications of such changes in the intensity of impacts.

Map 1 Marine Protected Areas (SACs and SPAs), Operational, consented and priority not consented/ proposed/ search areas for offshore wind.



Map 2 Marine Protected Areas, Operational, consented and priority not consented/ proposed/ search areas for offshore wind.



Species vulnerable to these impacts include harbour porpoise found within Bristol Channel Approaches / Dynesfeydd Môr Hafren, and seabird features of the Grassholm SPA, Skomer, Skokholm and the Seas off Pembrokeshire / Sgomer, Sgogwm a Moroedd Penfro and the Liverpool Bay / Bae Lerpwl SPA,

Pollution: Two potential sources of pollution have been identified during construction and operation of wind turbines. Firstly, the remobilisation of pollutants from sediments during construction (e.g., piling, dredging), particularly if those pollutants can accumulate in foodchains. Many UK Sea areas, notably locations within and near the estuaries of existing and former industrial areas have a legacy of marine pollution within sediments. The current provisions of the Habitats and EIA regulations require developers to consider and prevent these pollution risks but only if the safeguards provided by the legislation are left in place.

Areas that may be vulnerable to remobilisation of pollutants are sites near former or currently industrialised estuaries where cables are brought ashore and works involve disturbing sediments. Bird species will also be vulnerable to accidental spills. Pollution from shipping accidents pose a risk to adjacent SPAs designated for seabirds.

Entanglement: The use of mooring lines and cables by Floating Offshore Wind Turbines (FOWT) creates a risk of entangling and killing marine mammals and fish species. The impact takes two forms: primary and secondary entanglement. Primary entanglement is where a creature, potentially larger marine mammals, and sharks, becomes entangled in the turbine's moorings and cables. Secondary entanglement occurs where ropes, fishing gear etc. becomes entangled and in-turn entangles marine wildlife, like 'ghost fishing'. The impact is not well understood, as the use of FOWT is limited within UK

waters, emphasising the need to retain HRA and EIA regulations to ensure developers take account of entanglement risks. With developments planned in the Celtic Sea area, it is important that the legislation that requires the impacts to protected sites features is retained, to ensure that new developments are nature positive in addition to climate positive.

Habitat loss/change: Construction of offshore turbines could lead to habitat degradation and loss through direct impacts or changes in sedimentation regimes causing smothering. Piling of foundations, dredging and laying of cables and related infrastructure will damage and destroy seabed habitats in a similar way to oil and gas development. Construction within MPAs impacts protected species or is within sensitive/ vulnerable habitats (e.g., Habitats Directive Annex I Natural Habitats and Annex II Species) that are currently protected by the Habitats Regulations. In addition, removal of the EIA Regulations would undermine consideration for non-EU derived sites, e.g., MCZs.

The loss of this protection could lead to the disruption of ecosystem processes and properties by construction within these sensitive sites, altering food webs and impacting on associated species. A direct impact to benthic communities may then ripple through food webs to impact pelagic species distribution.

Alongside direct physical damage, constructing foundations for static wind turbines can disturb sediment into the water column during dredging and piling. Resultant increases in sediment (turbidity) can harm juvenile fish and other sensitive organisms and lead to smothering of seabed communities. In shallow inshore waters increase suspended sediments and alter sedimentation rates/ longshore sediment transport resulting in habitat change. Once again, undertaking a HRA or EIA can identify methods to mitigate these impacts, but only if the Habitats and EIA Regulations are retained.

MPAs vulnerable to seabed habitat damage include, of interest to Wales, South of Celtic Deep.

Invasive Species: Unfortunately, new at sea developments may be accompanied by opportunities for non-native/ invasive species colonisation. Turbine construction with the proliferation of new foundations and anchoring points across a wide, area may also provide corridors that allow non-native species to propagate and expand their range into previously unconnected areas. The cost of prevention is far lower than the cost of removal and existing planning and licensing conditions, advised by HRA and EIA, consider the need for monitoring and corrective actions if undesirable impacts (e.g., invasive species) occur. Loss of these regulations could remove the ability of regulators to justify such safeguards.

The Welsh Government therefore has an important role to play in ensuring the revocation and reform of retained EU law in devolved areas. For example, where proposals impact or hinder the delivery of Devolved legislation (E.g. the Future Generations and Wellbeing act), Welsh Government should have right to veto changes that would result in a lowering of standards.

While understandable given the resource implications for doing so, Welsh Government's decision not to carry out its own assessment of REUL, including not forming its own view on what is devolved and reserved potentially hinders the Welsh Governments ability to respond and challenge proposals made under the REUL bill. However, is should also be noted that the deadlines imposed by the bill provide a significant risk of their own, drawing Welsh government resource away from the implementation of planned or existing polices or legislation designed to improve the natural environment of Wales. Given the apparent limitations of Defra to fully review the extent of the implications of the REUL bill to UK Legislation, it would be unfair to expect Welsh Government to complete a similar review of its own.

We share the concern that the bill may introduce new limitations for the Welsh Government, which wants to improve pre-Brexit standards. The ambitions set out in the recent biodiversity deep dive set a clear agenda for improvement. In contrast the REUL bill, if implemented as proposed, would not only undermine those ambitions, but actively hinder them.

It is therefore imperative that the Welsh Government's plays an active role in the planned UK Government's joint review, ensuring the scope of regulation-making powers granted to the Welsh Ministers by the Bill not only include scrutiny procedures attached to those powers, but also the power to improve standards as required.

Examples of where existing powers could be strengthened;

1. Existing regulations and legislation could be strengthened to meet or exceed current EU derived standards by ensuring that the environmental principles (including the "Precautionary Principle") contained within the Environment Act 2021 are strengthened and clearly defined for incorporation into all future amendments and replacements of current regulation and legislation to protect MPAs, priority species and habitats.
2. Ensure that planning and marine licensing decisions continue to be supported by HRA (possibly via enhanced MCZ assessment) and EIA
3. Protection of the UK MPA network could be strengthened through:
    a. the provision of minimum legal standards for HRA and EIA
    b. legislation to meet or exceed current EU derived standards defining environmental damage and the framework for preventing and remediating such damage from the oil and gas industry within UK legislation
    c. Extend the ecosystem approach from the Fisheries Act (2020) to cover all forms of development assessment within the MPA Network, retaining Marine Strategy Framework Regulations as guiding criteria that must be met.

[i] HM Treasury. 2022. The Growth Plan 2022. His Majesty's Stationary Office.

Response to the Senedd Legislation, Justice and Constitution Committee Call for Views

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About this evidence

This evidence has been written by Charles Whitmore as a part of the Wales Civil Society Forum project (Forum). This is a partnership between Wales Council for Voluntary Action (WCVA) and Cardiff University's Wales Governance Centre (WGC) funded by The Legal Education Foundation. Its aim is to provide a civic society space for information sharing, informed discussion and coordination in areas subject to legal, administrative and constitutional change stemming from the UK's withdrawal from the European Union.

WCVA is the national membership organisation for the voluntary sector in Wales.

The **WGC** is a research unit sponsored and supported in the School of Law and Politics, Cardiff University.

1. Introduction

1.1 Many thanks to the Committee for the invitation to submit views on the Retained EU Law (Revocation and Reform) Bill. I am doing so in my capacity as coordinator of the Forum project as civil society organisations we have engaged with in Wales and at the UK level have expressed serious concerns about many aspects of the legislation. The Bill's core function – to automatically repeal or to amend without parliamentary or public scrutiny a massive body of law, while transferring vast law-making powers to ministers, with little to no consideration of the devolved implications reflected in the drafting - is constitutionally extremely worrying. The bill will:

a. Transfer significant legislative powers to ministers at both the devolved and central levels. Even going so far as to allow Ministers to use the broad powers in clause 15 to amend provisions of primary law (by virtue of clause 12(2)b).
b. Create significant legal uncertainty.

c. Likely lead to legislative errors and omission – potentially creating holes in the statute book which will require further legislative time to fix at a later date.
d. Drain capacity from the Senedd, Welsh Government and civil society in Wales – an issue that is likely to be felt even more acutely at the devolved level.
e. Empower the executives to enact policy change, either intentionally or by omission as a result of inaction - this is an entirely inappropriate means of reforming such a huge body of law. It is unclear how such a decision would be communicated, impact assessed, consulted on or challenged.
f. Risk sunsetting key rights and standards. The equality impact assessment[1] and the human rights memorandum[2] both note that in theory (UK Government reassurances notwithstanding) there is a risk of anti-discrimination protections and retained EU law (REUL) relevant to Convention Rights being caught by the sunset mechanism. The former explains that there are equality risks created by the Bill's provisions on departing from Retained EU case law, but that these are mitigated by the Human Rights Act section 3 duty on the courts to interpret domestic legislation in line with the European Convention on Human Rights (ECHR). **This ignores that the Bill of Rights Bill is also being considered by the House of Commons which will repeal this duty**.
g. Undermine ordinary legislative procedures, parliamentary oversight, and civil society's role in scrutinising significant policy change by providing no time or mechanism by which the impact of the potential sunset, preservation, restatement, update, repeal or replacement of REUL might be assessed, scrutinised or consulted on.

1.2 In addition to the above, there are further concerns that relate specifically to the non-consideration and complexity of interactions with devolution which I will now focus on.

2. Impact on Wales' regulatory landscape and Interactions with the UK Internal Market Act (UKIMA)

2.1 There has clearly been very little consideration and consistency in the drafting of the Bill around its interaction with the institutions of devolution. Devolution is mainly considered at only two points across the Bill's various documents – less than half a page in the explanatory notes,[3] and paragraph 36 of the Equality Impact Assessment.[4]

a. The former notes that the bill's approach is consistent with other EU related legislation, that the devolved 'administrations' have been appropriately and proactively engaged with, that the Bill reflects a commitment to respecting the devolution settlements and the Sewel Convention and '***will not create greater intra-UK divergence***' (my emphasis).

b. In contrast, the latter document recognises that the Bill is likely to lead to regulatory divergence but that this will be managed by the UK Internal Market Act and Common Frameworks. There is a vague reference to conversations having taken place in Whitehall (presumably without the Welsh Government) to ensure that the Bill does not '*change the*

[1] Retained EU Law (Revocation and Reform) Bill, Equality Impact Assessment, para. 27.
[2] Retained EU Law (Revocation and Reform) Bill, ECHR Memorandum, para. 8.
[3] Retained EU Law (Revocation and Reform) Bill, Explanatory Notes, Paragraphs 58-61.
[4] Retained EU Law (Revocation and Reform) Bill, Equality Impact Assessment, para. 36.

impact of the UKIM Act'. The impact assessment ends this argument noting that where divergence occurs, the UKIMA market access principles (MAPs) will apply in many areas. **This assessment is worrying and even misleading in several ways - I will take each in turn.**

The potential for and impact of regulatory divergence

2.2 As evidenced by the Equality Impact Assessment,[5] it is extremely misleading for the explanatory notes to state with certainty that the Bill will not increase intra-UK divergence. On the contrary, the mechanisms in the Bill provide significant scope for divergence, including in many areas that could trigger the market access principles - for example, around food composition, labelling and environmental policy. In theory it is conceivable that different parts of the UK may choose to allow different pieces of REUL to sunset and/or make different uses of the restatement, update, repeal and replacement powers in clauses 12-16 across a large body of law. There may even be different approaches to re-instating the principle of supremacy and the general principles of EU Law, particularly considering Scotland's Continuity legislation.

2.3 The brief explanation provided on this in the impact assessment is extremely limited and one-sided. It notes only that the UKIMA will protect consumers and businesses from the resulting divergences. However, it fails to acknowledge that **there could be significant and unforeseen extra-territorial policy impacts arising from different uses of the vast delegated powers in the Bill in different parts of the UK by virtue of the UKIMA MAPs**. As was explored at the time of the UKIMA's passage through Parliament, this is likely to work against Welsh policy autonomy as decisions to sunset or amend REUL / assimilated law in England will have disproportionately more impact on the other parts of the UK due to England's economic weighting and the constitutional imbalances between the central and devolved levels. **As a result, it should not be the case that the UKIMA is the default mechanism to manage the effects of any piece of legislation**. There is an acknowledgement of the overriding and problematic nature of the MAPs in the choice to provide a limited role for Common Frameworks in the operation of the UKIMA. This provides a statutory role for intergovernmental relations in helping to manage potential regulatory divergences that may otherwise result in tensions.[6]

2.4 Yet, depending on the policy directions taken by the different governments in the use of the delegated powers in the REUL Bill, the legislation risks triggering the MAPs on a scale far beyond what was initially conceived. **In practice this means that governments and legislatures will need to be hyper aware of the policy intentions behind the use of these powers in different parts of the UK as this may well result in *de facto* limitations of competence**.

2.5 In one hypothetical example, EU Regulation 1169/2011 on the provision of food information to consumers establishes essential requirements on nutrition, allergens and country of origin information on food labelling. There are relevant pieces of REUL at the devolved and UK levels implementing these requirements (the Food Information (Wales) Regulations 2014). Using

[5] There is a significant question as to why this Bill does not have a wider impact assessment. It is odd to see the equality impact assessment being used to consider wider regulatory impacts like potential interactions with UKIMA.

[6] As experienced recently with the expansion of exceptions to the MAPs in relation to single use plastics using the procedure in section 10 of the UKIMA, which provides a role for common frameworks in the discussion of further exceptions.

clause 15, the UK Government could decide to lessen these labelling requirements – indeed these powers are clearly drafted with deregulation in mind. It would also be within the scope of the powers in the Bill for the Welsh Government to preserve the requirements without amending them at the devolved level. It should be noted, that it would not be possible to introduce any changes that might fall within the Bill's extremely broad definition of an 'increased regulatory burden'. However, even if maintained, labelling requirements are likely to fall within the mutual recognition principle of the UKIMA and, as a result, products originating in England would not be required to comply with the 'preserved' standards in Wales. They would need only comply with the amended 'assimilated' lower standard in England. This would invariably place significant pressure on policy makers in Wales to match the standard introduced by the UK Government to ensure a level playing field for producers in Wales.

2.6 Given the amount of reserved and devolved REUL that would need to be considered in such a short amount of time, its extraordinary breadth, the limited capacity available, and the lack of an effective system of intergovernmental relations to support such an in-depth joint analysis in so many areas, **it is likely to be impossible to consider the impact of all such potential divergences on Wales' regulatory landscape while no policy direction is provided on how these powers might be used**. This is legal uncertainty on a constitutional scale.

The potential role of the Common Frameworks

2.7 The equality impact assessment (and questions provided to me by the UK Parliament Public Bill Committee) suggest that it is the UK Government's view that if significant policy divergence were to arise from different uses of the Bill's delegated powers, the Common Frameworks would be sufficient to manage this outcome.

2.8 It is the case that if there were no sunset date, a significant body of intergovernmental work should take place around the replacement of reserved and devolved REUL because there is scope for interaction with the UKIMA and there is a need to identify potential interactions and interdependencies between UK and devolved acts. This is very much in the spirit of what the Common Frameworks were intended to provide – intergovernmental cooperation based on trust and consensus in a shared space to facilitate meaningful policy differentiation. As a result, they have seen a measure of success,[7] **but are unlikely to be an adequate mechanism to manage the level of disruption that could arise from the REUL Bill**:

a. They were designed with a level of cooperation in mind necessary to facilitate the repatriation of competencies from the EU as examined in the framework analysis.[8] The potential scale of divergence and tension that could arise from different uses of the

[7] J. Hunt, T.Horsley, 'In Praise of Cooperation and Consensus under the Territorial Constitution: The Second Report of the House of Lords Common Frameworks Scrutiny Committee', 16 July 2022. Available at: https://ukconstitutionallaw.org/2022/07/26/thomas-horsley-and-jo-hunt-in-praise-of-cooperation-and-consensus-under-the-territorial-constitution-the-second-report-of-the-house-of-lords-common-frameworks-scrutiny-committee/

[8] Cabinet Office, 'Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland', April 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

delegated powers in the Bill and of the sunset mechanism, from potentially asymmetrical instances of omission and from different approaches taken to supremacy and the general principles – would likely be far beyond what the common frameworks are capable of managing. A higher-level commitment to intergovernmental work on the basis of consensus would be required.

b. There are gaps – some policy areas do not have common frameworks but do have REUL. Indeed the framework analysis identified only a minority of policy areas as requiring a common framework and left many others to rely on other mechanisms. If the common frameworks are expected to provide a formal role in managing divergence arising from the REUL Bill, it is unclear how policy areas without a framework would be managed.

c. It is likely that different teams in the civil service at the devolved and central levels work on the common frameworks and REUL. Given the already significant capacity challenges, there are likely to be further practical issues around ensuring communication between relevant teams.

d. Despite their successes, the Common Frameworks lack transparency and consistency. Furthermore, the timeline of the UK's withdrawal from the EU required them to enter force despite many being incomplete and provisional.

The Bill is out of keeping with the devolution, the spirit of the Sewell Convention and other pieces of EU withdrawal related legislation

2.9 Contrary to the claim in the explanatory notes, the Bill does not respect the devolution settlements or the Sewell Convention. Insufficient *a priori* engagement took place as evidenced by communications from the Welsh (and Scottish) governments. Even *a posteriori*, it is striking that the Welsh Government was not invited to give oral evidence alongside the Scottish Government to the Public Bill Committee. Indeed at his evidence session on 8 November 2022, Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture at the Scottish Government, seemed to be placed in a position by the Committee to also present the views of the Welsh Government.[9]

2.10 The Welsh and Scottish Governments have both recommended against legislative consent yet given recent practice it seems likely that the legislation will be passed anyway. Furthermore, it grants law-making powers to the UK Government in areas of Welsh devolved competence that can be exercised without seeking the consent of the Senedd or the Welsh Government. The clause 16 power to update assimilated law, which does not appear to be time limited up to 2026, would give an indefinite power to the UK Government to update Welsh law where there is a 'development in scientific understanding'. This makes the bill asymmetrical in how it addresses devolution, as Schedule 2 places restrictions on devolved competence, preventing the use of powers by the devolved authorities, but it creates no parallel restriction or consent mechanism on the exercise of the ministerial powers by the UK Government in devolved areas.

[9] Transcript available at: https://www.theyworkforyou.com/pbc/2022-23/Retained_EU_Law_%28Revocation_and_Reform%29_Bill/02-0_2022-11-08a.76.2

2.11 Also contrary to the statement in the explanatory notes, the absence of a consent mechanism makes the Bill out of keeping with other EU Withdrawal related legislation.

e. For example, sections 6(7), 8(9), 10(9) of the UKIMA require the UK Government to seek the consent of Welsh Ministers when exercising relevant delegated powers.

f. The Withdrawal Act and its associated intergovernmental agreement provide a constitutionally sounder example of a consent mechanism. In the event of the powers to freeze devolved competence being exercised by the UK Government, the system required that the Llywydd be notified and that the relevant regulations be provided to the Welsh Government. The Senedd was to then be given an opportunity to consent. If the UK Government wished to proceed without consent, both devolved and central governments were to provide a written statement to the UK Parliament explaining why consent was denied. The UK Parliament could then decide whether to approve the regulations or not. **It is constitutionally egregious that no consideration is given on the face of the REUL Bill to seeking the consent of devolved authorities in the exercise of concurrent powers, which in the case of this Bill, are vast**.

2.12 Similarly, there are several issues with the power to extend the sunset as it is unclear why this is granted exclusively to the UK Government. While the government has noted that this is intended as a 'fail-safe', given the tightness of the deadline it is likely to be essential. It is equally worrying that directly effective rights derived from EU case law, EU treaties and EU directives will sunset in 2023 by virtue of clause 3 without the possibility of extension when it is entirely uncertain what the effects of this will ultimately be.

2.13 The mechanism in clause 1(2) to preserve from sunset does provide an option that is open to the Welsh Government, but it too requires that all devolved REUL be identified prior to the deadline. It is also far from ideal that it is subject to the negative procedure. The articulation and differences between the clause 1(2) and clause 2 mechanisms are not entirely clear, though it seems the latter may be usable in relation categories of legislation making it potentially broader. In either case, it is possible that the sunset deadline will lead to a rush to extend or preserve devolved REUL from the sunset and will be conducive to omissions and legislative mistakes, with potentially serious ramifications for the statute book and legal certainty.

2.14 Furthermore, the process is entirely inappropriate from the perspective of parliamentary scrutiny, as the Senedd will have no meaningful decision to make if presented *en masse* with a body of devolved REUL to preserve. The decision not to preserve would simply be too problematic. **The Senedd should have an ordinary legislative role in scrutinising the changes to REUL over a much more protracted timeline, wherein the merits of specific legislative reforms can be subject to considered debate, impact assessment and consultation. The sunset mechanism should be removed or changed so that instruments must be specified to be included within its scope such the decision to do so can be scrutinised. A mechanism akin to that in the Withdrawal Act should also be considered so that the Senedd has a scrutiny role where concurrent powers are being exercised by the UK Government in areas of devolved competence**.

3 Capacity concerns

3.1 The deadline created by the sunset in clause 1 will place enormous pressure on the Welsh Government and the Senedd as the timeline for identifying all devolved REUL is impossibly tight. **This is tantamount to the UK Government asking that Welsh legislative and executive priorities be put on pause while an entirely unnecessary exercise takes place that can only lead to significant legal uncertainty and tension between central and devolved authorities**. These capacity concerns extend to Welsh third sector organisations, who will struggle if any meaningful civic society scrutiny is to take place on the use of the sunset and ministerial powers. That such a large and unnecessary re-direction of capacity should take place while the country is grappling with the cost of living crisis, an energy crisis and the fallout from the war in Ukraine, is astonishing.

3.2 The Welsh Government has stated that mapping devolved REUL for the purpose of this Bill should not be placed as a burden on devolved authorities. While understandable on a political level, in practice if the Bill passes largely unamended, it will be crucial that devolved REUL be identified as comprehensively as possible, as the consequences of being caught by the sunset are severe.

3.3 The capacity pressures the Bill will create are not limited to the identification of devolved REUL however. Significant intergovernmental coordination is needed to ensure that cross-border policy implications are identified and considered jointly prior to any decisions to sunset, restate, amend or repeal specific instruments. Dialogue should also take place where changes to reserved policy areas using these powers would have significant implications in Wales (for example around potential changes to labour rights).

3.4 It is unhelpful that the dashboard does not identify relevant devolved REUL as this means that devolved authorities are likely further behind in this process than the UK Government. They are likely also subject to even more acute capacity constraints. However, even if the Dashboard were to distinguish between devolved and reserved REUL, this would be of limited help as it does not go into the level of detail necessary to support a policy exercise of this nature and scale. Indeed recent work by the National Archives has highlighted just how incomplete it is as a database – noting that it has identified a further 1,400 pieces of REUL.[10] Meanwhile, little to no consideration has been given in debates in the UK Parliament to the absence of devolved REUL from the database.

4 The scope of the new regulation-making powers and their scrutiny

4.1 The bill will transfer vast amounts of law-making powers from the legislatures to the executives with no meaningful scrutiny, consultation or impact assessment process – **this is constitutionally inappropriate regardless of the level of governance at which it takes place**. It undermines both the role of the Senedd and the democratic scrutiny role provided by wider civic society. Clause 12 (2) (b) would even allow Ministers to amend provisions of primary legislation using the already extreme powers in clause 15. Furthermore**, it will enable, either by intention or**

[10] See the Financial Times report on 7 November 2022. Available here: https://www.ft.com/content/0c0593a3-19f1-45fe-aad1-2ed25e30b5f8

omission, Ministers to enact policy reform by inaction. It is unclear how, or even whether given the tight deadline, the intention to allow a piece of REUL to sunset would be communicated, let alone challenged.

4.2 Clause 15 is particularly egregious in two regards. Firstly, it is striking in the breadth of powers given to ministers who would be able to revoke and replace REUL with any alternative they consider 'appropriate'. Secondly, despite political reassurances, the tone and mechanisms of clauses 15(5) and 15(10) are clearly deregulatory.

a. Clause 15(5) would place a limitation on the Welsh Government's ability to use the delegated powers in Clause 15 to make any changes that could be interpreted as increasing the 'regulatory burden'.

b. Meanwhile, clause 15(10) establishes an incredibly broad (and open ended) definition of what can amount to a regulatory burden. This includes for example 'obstacles to efficiency, productivity, or profitability', 'financial cost' or even an 'administrative **inconvenience'**. It is unclear how differences in interpretation might be discussed and addressed around these definitions. What one authority considers a burden, another might consider a higher regulatory standard. This would effectively prevent regulatory standards being raised using these powers which, it is important to remember, are exercisable by the UK Government unilaterally in areas of devolved competence. Ordinary legislative processes could be used to re-establish or raise standards, however, there are concerns around legislative time, capacity, and the potential risk of entrenchment of any changes that might be introduced using these ministerial powers.

Cyswllt Amgylchedd Cymru | Wales Environment Link

Legislation, Justice and Constitution Committee on the Retained EU Law (Revocation and Reform) Bill

18 November 2022

Summary

Wales Environment Link is deeply concerned about the REUL Bill[1], which has major implications for environmental protection, food standards, animal and human welfare and worker's rights law as well as for legal certainty for all in Wales. Retained EU Law (REUL) includes some of the most important and powerful legislation we have to protect the environment and nature, such as the Habitats Regulations[2], air quality and water regulations[3] and regulations on environmental assessment. As stated by the Counsel General[4], the Bill

> "…risks the reduction of standards in important areas including employment, health and the environment."

The REUL Bill is a blunt instrument that does not allow for a sensible, consultative process to examine, update and improve the laws in these areas, but puts vital protections and standards at risk. We are therefore calling on the UK Government to withdraw the Bill.

What are the Bill's impacts in Wales?

REUL in Wales exists in a huge number and variety of statutory instruments. Some are specific to Wales, while some apply to England and Wales and others to the whole of the UK. The sunset provision in clause 1 of the Bill means that, unless other action is taken to retain, replace or amend REUL, it will automatically be revoked on

[1] the Retained EU Law (Revocation and Reform) Bill
[2] Conservation of Habitats and Species Regulations 2017
[3] For example the National Emission Ceilings Regulations 2018, Water Environment (Water Framework Directive) (England and Wales) Regulations 2017/407 and the Bathing Water Regulations 2013/1675 which in part implement - the Water Framework Directive 2000/60/EC and the Bathing Water Directive 2006/7/EC
[4] https://gov.wales/power-grab-fears-over-new-uk-government-legislation

31 December 2023. While there is scope for some laws to be subject to a later sunset of 2026, the power to extend the sunset (to 2026) is only available to Ministers of the Crown and not to devolved administrations.

It is not clear, at present, whether and how Welsh Government might retain laws in effect for Wales if the UK Government's position is to revoke or amend England and Wales, or UK wide regulations, or the implications for Wales if English regulations are revoked entirely or significantly amended but Wales wishes to retain its regulations.

It is of significant concern that there is not a complete list of REUL that is caught by the Bill, as stated by expert academics Dr Viviane Gravey from Queen's University Belfast and Professor Colin Reid from the University of Dundee

> "it is difficult, if not impossible, to fully gauge what the impact of the Bill will be on devolved competences as the scope of Retained EU Law itself is unclear".

Nor is it clear what impact the Internal Market Act 2020 might have on the ability and freedom of the devolved nations to retain higher standards in devolved areas than the UK Government. During a Westminster Hall debate held to consider the impact of Retained EU law on the Scottish Devolution Settlement on 19th October 2022, BEIS Minister Dean Russell sought to reassure Scottish MPs

> "I want to assure the House that the Government are committed to ensuring that the Bill works for all parts of the UK. We have carefully considered how it will impact each of the four nations, in close discussion with the devolved Governments, and it is of paramount importance that our legislatures function in a way that makes certain that we can continue to work together as one.
>
> The Government recognise the importance of ensuring that the Bill is consistent with the devolved arrangements, and we remain committed to respecting the devolution settlements and the Sewel convention…. We are not changing the constitutional settlement…. Environmental protections will not be weakened. We want to ensure that environmental law is fit for purpose and able to drive

improved environmental outcomes[5]…. If the Scottish Government want to preserve legislation within their competency, the UK will respect it.[6]"

However, this is not clearly contained within the Bill. In fact, complexity notwithstanding, the apparent impact of the 2023 sunset clause is that government officials will need to work through a body of thousands of pieces of REUL[7] and implement decisions before a deadline which is a little over a year away (and will not change no matter how long the Bill takes to reach Royal Assent). The requirement to process the vast number of REUL due to Brexit has given a glimpse of what this looks like in terms of impacts on Welsh Government workload and capacity to drive forward its own legislation; the current implications of the REUL Bill look yet more drastic.

The Welsh Government has stated that there is a risk REUL will simply be lost due to insufficient time being available to fully review, or due to confusion over where competency lies. Furthermore, due to Welsh Government teams having to absorb this vast, new workload, there will be an impact on the delivery of Welsh Government's own commitments and legislative priorities – for example the promised, and already delayed, Bill on environmental governance and nature recovery targets and the Clean Air Bill. Dealing with the REUL Bill will mean more precious time lost when nature in Wales needs us to move further and faster.

In addition to the risks to regulations that are within the competence of the Welsh Government and the Senedd (whether or not it exists as Wales-only or shared competency) it is important to note that changes in respect of areas solely within UK Government control also have major potential to impact on environmental protections in Wales – for example, the UK Government is responsible for consenting energy projects in Wales that are over a certain size (50MW on land, 350 MW at sea). Changes to the rules governing the UK Government's assessment of environmental

[5] https://hansard.parliament.uk/Commons/2022-10-19/debates/300E533E-0C71-44BC-A140-028019516462/details#contribution-3CD6C4C2-B588-4976-9917-FB50ECE00E5E
[6] https://hansard.parliament.uk/Commons/2022-10-19/debates/300E533E-0C71-44BC-A140-028019516462/details#contribution-74D97EBA-D66C-4F02-ACB2-A78CD12C1C0E
[7] *The UK Government estimates that there are over 2,400 pieces of legislation on its REUL dashboard but this does not include REUL made by Welsh Ministers (*Senedd Research Service briefing https://research.senedd.wales/media/fqfhrteg/22-67-eng-web.pdf)

impacts and responsibilities to protect nature, for example, could also have a significant impact on Wales' natural environment.

What role should the Senedd have in the revocation and reform of retained EU law in devolved areas

WEL is concerned that the role of the Senedd in respect of the Bill's implementation is limited. Key issues include:

1. The Bill will transfer considerable legislative powers from the UK and devoled Parliaments to the Executive. Ministers will be empowered to change REUL via statutory instruments which receive very limited scrutiny with no meaningful opportunity for challenge from parliamentarians;

2. The Bill gives UK Government Ministers powers to make changes without Welsh Government consent;

3. Clause 15 of the Bill, described by some including the Hansard Society as "….tantamount, with just a few caveats, to a 'do anything we want' power for Ministers." 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;

4. When replacing REUL, ministers must also not increase the regulatory burden, which is defined to include any financial costs, administrative inconveniences or obstacles to trade, innovation, efficiency, productivity or profitability. The direction of travel that this Bill promotes is therefore abundantly clear – deregulatory; and

5. Clause 16 provides an ongoing power to amend REUL in light of changes to science and technological understanding, but provides no clarity as to the expertise, objectivity or scrutiny of such judgements nor definitions for either.

Please see the Greener UK Second Reading briefing for more information.

Implications arising from the potential deadlines introduced by the Bill

As discussed above, a major concern is that Clause 1 of the Bill contains a sunset provision which would mean that, unless other action is taken to retain, replace or amend REUL, it would automatically be revoked on 31 December 2023. While there is scope for some REUL to be subject to a later sunset of 2026, this power is only available to Ministers of the Crown and not to devolved administrations, and there is no clarity on how this would be decided. This 'cliff edge' constitutes irresponsible law making: a legislative sledgehammer instead of an evidence-driven, targeted and cost-effective process. Moreover, due to the sheer amount of REUL, there is a real danger that important laws will fall automatically at the end of 2023, simply because they have not been identified and/or restated or amended in time. This could lead to significant gaps in our environmental law framework that could have knock-on effects on other domestic and assimilated laws because they depend on each other.

The Welsh Government's decision not to carry out its own assessment of REUL, including not forming its own view on what is devolved and reserved

It is worth noting that in June of this year devolved administrations requested the REUL dashboard including information about which REUL are in devolved areas. It is our understanding this still has not been made clear nor is there the ability to search for such REUL within the dashboard.

We also note that Counsel General stated, in his letter to the Committee Chair dated 4 August 2022:

> "My officials, along with officials from the Scottish Government and Northern Ireland Executive, have made strong representations requesting UK Government departments share an understanding of the split of devolved and reserved REUL, recognising that UK Government departments will need to identify this in any case as part of their work. To date this has not been forthcoming. We do not consider that the Devolved Governments should have to undertake entire separate analytical exercises on this, not least given the scale of the task and that this is a UK Government initiative driven to an arbitrary UK Government timetable, and bearing in mind that we have requested this be worked on collaboratively."

The scope of regulation-making powers granted to the Welsh Ministers by the Bill including the scrutiny procedures attached to those powers

As per our comments above, we have serious reservations about the wide-ranging powers represented by Clauses 15 and 16 of the Bill. As Sir Jonathan Jones KC (a previous head of the Government Legal Services) has clearly stated – retained EU law is domestic law. This Bill gives very wide powers to ministers (more to UK Government than to Welsh Ministers) to revoke or modify domestic law without the normal parliamentary scrutiny. WEL members feel strongly that these reduce democratic scrutiny and move England, and potentially Wales, in a deregulatory direction which does not sit well with existing legislation in Wales, for example, the Well-being of Future Generations Act.

Whether the Bill might introduce new limitations for the Welsh Government, which wants to improve pre-Brexit standards, where possible

As mentioned above, the Bill requires Ministers, when replacing REUL, to not increase the regulatory burden, which is defined to include financial costs, administrative inconveniences, obstacles to trade, innovation, efficiency, productivity or profitability. The direction of travel that this Bill promotes is therefore abundantly clear – deregulatory.

Clause 16 provides an ongoing power for REUL, and legislation brought in to replace REUL, to be amended in light of changes to science and technological understanding, but provides no clarity as to the expertise, objectivity or scrutiny of such judgements.

The Welsh Government has repeatedly reaffirmed its commitment to upholding EU standards, which we strongly welcome. As stated by the Counsel General in the Legislative Consent Memorandum[8], the Bill's policy objectives "are those of the UK Government and are not shared by the Welsh Government, where it is our view that the body of REUL is, in general, functioning well and does not need to be treated collectively in this way". It appears – given the risks and uncertainty discussed throughout this paper – that the Bill has potential not only to cool ambition for

[8] https://senedd.wales/media/wu0fwcny/lcm-ld15434-e.pdf

improvement, but to weaken current standards in a way that directly contradicts Welsh Government policy.

Implications for Wales' legal landscape, including the introduction of new categories of legislation, and issues relating to clarity and accessibility

Information on the impacts of the Bill on businesses, large and small, has not been made available by UK Government. Environmental regulations play a key role in driving investment, job creation, skills, and innovation, as discussed further in the Greener UK Second Reading Briefing. In addition, industry is committed to improving the environment through corporate social responsibility (CSR); not achieving CSR goals will impact on investment and public perception of industry. The REUL Bill will not provide a stable operating and planning environment for businesses because of the "endless uncertainty" that it will create. With no clarity about whether regulations will be replaced and if so by what, instead of reducing red tape, we believe the UK Government's REUL plans would have a severe chilling effect on business activity and investment.

Since the impact assessment for the Bill is still not published, this too is an area where there is no further information available.

Wales Environment Link (WEL) is a network of environmental, countryside and heritage Non-Governmental Organisations in Wales. WEL is a respected intermediary body connecting the government and the environmental NGO sector. Our vision is a thriving Welsh environment for future generations.

This paper represents the consensus view of a group of WEL members working in this specialist area. Members may also produce information individually in order to raise more detailed issues that are important to their particular organisation.

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Retained EU Law (Revocation and Reform) Bill

Written Evidence for Legislation, Justice and Constitution Committee, Senedd Cymru/Welsh Parliament

Professor Jo Hunt, Cardiff School of Law and Politics, Wales Governance Centre

Please find my response to selected questions suggested in your call for evidence. I have focused my responses in particular on the constitutional consequences of the Bill and its impact on devolved competence. I would be happy to discuss any of these, and other issues raised by the Bill with the Committee.

The Bill's impact in Wales – General Comments:

The Retained EU Law (Revocation and Reform) Bill (hereinafter REUL Bill) is the most recent in a line of Westminster legislation dealing with the domestic legal and constitutional consequences of the UK's withdrawal from the European Union.

The Bill follows in the same vein as the EU (Withdrawal) Act 2018, and the UK Internal Market Act 2020 in that it provides new challenges to the effective operation of devolved competence, in part in the apparent pursuit of ensuring cross-UK regulatory consistency following the end of EU membership which brought with it a large body of common, harmonised (though not necessarily identical) regulation.

An additional aim appears to be to facilitate the pursuit of a deregulatory agenda, on which there may be different views across the Governments of the UK. Further the Bill seeks to limit regulation which creates obstacles to trade, which, if interpreted to mean intra-UK trade, could have significant repercussions for devolved regulatory competence.

The approach of the proposed legislation does nothing to support the more collaborative and cooperative intergovernmental modes of governance that might operate across the UK, i.e. through the common frameworks process. The frameworks process was introduced as a means of managing (which includes, where appropriate, accommodating) regulatory divergence. There is no acknowledgement in the Bill of the fact that the existing regulations that fall within the scope of the powers to restate, revoke or replace, may form part of a framework. Under the agreed process for the operation of frameworks however, any proposed change in policy and amendment to the law should be raised with the other governments. None of the powers under the Bill come with a trigger for the frameworks process to be engaged. The approach of the Bill risks undermining the frameworks process.

Additionally, the ideologically-driven commitment in the Bill to a sunset clause for retained EU law (except that transposed by Act of Parliament or the Senedd) places resource pressures on Welsh government departments, requiring them to work through the options of restating, replacing, or rejecting existing legislation, and up against a deadline not of their making. The Welsh Government's existing programme of government will not have taken into consideration the resources required for this exercise.

The Bill provides for concurrent powers for UK and Welsh Ministers to restate, revoke or replace the law within areas of devolved competence. The absence of any requirement to seek consent from Welsh Ministers (or the Senedd) before UK Government Ministers can exercise powers in areas of devolved competence is out of line with previous Brexit legislation, and appears anomalous, and without clear justification.

To what extent might the Bill impact Wales' regulatory landscape?

The operation of the powers under the Bill has the potential to generate a number of unwelcome impacts on Wales' regulatory landscape. The potential for *either* government to take actions that restate, revoke or replace existing regulations within devolved competence may create uncertainty, and complexity for those seeking to navigate the statute book applying to Wales.

Further, any attempt to that the Welsh Government may make to improve pre-Brexit standards will engage the requirement in clause 15 (5) that any replacement regulation does not increase the regulatory burden – which is defined in clause 15 (10) as including (among other things)— (a) a financial cost; (b) an administrative inconvenience; (c) *an obstacle to trade* (my emphasis) or innovation; (d) an obstacle to efficiency, productivity or profitability; (e) a sanction (criminal or otherwise) which affects the carrying on of any lawful activity.

This formulation differs from the definition of burden in the Legislative and Regulatory Reform Act 2006, as the Bill includes 'an obstacle to trade' – which might be read as a limitation on the exercise of competence where this may result in regulatory divergence that may impact on intra-UK trade flows. Importantly, if it is interpreted in this way, this would go further than the already problematic UK Internal Market Act, which impacts the effects but not legal capacity to regulate.

The Bill ties the devolved governments to an agenda that has been set elsewhere, cutting into the operation of devolved competence, regardless of policy commitments the Welsh Government might have made.

The Bill should be amended to provide either for the removal of UK Government ministerial powers within areas of devolved competence, or for a consent requirement by at least the Welsh Government for the exercise of these powers. Further, the 'impact on trade' provision in clause 15(10) should be removed, or more broadly the requirement that the regulatory burden is not increased should be excluded from applying to law making by the devolved legislatures and ministers, within devolved competence.

Implications arising from the potential deadlines introduced by the Bill

The initial deadline for action before the operation of the sunset revoking existing retained (and subsequently, assimilated) EU law is set at 'the end of 2023' (Clause 1(1)). This may be extended, to the end of 2026, but the Bill only gives this power to extend to a UK Minister (Clause 2). There is no clear justification why that power is not also given, for law within devolved competence, to Welsh Government ministers.

The date selected for the operation of the sunset does not appear to have been reached on the basis of the feasibility of the task at hand. The true extent of retained EU law within the UK

legal order is a live question, and there is further a lack of detail about measures falling within devolved competence. Against this background, there is an understandable concern that legislation may be sunsetted inadvertently, due to a lack of knowledge.

If a sunset clause is to be incorporated, then it should reflect a more realistic time scale, and should also apply only to positively identified measures, to avoid unforeseen gaps with possible unexpected consequences.

Professor Jo Hunt
Cardiff, November 2022.

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Llywodraeth Cymru
Welsh Government

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28 November 2022

Dear Elin,

The Retained EU Law (Revocation and Reform) Bill ("the Bill") was introduced into the UK Parliament, the House of Commons, on 22 September and I laid a Legislative Consent Memorandum (LCM) on the Bill on 3 November.

The Bill is currently being considered at Commons Committee Stage which commenced on 8 November and is scheduled to conclude on 29 November. On 16 November the UK Government tabled amendments for consideration during Commons Committee Stage which we now consider require a supplementary LCM to be laid. We were not informed by the UK Government about plans to table government amendments. It is possible the UK Government may table further amendments for consideration at this stage and, in addition, relevant non-government amendments may also be tabled and agreed to the Bill.

We will prepare a single supplementary LCM dealing with all the relevant amendments identified during Commons Committee stage. I acknowledge this will mean the supplementary LCM will be laid more than two weeks after the tabling of the first batch of amendments, however, I believe this will ensure the supplementary LCM accurately reflects the development of the Bill and enables effective Senedd scrutiny.

I am copying this letter to the Minister for Economy, Vaughan Gething MS, the Minister for Rural Affairs and North Wales, and Trefnydd, Lesley Griffiths MS, and the Chair of the Legislation, Justice and Constitution Committee, Huw Irranca-Davies MS.

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Yours sincerely,

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Counsel General and Minister for the Constitution