

The Welsh Government's Legislative Consent Memoranda on the Retained EU Law (Revocation and Reform) Bill

February 2023



The Welsh Parliament is the democratically elected body that represents the interests of Wales and its people. Commonly known as the Senedd, it makes laws for Wales, agrees Welsh taxes and holds the Welsh Government to account.

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February 2023



About the Committee

The Committee was established on 26 May 2021. Its remit can be found at www.senedd.wales/SeneddLJC

Current Committee membership:



Committee Chair:
Huw Irranca-Davies MS
Welsh Labour



Alun Davies MS
Welsh Labour



James Evans MS
Welsh Conservatives



Peredur Owen Griffiths MS
Plaid Cymru

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Conclusions and Recommendations

Conclusion 1. As the Senedd Committee with overall responsibility for the scrutiny of secondary legislation, and as the Committee which takes a broad role in seeking to assess and improve Welsh law, we cannot overestimate our concerns as to the effect this Bill could have on the certainty and quality of law as it applies in Wales. Page 61

Conclusion 2. As a Senedd Committee, we are very concerned that the Bill's provisions do not sufficiently engage or acknowledge the role of a legislature in a parliamentary democracy. Page 64

Conclusion 3. The Bill enables an unacceptable power imbalance between executive and legislature. We support the calls by the DPRR Committee and others to remove from the Bill the unlimited and unnecessary Ministerial powers. Page 66

Conclusion 4. Given what we know the Bill will do, the views expressed by the Welsh Government, and based on the little information we have been given by the Welsh Government as regards any strategic plan, we must conclude that the timetable for the Bill, caused by the sunset date of 31 December 2023, means we and the Senedd could likely be confronted with an unprecedented workload in the autumn of 2023. Page 71

Conclusion 5. It is vital that the Welsh Government makes urgent progress with its plan on how it will approach the requirements of the Bill, if and when it is enacted. Page 72

Conclusion 6. The Welsh Government needs to engage urgently with the Senedd and closely coordinate with it on the implications of the Bill, if and when it is enacted, on the Welsh Government's programme for government and the impact on Senedd business. Page 72

Conclusion 7. We agree with the Welsh Government's assessment that the Senedd's consent should be sought for all clauses of and Schedules to the Bill, with the exception of clause 18. Page 74

Conclusion 8. A majority of the Committee agrees with the Counsel General that the Senedd should withhold its consent to the Bill; not all members of the Committee are of the view that consent should be refused. Page 74

Conclusion 9. We believe that decisions taken under the Bill's regime (if and when enacted) should be made on a case-by-case basis with full stakeholder consultation and parliamentary oversight..... Page 77

Conclusion 10. We consider the current approach by the UK and Welsh governments means that the risk of the Senedd being bypassed is very high.
..... Page 77

The following recommendations are recommendations made by the majority of the Committee.

Recommendation 1. The 31 December 2023 sunset date should be removed from the Bill..... Page 60

Recommendation 2. If the 31 December 2023 sunset date remains in the Bill, the Bill should be amended so that the power in clause 2 to extend the sunset date is also granted to the Welsh Ministers in relation to devolved matters. Page 60

The following recommendations are recommendations made by the whole Committee.

Recommendation 3. If the 23 June 2026 sunset date remains in the Bill, the Welsh Government should, as a matter of urgency, raise with the UK Government the unique issue of the 2026 Senedd election and its conflict with the 23 June 2026 sunset date. Page 60

Recommendation 4. If the 23 June 2026 sunset date remains in the Bill, the Welsh Government should ensure that the Senedd dissolution period ahead of the election for the Seventh Senedd is factored in to long-term planning for all regulations that may need to be made before that sunset date..... Page 60

Recommendation 5. If the 23 June 2026 sunset date remains in the Bill, the Business Committee, in its preparation for the Seventh Senedd, should ensure that its successor is aware that there will be a priority need for an appropriate committee to be urgently established so that regulations to be made before that sunset date may be considered and, further, that Plenary sittings may be needed for Members of the new Seventh Senedd to consider and vote on any regulations subject to the draft affirmative procedure. Page 60

Recommendation 6. We support the Welsh Government's call for the UK Government's dashboard to identify how each piece of retained EU law falls across reserved and devolved competencies. Page 62

Recommendation 7. The Welsh Government should share its own list of Welsh-made retained EU law with our Committee and with the UK Government as soon as possible.....Page 62

Recommendation 8. The Welsh Government should request that Welsh-made retained EU law should be added to the dashboard.....Page 62

Recommendation 9. The Bill should be amended so as to require Ministers to lay before the legislatures of the UK by 30 September 2023 the details of the retained EU law which is not to be saved or reformed – i.e. that which will be deliberately revoked and not replaced, and that which will be subject to the 31 December 2023 sunset provision (if this sunset date remains in the Bill).....Page 67

Recommendation 10. We call on the Welsh Government to ensure that Wales remains compliant with international obligations, as required by the devolution settlement and by the Welsh Government's Ministerial Code.....Page 69

Recommendation 11. The Welsh Government should clarify with the UK Government how it will take into consideration the views of the Senedd in respect of changes to reserved retained EU law particularly in areas not covered by common frameworks.....Page 69

Recommendation 12. We call on the Welsh Government to urgently provide an assessment of the combined impact of the Bill, common frameworks and the UK Internal Market Act 2020.....Page 69

Recommendation 13. The Welsh and UK Governments should provide an assurance that all changes being made to retained EU law within an area covered by a common framework is taken through the relevant common framework process before it is saved, sunsetted, revoked, or reformed.....Page 69

Recommendation 14. The Business Committee should urgently consider whether the autumn term should be extended to 22 December 2023, in order to accommodate additional meetings of this Committee and additional Plenary sittings which may be required for the consideration of regulations arising from the Bill.....Page 73

Recommendation 15. The Welsh Government should assess the Bill's impact on Wales as a matter of urgency to assist the Senedd and stakeholders to better understand the Bill's implications for Wales.....Page 77

Recommendation 16. The Counsel General should:

- confirm whether there would be circumstances under which the Welsh Government would recommend the Senedd’s consent is given to the Bill and explain what these are;
- provide to us a comprehensive list of the amendments to the Bill the Welsh Government has sought and/or supported. Page 78

Recommendation 17. The Welsh Government must clarify and set out a frank and candid assessment about the resource and capacity implications for the Welsh Government of implementing the Retained EU Law (Revocation and Reform) Bill (should it be enacted), and clearly set out what, if any, other legislative activity will need to be displaced in order to ensure that it can deliver on the tasks it will need to complete by the end of 2023. Page 79

1. Retained EU law

What is retained EU law?

In order to minimise disruption when exiting the European Union, EU law was converted to domestic law by the *European Union (Withdrawal) Act 2018* (the 2018 Act). This law became a distinct category of law known as retained EU law. As a result, EU laws stayed in place with the aim of avoiding gaps in important areas like product standards, animal welfare and employment law.

1. There are different categories of retained EU law that reflect its origin in EU law. The three main categories are:

1. EU-derived domestic legislation, which is domestic law giving EU law effect in the UK;
2. direct retained EU legislation, which is EU law that automatically applied in the UK as a Member State;
3. other retained EU law, which covers EU rights, powers, liabilities etc.

2. Retained EU law covers a mix of devolved areas for which the Welsh Government is responsible, like the environment, food, rural affairs, energy and fisheries, and reserved areas for which the UK Government is responsible, like trade, taxes, medical devices and electronic communications.

Amount of retained EU law

3. There remains significant uncertainty around how much retained EU law there is.¹ While the UK Government has taken steps to identify individual pieces, it

¹ See *Financial Times*, 8 November 2022; *Letter from Nusrat Ghani MP, Minister of State in the Department for Business, Energy and Industrial Strategy, to the Retained EU Law (Revocation and Reform) Bill*, Public Bill Committee, 11 November 2022; *Evidence from Lord Callanan, the*

remains the case that quantifying other aspects of retained EU law, such as retained general principles of EU law and retained case law, presents further challenges.

4. When first published in June 2022, the UK Government's **retained EU law dashboard** estimated that there are 2,400 pieces of retained EU law (often referred to as 'REUL') in force. The UK Government has continued to identify more and, on 18 January 2023, the Minister for Industry and Investment Security², Ms Nusrat Ghani MP, stated that it has identified and verified 3,200 items and expects the final number to be 4,000 pieces.³

5. The background guide to the dashboard notes that it is a catalogue provided by the UK Government and "is therefore not intended to provide an authoritative account of REUL that sits within the competence of the Devolved Governments. However it may contain individual pieces of REUL which do sit in devolved areas". The most recent update to the dashboard on 30 January 2023 included 'REUL by territorial application'.

6. The dashboard, therefore, may not include all retained EU law in devolved areas, and does not include retained EU law made by the Welsh Ministers. The **Welsh Government's requests** for the dashboard to identify which legislation is reserved and devolved, and how Welsh legislation might be affected, were initially denied.

7. On 27 June 2022, Mick Antoniw MS, the Counsel General and Minister for the Constitution (the Counsel General) issued a **statement** about the dashboard, in which he stated:

"In contrast to the collaborative work between the UK Government and the Devolved Governments to create the body of REUL, prior to publication we were given a very limited opportunity to view the dashboard, which is unacceptable. The dashboard contains no information about which instruments of REUL are in devolved areas, despite requests for this being made by the Devolved Governments, or what legislation made

Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, to the House of Lords' Secondary Legislation Scrutiny Committee, 6 December 2022.

² References to UK Ministers' titles in this report are references to titles they held at the time. References are not therefore made to titles acquired subsequently.

³ **Hansard, Retained EU Law (Revocation and Reform Bill), 18 January 2023, Column 462**

in Wales could be affected by the UK Government's wider proposals to amend, repeal or replace all REUL."

2. The UK Government's Retained EU Law (Revocation and Reform) Bill

The Retained EU Law (Revocation and Reform) Bill⁴ (the Bill) was introduced into the House of Commons and had its first reading on 22 September 2022. It is sponsored by the Department for Business and Trade.⁵

The purpose of the Bill

8. The long title states that the Bill:

"will revoke certain retained EU law; to make provision relating to the interpretation of retained EU law and to its relationship with other law; to make provision relating to powers to modify retained EU law; to enable the restatement, replacement or updating of certain retained EU law; to enable the updating of restatements and replacement provision; to abolish the business impact target; and for connected purposes".

9. On the Bill's introduction, the UK Government **set out** the view that "there is no longer a place for EU law concepts on the UK statute book". Later, on 18 January 2023, the Minister for Industry and Investment Security, Ms Nusrat Ghani MP, stated:

*"Retained EU law was never intended to sit on the statute book indefinitely. It is constitutionally undesirable, as some domestic laws, including Acts of Parliament, currently remain subordinate to some retained EU law. The continued existence on our statute book of the principle of supremacy of EU law is just not right, as we are a sovereign nation with a sovereign Parliament."*⁶

⁴ Retained EU Law (Revocation and Reform) Bill, as introduced (Bill 156)

⁵ To note, on introduction the department was named the Department for Business, Energy and Industrial Strategy

⁶ Hansard, 18 January 2023, Column 392

10. The Bill would:

- Sunset the majority of retained EU law so that it expires at the end of 2023 (this applies to EU-derived subordinate legislation and retained direct EU legislation). The UK and Welsh Ministers could make regulations specifying which retained EU law instruments are not subject to the 31 December 2023 sunset, nor to any extended sunsets. Such regulations made by the Welsh Ministers would be subject to the negative procedure, whereby the Senedd has a period of 40 days to object and annul.
- Provide a mechanism for UK Ministers to extend the sunset date to up to 23 June 2026.
- Rename all surviving retained EU law “assimilated law” and remove its special status from 1 January 2024.
- Grant the UK and Welsh Ministers powers to save, reform and revoke retained EU law and assimilated law more easily, via subordinate legislation.
- Remove the supremacy of EU law, general principles of EU law, and directly effective EU rights.
- Provide domestic courts with greater discretion to depart from retained EU case law.
- Repeal the Business Impact Target as part of other regulatory reforms (this does not apply to regulatory provisions in devolved areas).

11. The Bill applies to primary and secondary legislation in different ways. It defines secondary retained EU law as:

- any retained EU law that is not primary legislation; and
- any retained EU law that is primary legislation, the text of which was inserted by subordinate legislation.

12. The powers granted to the Welsh Ministers by this Bill relate to secondary retained EU law in devolved areas.

The impact assessment for the Bill

13. On 18 November, the independent **Regulatory Policy Committee** (RPC) issued its view that the Bill's impact assessment is "not fit for purpose". The RPC rated aspects of the impact assessment, such as its rationale and cost-benefit analysis, as either 'weak' or 'very weak'.

14. On 28 November 2022, the Chair of the House of Commons' Business, Energy and Industrial Strategy Committee wrote to the Secretary of State for Business, Energy and Industrial Strategy, the Rt Hon Grant Shapps MP, and invited him to set out his response to the RPC's findings. The Secretary of State responded on 21 December, and said:

"...this reflects the limited information available at this stage to quantify potential impacts around how the enabling powers in the Bill will be used."

15. The Secretary of State added:

"...proper and proportionate analysis will be undertaken by departments in relation to specific amendments to REUL. Efforts are also underway to understand the potential impacts of sunseting. (...) Where measures are being revoked, departments will be expected to undertake proportionate analytical appraisal."

16. In evidence to the House of Lords' Secondary Legislation Scrutiny (SLS) Committee on 6 December 2022, Lord Callanan, the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, also confirmed that the RPC would look again at "extensive policy changes" made by delegated powers and produce a more detailed estimate.

Welsh Government initial response to the Bill

17. On introduction, the Welsh Government described the Bill as a 'power grab'.

18. In a statement on 3 November 2022, the Counsel General expressed the Welsh Government's view that the Bill would see all the governments of the UK engaged in a major piece of work to review thousands of legal instruments to ascertain how they should be handled under the Bill, or otherwise risk the law being removed from the statute book on this date. The Counsel General called

this a significant distraction at a time when the focus of governments should be on matters of greater importance such as the cost-of-living crisis.

19. On 28 November 2022, the Counsel General took the unusual step of writing jointly with the Scottish Government an **open letter** in the Financial Times calling for the Bill to be withdrawn.

Saving, reforming and removing retained EU law

20. The Bill provides Ministers many routes to save, reform and remove retained EU law by 31 December 2023.

21. Each option requires the governments in the UK to identify retained EU law, decide what they want to do – collectively or individually – and choose which route to take under the Bill. The infographic on page 19 shows how the Welsh or UK Ministers could save, reform or remove retained EU law under the Bill.

Sunset provisions

22. The Bill makes provision for two automatic sunsets on 31 December 2023 and 23 June 2026.

23. Clause 1 of the Bill sunsets EU-derived subordinate legislation and retained direct EU legislation on 31 December 2023 unless it is saved by Ministers.

24. On 18 January 2023, the Minister for Industry and Investment Security, Ms Nusrat Ghani MP, said that:

“...the sunset clause is necessary and is the quickest and most effective way to pursue retained EU law reform. It is only right to set the sunset and the revocation of inherited EU laws as the default position. It ensures that we are proactively choosing to preserve EU laws only when they are in the best interests of the UK. It ensures that outdated and unneeded laws are quickly and easily repealed. It will also give the Government a clear timeline in which to finish the most important tasks. (...) Requiring the Government to undergo complex and unnecessary parliamentary processes to remove retained EU

law that is no longer necessary or operable, and can more easily be removed, is not good governance.”⁷

25. Specifically in response to an amendment which would carve-out the devolved nations from the sunset date, the Minister said:

“One amendment relates to carving out devolved nations. This Bill must and should apply to all nations of the UK. The territorial scope of the Bill is UK-wide and it is therefore constitutionally appropriate that the sunset applies across all four sovereign nations of the UK. One of the Bill’s primary objectives is to end retained EU law as a legal category across the UK. Providing a carve-out for legislation that is within a devolved competence would severely impact the coherence of the UK statute book and legal certainty for our public and businesses.”⁸

26. Different provisions in the Bill sunset other aspects of retained EU law on 23 June 2026, including extensions to the first sunset and various Ministerial powers.

Reviewing retained EU law

27. The UK Government has described how the Bill would grant powers to devolved Ministers to take action in devolved areas and how it places the onus on devolved governments to take decisions and exercise such powers.⁹

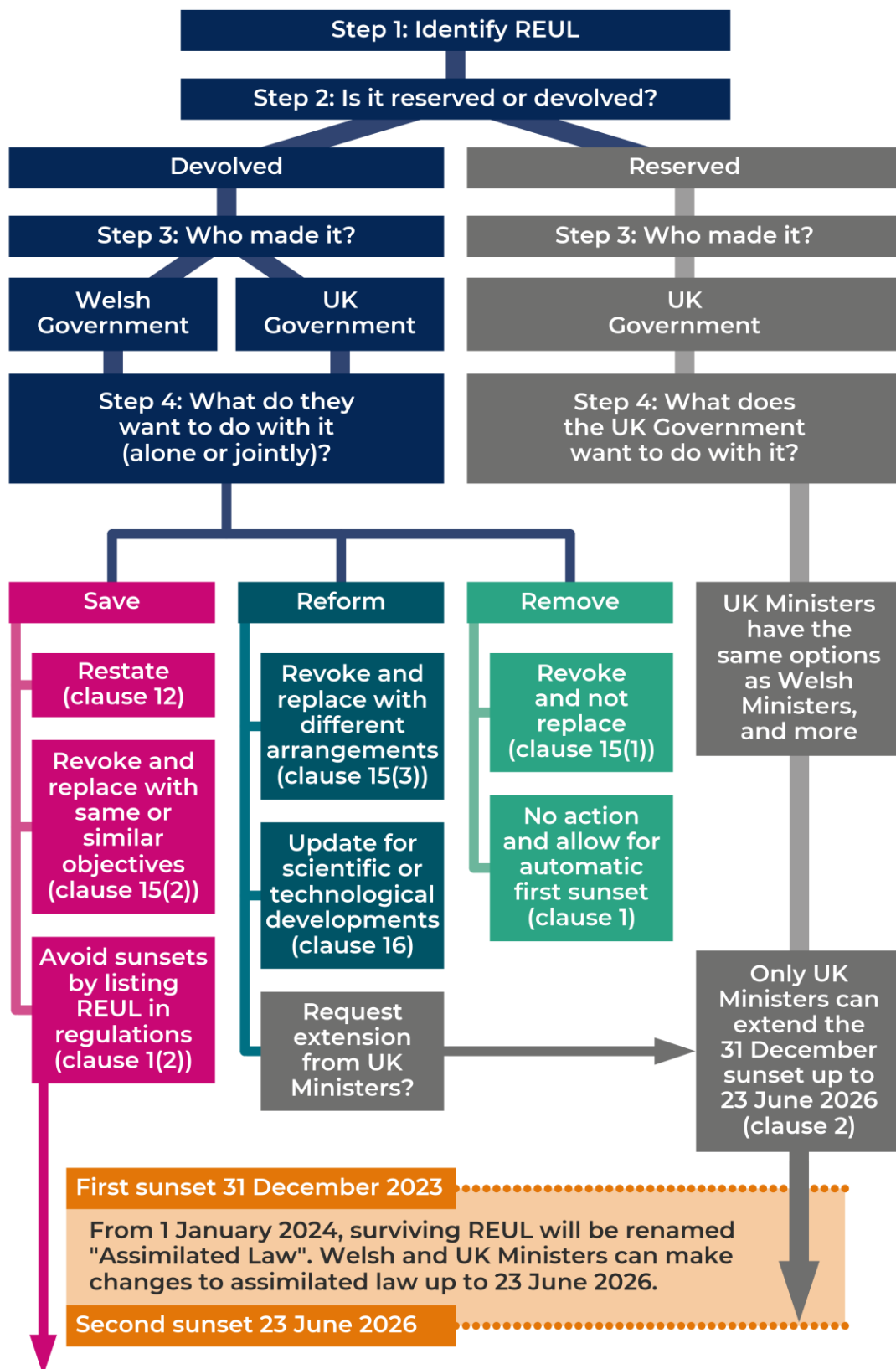
28. On 22 September 2022 in a **statement** to House of Commons, the former Secretary of Business, Energy and Industrial Strategy, the Rt Hon. Jacob Rees-Mogg MP, announced plans to jointly review retained EU law with the devolved governments to decide what to save, reform or remove before the Bill’s first automatic sunset date of 31 December 2023.

⁷ Hansard, 18 January 2023, Column 398

⁸ Hansard, 18 January 2023, Column 403

⁹ Hansard, 18 January 2023, Column 395

Figure 1: How Welsh or UK Ministers could save, reform or remove REUL under the Bill¹⁰



¹⁰ Senedd Research article: [Will there be a sunset for retained EU law in Wales?](#)

UK Government statements

29. Lord Callanan was also asked by the SLS Committee whether the UK Parliament will know “how much significant European law, for example, such as on working rights, environmental law and food and safety law, will be kept, changed or altered before the Bill is passed”, and he responded “No”.¹¹

30. In terms of how the UK Government would keep the UK Parliament informed, Lord Callanan said:

“The vehicle, of course, is that the legislation will be published on the dashboard. As individual departments and Ministers are looking at their particular policy areas, I have no doubt that they will want to update Parliament in the normal course of events, when Ministers are answering questions, et cetera, about the course of their discussions.”¹²

31. When challenged that legislatures would have no means of identifying the issues or the laws that it imagines are important, Lord Callanan stated “It is the judgment of Ministers”.¹³

32. When asked if there was a ‘plan B’, in the event that a piece of retained EU law “falls of the edge by accident”, Lord Callanan said that it was the UK Government’s intention to “make plan A work and not to have a piece of legislation sunset accidentally”. He added:

“In the unlikely event of such a thing occurring, if the power exists in the original primary legislation, which is a big question mark, we could certainly revisit it. As much of this is, by the very nature, EU-derived legislation, sometimes there are no equivalent primary Acts in the UK that allow us to legislate in that respect, unless the powers of this Bill would still carry on after the sunset date.”¹⁴

¹¹ Secondary Legislation Scrutiny Committee, Corrected oral evidence: Retained EU Law (Revocation and Reform) Bill, 6 December 2022, question 7

¹² Secondary Legislation Scrutiny Committee, 6 December 2022, question 8

¹³ Secondary Legislation Scrutiny Committee, 6 December 2022, question 2

¹⁴ Secondary Legislation Scrutiny Committee, 6 December 2022, question 4

33. Lord Callanan also confirmed that the Bill does not provide a primary power if “a gap between the floorboards” was found after the sunset date.¹⁵

34. Lord Callanan was asked by the SLS Committee about the UK Government's estimate of the number of instruments that it intended to lay before the UK Parliament between Royal Assent of the Bill and the sunset date. He said he understood that current estimates suggested approximately 1000 pieces of subordinate legislation would be needed. He also indicated that there are probably more instruments and they would be more detailed than those which came forward under the 2018 Act.¹⁶

35. Lord Callanan also confirmed to the SLS Committee that the UK Government was drawing up a programme of secondary legislation in individual departments, and “that will come to Parliament for decision”.¹⁷

Regulatory landscape

36. The Bill would empower Ministers to significantly alter the UK's regulatory landscape.

37. Clause 15 would prohibit Ministers from increasing what it calls “regulatory burdens”, such as financial costs, trade obstacles or administrative inconveniences. “Burden” is defined in the Bill to mean any of the following:

- a. a financial cost;
- b. an administrative inconvenience;
- c. an obstacle to efficiency, productivity or profitability; or
- d. a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.

38. Clause 17 amends the *Legislative and Regulatory Reform Act 2006*, which allows UK Ministers to ‘remove and reduce burdens’, so that retained direct EU legislation is included within its remit. The Act's purpose is to remove or reduce “any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation”.

¹⁵ Secondary Legislation Scrutiny Committee, 6 December 2022, question 4

¹⁶ Secondary Legislation Scrutiny Committee, 6 December 2022, question 6

¹⁷ Secondary Legislation Scrutiny Committee, 6 December 2022, question 6

39. Clause 18 abolishes the Business Impact Target (BIT) as part of other regulatory reforms. The BIT relates to the economic impact on business of regulatory requirements that are introduced or cease during a parliament. The BIT does not apply to regulatory provisions in devolved areas.

40. The Bill's sunset clause could automatically remove retained EU law containing regulatory standards and protections on 31 December 2023, by accident or design, unless it is saved by the UK or Welsh Ministers.

41. The Bill could create divergence between the four nations of the UK, and between the UK and EU. This would be in addition to existing post-EU exit divergence, as monitored by UK in a Changing Europe.¹⁸

42. The Bill also raises questions about existing mechanisms to manage internal UK divergence, such as common frameworks and the *United Kingdom Internal Market Act 2020* (the Internal Market Act).

EU-derived rights

43. On 9 December 2022, the First Minister said the Bill has “potential to do harm” to human rights because EU-derived rights, such as workers’ rights, would expire on 31 December 2023 with no option to extend this date. The effects of EU-derived rights could be replicated in domestic law using other powers in the Bill but this must be done before these powers expire on 23 June 2026.

44. The Bill would also abolish general principles of EU law on 31 December 2023, including equal treatment and respect for fundamental rights. Domestic law will no longer be read in accordance with these from 2024.

Ministerial powers

45. The Bill would enable the UK or Welsh Ministers to act alone or jointly.

46. In devolved areas, the Welsh Ministers could legislate with or without the Senedd’s explicit approval. UK Ministers could do the same for Wales, bypassing the Senedd and the Welsh Government.

¹⁸ UK in a Changing Europe, [UK-EU regulatory divergence tracker: sixth edition](#), 2 February 2023

The draft affirmative procedure applies to regulations made by the Welsh Ministers acting alone under:

- clause 8 (which amend, repeal or revoke primary legislation)
- clause 12 (which amend, repeal or revoke primary legislation)
- clause 13 (which amend, repeal or revoke primary legislation)
- clause 15(2) (which confer a power to make subordinate legislation or create a criminal offence)
- clause 15(3)

The made negative procedure applies to regulations made by the Welsh Ministers acting alone under:

- clause 1
- clause 8 (which do not amend, repeal or revoke primary legislation)
- clause 16

Unless the Welsh Ministers choose to follow the draft affirmative procedure, the sift procedure applies to regulations made by the Welsh Ministers acting alone under:

- clause 12 (which do not amend, repeal or revoke primary legislation)
- clause 13 (which do not amend, repeal or revoke primary legislation)
- clause 15(1)
- clause 15(2) (which do not confer a power to make subordinate legislation or create a criminal offence)

47. Ministerial powers would be subject to different procedures depending on the power exercised.

48. Clause 19 of the Bill grants UK Ministers powers to make regulations in consequence of the Bill as they consider appropriate, which includes a Henry VIII power to modify “any” enactment. This could include UK Ministers legislating in devolved areas.

49. Clause 20 clarifies the scope of the regulation-making powers in the Bill, and introduces Schedules 2 and 3 to the Bill. This clause clarifies that the powers to make regulations can be used, for example, to make supplementary and transitional provision.

50. Schedule 1 makes amendments that are consequential to clause 10, including amending parliamentary procedure for certain retained EU law. The Bill amends parliamentary procedure for legislation in devolved areas, such as the *Professional Qualifications Act 2022*. The Senedd has withheld consent for some of this legislation.

51. Schedule 2 outlines restrictions on devolved Ministers, such as that they cannot make provision outside devolved competence.

52. Schedule 3 sets procedures for the regulation-making powers in the Bill, including providing a sifting role to a Senedd committee.

1 January 2024 onwards

Creation of a new category of domestic legislation: Assimilated Law

53. Clause 6 renames surviving retained EU law as “assimilated law” from 1 January 2024. This will apply to all retained EU law, including EU-derived primary legislation, such as the *Equality Act 2010*. The Welsh Ministers have powers to restate and update assimilated law in devolved areas up to 23 June 2026.

Abolition of the supremacy of retained EU law

54. Clause 4 abolishes the supremacy of EU law on 31 December 2023 and introduces a new hierarchy of domestic law. From 1 January 2024, retained direct EU law must be read and given effect in accordance with domestic legislation, even if the domestic legislation pre-dates the retained direct EU law.

55. Despite abolishing the principle of supremacy, clause 8 gives Ministers powers to re-introduce the principle, so that specific domestic legislation is to be read and given effect in a way that is compatible with specific retained direct EU law. Clause 8 powers can be used until 23 June 2026.

Abolition of general principles of EU law

56. Clause 5 abolishes general principles of EU law on 31 December 2023. Domestic law will no longer be read in accordance with the general principles of

EU law from 1 January 2024. These include legal certainty, equal treatment, proportionality, respect for fundamental rights and the precautionary principle.

Changes to the role of domestic courts

57. Clause 7 changes the role of the courts so that they are no longer bound by retained EU case law. Higher and appeal courts may depart from previous decisions but lower courts and tribunals must refer decisions to depart to higher courts.

58. In certain circumstances, the Counsel General can refer points of law on retained EU law cases within six months, which can ultimately result in the case being heard by the Supreme Court. The Counsel General may also become party to proceedings related to the meaning or effect of Welsh legislation.

59. Clause 9 allows for courts and tribunals to issue incompatibility orders where they decide that domestic law is incompatible with retained direct EU law. Incompatibility orders can be used to:

- i. set out the effect of the relevant provision in its operation in relation to that particular case;
- ii. delay the coming into force of the order;
- iii. remove or limit any effect of the operation of the relevant provision before the coming into force of the order.

The Bill's progress through the UK Parliament

60. The Bill completed Committee Stage in the House of Commons on 29 November 2022. Report Stage and Third Reading took place on 18 January 2023. The Bill had its First Reading in the House of Lords on 19 January 2023 and had its Second Reading on 6 February. Committee Stage will begin on 23 February 2023.

3. The Welsh Government's Legislative Consent Memoranda

Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.

61. On 5 October 2022 the Counsel General and Minister for the Constitution, Mick Antoniw MS, wrote to the Llywydd and said:

"...the Bill as presented contains policy content that was not shared with the Devolved Governments before its introduction and, because of the significant ramifications for the Welsh Government, it has not yet been possible to consider properly the devolution consequences of what is being proposed. (...)

*...I anticipate that a Legislative Consent Memorandum will be laid before the Senedd. However, this will be outside the normal two-week Standing Order 29 time period."*¹⁹

The Welsh Government's Legislative Consent Memorandum

62. On 3 November 2022, the Counsel General laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.²⁰

63. On the same day, the Counsel General also issued a **written statement**.

¹⁹ Letter from the Counsel General to the Llywydd, 5 October 2022

²⁰ Welsh Government, Legislative Consent Memorandum, Retained EU Law (Revocation and Reform) Bill, November 2022

64. The Business Committee agreed that the Legislation, Justice and Constitution Committee should report on the Memorandum by 9 February 2023.²¹ This date was later revised to 13 March 2023 (see paragraph 92).

Provisions for which the Senedd's consent is required

65. Paragraphs 9 to 78 of the Memorandum set out the Welsh Government's assessment of the provisions in the Bill which require Senedd consent because they either make provision in relation to Wales for any purpose within the legislative competence of the Senedd or because they modify the Senedd's legislative competence, and are categorised as follows:

Clauses in the Bill 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 retain direct EU legislation);
- clause 2 (Extension of sunset under section 1);
- clause 8 (Compatibility).

Powers in the Bill relating to retained EU law and assimilated law:

- clause 12 (Power to restate retained EU law);
- clause 13 (Power to restate assimilated law or reproduce sunsetted retained EU rights, powers, liabilities etc);
- clause 14 (Powers to restate or reproduce: general);
- clause 15 (Powers to revoke or replace);
- clause 16 (Power to update);
- clause 17 (Power to remove or reduce burdens);
- clause 19 (Consequential provision);
- clause 20 (Regulations: general);

²¹ Business Committee, Timetable for consideration: Legislative Consent Memorandum on the Retained EU Law (Revocation and Reform) Bill, November 2022

- Schedule 2 (Regulations: restrictions on powers of devolved authorities);
- Schedule 3 (Regulations: procedure).

Clauses in the Bill which amend the current provisions in the 2018 Act:

- clause 3 (Sunset of retained EU rights, powers, liabilities etc);
- clause 4 (Abolition of supremacy of EU law);
- clause 5 (Abolition of general principles of EU law);
- clause 6 ("Assimilated law");
- clause 7 (Role of courts in relation to retained EU law);
- clause 9 (Incompatibility orders);
- clause 10 (Scope of powers);
- clause 11 (Procedural requirements).

Remaining provisions:

- clause 21 (Interpretation);
- clause 22 (Commencement, transitional and savings);
- clause 23 (Extent and short title);
- Schedule 1 (Amendment of certain retained EU law).

66. In summary, the Welsh Government considers that the Senedd's consent should be sought for all clauses of and Schedules to the Bill, with the exception of clause 18 (Abolition of business impact target).

67. At paragraph 79 of the Memorandum, the Counsel General notes that the former Secretary of State wrote to the Welsh Government on 22 September 2022, outlining the UK Government's devolution analysis and stating that the UK Government considered that clauses 1, 2, 3, 7, 10, 12, 13, 15, 16, 17 and Schedule 3 trigger the legislative consent process.

68. The Counsel General notes that 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".²²

The Welsh Ministers' powers

69. At paragraphs 75 to 78 of the Memorandum, the Counsel General describes the powers in the Bill given to the Welsh Ministers to make regulations.

70. In summary, the Counsel General notes that:

- paragraph 10 of Schedule 3 sets out the Senedd procedures where regulations are made by the Welsh Ministers under powers in the Bill;
- the draft affirmative procedure will apply to regulations under clauses 8, 12 and 13 (which amend, repeal or revoke primary legislation), clause 15(2) (which confer a power to make subordinate legislation or create a criminal offence), and clause 15(3);
- the negative procedure will apply to regulations under clause 1, clause 8 (which do not amend, repeal or revoke primary legislation), and clause 16;
- the procedure could be the draft affirmative or the negative procedure for any other regulation-making power in the Bill, depending on the decision of the Welsh Ministers and the outcome of a sifting exercise (as provided for in paragraph 11 of Schedule 3) if the Welsh Ministers choose the negative procedure for regulations under clauses 12, 13 or 15.

Financial implications of the Bill

71. Paragraphs 91 and 92 of the Memorandum set out the Welsh Government's assessment as regards the financial implications of the Bill:

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

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."

²² Memorandum, paragraph 79

The Welsh Government's position on the Bill as introduced

72. Paragraphs 81 to 90 of the Memorandum set out the Welsh Government's position on the Bill as it was introduced to the UK Parliament.

73. The Welsh Government considers that the Bill seeks to realise the policy objectives of the UK Government which "are not shared by the Welsh Government".²³ In the Memorandum, the Counsel General states:

"...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.

*The Bill as introduced presents a number of legal, constitutional, policy and practical concerns."*²⁴

74. These concerns are grouped into five categories:

- i. concurrent powers,
- ii. sunseting of retained EU law,
- iii. regulatory burden,
- iv. interaction with the Internal Market Act, and
- v. powers for the Law Officers.

75. On concurrent powers, the Counsel General states that UK Ministers using powers in devolved areas without consent:

*"...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."*²⁵

²³ Memorandum, paragraphs 81 and 82

²⁴ Memorandum, paragraphs 82 and 83

²⁵ Memorandum, paragraph 84

76. On the sunset provision, the Counsel General states:

"The Welsh Government has very significant concerns that the arbitrary sunseting 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.

Moreover, the sunseting 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.

*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."*²⁶

77. On regulatory burdens, the Counsel General states that the restrictions on the use of powers in the Bill introduced by clause 15:

*"...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."*²⁷

²⁶ Memorandum, paragraphs 85 to 87

²⁷ Memorandum, paragraph 88

78. On the interaction with the Internal Market Act, the Counsel General believes 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”. At paragraph 89 of the Memorandum he states:

“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.”

79. On the powers for the Law Officers to refer cases to the appeal courts or to intervene in cases that raise issues relating to retained EU case law, the Counsel General states:

“...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.”²⁸

80. In conclusion, the Counsel General states:

“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.”²⁹

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 2)

81. The Counsel General wrote to the Llywydd on 28 November 2022 stating:

“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

²⁸ Memorandum, paragraph 90

²⁹ Memorandum, paragraph 93

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.”³⁰

82. On 21 December 2022 the Counsel General laid before the Senedd a Supplementary Legislative Consent Memorandum (Memorandum No. 2)³¹ in respect of 15 amendments tabled to the Bill by the UK Government on 16 November.

83. The Business Committee agreed that the Committee should report on Memorandum No. 2 by 13 March 2023.³²

Update on the position since the publication of the Memorandum and amendments for which consent is required

84. At paragraph 9 of Memorandum No. 2 the Counsel General notes that the amendments tabled by the UK Government modify:

- clause 1 (Sunset of EU-derived subordinate legislation and retain direct EU legislation);
- clause 7 (Role of courts in relation to retained EU law);
- clause 12 (Power to restate retained EU law);
- clause 13 (Power to restate assimilated law or reproduce sunsetted retained EU rights, powers, liabilities etc);
- clause 14 (Powers to restate or reproduce: general);

³⁰ Letter from the Counsel General to the Llywydd, 28 November 2022

³¹ Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 2), Retained EU Law (Revocation and Reform) Bill, December 2022

³² Business Committee, Timetable for consideration: Supplementary Legislative Consent Memorandum on the Retained EU Law (Revocation and Reform) Bill, January 2023

- clause 22 (Commencement, transitional and savings);
- Schedule 3 (Regulations: procedure).

85. The Counsel General states that these clauses were all considered 'relevant provision' for the purpose of the Memorandum laid before the Senedd in November 2022 and that the Welsh Government considers that a supplementary legislative consent memorandum is required in relation to the amendments to those clauses on the basis that they also make relevant provision.³³

86. At paragraph 10, the Counsel General notes that the Welsh Government considers all the amendments to be "technical in nature", except for amendment number seven to clause 22 "which is considered a more substantive amend as it broadens the scope of the existing power within clause 22". Amendment number 7 is described in Annex 1 to Memorandum No. 2 as follows:

"This amend to clause 22 will mean that a Minister of the Crown (only) will be able to make transitional, transitory or saving provision that is considered appropriate in connection with "(b) the revocation of anything by section 1, or (c) anything ceasing to be recognised or available in domestic law (and, accordingly, ceasing to be enforced, allowed or followed) as a result of section 3." This could include within areas of devolved competence."

The Welsh Government's position on the Bill as amended at Commons Committee Stage

87. Paragraphs 11 and 12 of Memorandum No. 2 set out the Welsh Government's position on the Bill as it has been amended in the Commons Public Bill Committee.

88. The Counsel General notes that the position of the Welsh Government is "unchanged". He states:

"...the Bill continues to present the same legal, constitutional, policy and practical concerns. These concerns have been

³³ Memorandum No. 2, paragraph 9

conveyed to the UK Government but have not been addressed in these in subsequent amendments to the Bill.”³⁴

89. In conclusion, the Counsel General states:

“...given our concerns with the Bill, which are not addressed by the amendments, we are not in a position to recommend that consent be given to the inclusions in the Bill, or to the other provisions of the Bill, as set out in the original LCM.”³⁵

The Welsh Government's Supplementary Legislative Consent Memorandum (Memorandum No. 3)

90. The Counsel General wrote to the Llywydd on 19 January 2023 stating:

“On 11 January the UK Government tabled amendments and we are analysing the details to see whether these initiate the requirement to undertake a further SLCM. The UK Government shared some policy content on one proposed amendment but did not share all the details of tabled amendments. In addition, relevant non-government amendments have also been tabled and these may yet be agreed for inclusion in the Bill.

We will prepare a single SLCM dealing with all the relevant amendments tabled for Report Stage. I acknowledge this will mean this SLCM will be laid more than two weeks after the tabling of the first batch of amendments, but I believe this will ensure it accurately reflects the development of the Bill and will enable effective Senedd scrutiny.”³⁶

91. On 6 February 2023 the Counsel General laid before the Senedd a Supplementary Legislative Consent Memorandum (Memorandum No. 3)³⁷ in respect of 19 amendments tabled to the Bill by the UK Government on 11 January ahead of Report Stage in the House of Commons, which took place on 18 January.

³⁴ Memorandum No. 2, paragraph 11

³⁵ Memorandum No. 2, paragraph 14

³⁶ Letter from the Counsel General to the Llywydd, 19 January 2023

³⁷ Welsh Government, Supplementary Legislative Consent Memorandum (Memorandum No. 3), Retained EU Law (Revocation and Reform) Bill, February 2023

92. The Business Committee agreed that the Committee should report on Memorandum No. 3 by 13 March 2023.³⁸

Update on the position since the publication of the Memorandum and Memorandum No. 2 and amendments for which consent is required

93. At paragraph 11 of Memorandum No. 3 the Counsel General notes that the amendments tabled by the UK Government “can be grouped into four categories”:

- a. an amendment to clause 2 relating to the extension of the sunset,
- b. amendments to clause 6 (this amendment removed clause 6) and clause 22 and a new clause with an accompanying new Schedule relating to “assimilated law” which replaces original clause 6,
- c. an amendment to clause 14 relating to the meaning of “restatement”, and
- d. amendments relating to the High Court of Justiciary (“HCJ”).

94. At Annex 1 to Memorandum No. 3, the Welsh Government provides descriptions of the UK Government amendments and considers their effect.

95. The Counsel General considers that the amendments to clauses 2, 6, 14 and 22, and the new clause (“Assimilated law”) and its accompanying Schedule (“Assimilated law: consequential amendments”), all make relevant provision for the purpose of Standing Order 29.³⁹

96. The Counsel General notes that the Welsh Government does not consider that the amendments relating to the HCJ require the consent of the Senedd as the HCJ forms part of the Scottish judicial system.⁴⁰

The Welsh Government's position on the Bill as amended at Commons Report Stage

97. At paragraphs 15 and 16 of Memorandum No. 3 the Counsel General states:

³⁸ Business Committee, Timetable for consideration: Supplementary Legislative Consent Memorandum on the Retained EU Law (Revocation and Reform) Bill, February 2023

³⁹ Memorandum No. 3, paragraphs 12 and 13

⁴⁰ Memorandum No. 3, paragraph 14

"The Welsh Government's position set out in the LCM laid on 3 November is unchanged as the Bill continues to present the same legal, constitutional, policy and practical concerns. These concerns have been conveyed to the UK Government but have not been addressed in these in subsequent amendments to the Bill.

On the basis that the UK Government has not addressed any of the concerns (outlined in our LCM) we will not be able to recommend to the Senedd that it gives consent to the Bill as currently drafted."

98. The Counsel General concludes by saying that the Welsh Government is still "not in a position to recommend that consent be given to the inclusions in the Bill, or to the other provisions of the Bill, as set out in the original LCM"⁴¹.

⁴¹ Memorandum No. 3, paragraph 18

4. Evidence from the Welsh Government

99. On 5 December 2022⁴², we took evidence from the Counsel General on the Bill and the Memorandum. We also questioned him on matters that had been raised with us by stakeholders.

100. Following the session, we wrote⁴³ to the Counsel General and sought answers to a number of further questions. The Counsel General responded on 19 January 2023.⁴⁴

The sunset provision

101. In Chapter 3 we highlight the “significant concerns” of the Counsel General and the Welsh Government about the sunset provision in clause 1 of the Bill which would sunset EU-derived subordinate legislation and retained direct EU legislation on 31 December 2023 unless they are saved by Ministers.

102. In his letter to us on 19 January 2023, the Counsel General said:

“...beyond gradually amending the law as appropriate with evidence-gathering, public consultation, and legislative scrutiny in the normal way, over time as with any body of law, we had no intention to repeal, revoke or amend REUL to an arbitrary deadline on ideological grounds. However, simply to propose legislation such as this that, by default, would repeal essential economic, social and environmental protections is unacceptable and irresponsible. This is especially true because of the use of valuable time by governments and legislatures when a good deal of this work will be merely to maintain in law those essential provisions that the Bill would otherwise automatically remove. This nugatory work has no demonstrable benefit to anyone and is a regrettable use of finite resource in both the Welsh Government and the UK Government, caused by the decisions made by UK Government Ministers.”⁴⁵

⁴² [Legislation, Justice and Constitution Committee, 5 December 2022](#)

⁴³ [Letter to the Counsel General, 14 December 2022](#)

⁴⁴ [Letter from the Counsel General, 19 January 2023](#). See also [Letter from the Counsel General, 12 January 2023](#)

⁴⁵ [Letter from the Counsel General, 19 January 2023](#)

103. The Counsel General also said that the automatic expiration of retained EU law could cause unidentified issues and potential negative impacts, “for example on protected groups”.⁴⁶

Amending the sunset date in Wales

104. We asked the Counsel General if the Welsh Government considers that the Senedd has the legislative competence to bring forward a Welsh Bill that would amend this Bill (if and when enacted) so as to amend the sunset date as it currently applies to retained EU law in devolved areas. We also asked if the Welsh Government was considering bringing forward such a Bill if the sunset date in the Bill remains as 31 December 2023.

105. The Counsel General told us:

“The Welsh Government is considering all options for minimising the negative impact of the Bill on the people of Wales. As in any situation, should the Welsh Government bring forward primary legislation, it would need to be satisfied that the legislation falls within legislative competence.”⁴⁷

Reviewing retained EU law

106. The Counsel General has said that:

- “the obligation is on the UK Government to actually ensure that its own legislation is fit for purpose”⁴⁸,
- the Welsh Government’s focus “has got to be firstly to ensure that we analyse and retain our own EU retained law, that we focus on that law that’s been made within Wales”⁴⁹,
- Welsh Government officials are working through analysis prepared by individual UK Government departments.⁵⁰

107. In addition, the Counsel General and officials from the Welsh Government told us that the Welsh Government is reviewing Welsh-made retained EU law

⁴⁶ Letter from the Counsel General, 19 January 2023, response to question 12

⁴⁷ Letter from the Counsel General, 10 February 2023

⁴⁸ LJC Committee, 5 December 2022, RoP [24]

⁴⁹ LJC Committee, 5 December 2022, RoP [242]

⁵⁰ LJC Committee, 5 December 2022, RoP [242] and [277]. See also Letter from the Counsel General, 19 January 2023, response to question 2

“because no-one else is going to preserve that”⁵¹, and will soon have a finalised list.⁵²

Ministerial powers

108. In Chapter 2 we set out the provisions in the Bill which provide regulation-making powers to UK Ministers and the Welsh Ministers. The provisions include concurrent powers, enabling UK Ministers to act in devolved areas, and powers enabling the Welsh Ministers to act alone.

109. We also highlighted that Schedule 3 of the Bill sets out procedures for the regulation-making powers in the Bill, including providing a sifting role to a Senedd committee. Our Committee is currently the responsible committee for sifting regulations made under the 2018 Act and the *European Union (Future Relationship) Act 2020*.

110. On 23 September 2022, the Counsel General said that the Bill could give UK Ministers “unfettered authority to legislate in devolved areas – contrary to the democratically established devolution settlement”.⁵³

111. The Counsel General also expressed a view about the breadth of the powers in the Bill for the Welsh Ministers and UK Ministers, saying these are “powers that, in normal circumstances, you would not wish to give to governments”. He also told us:

“...it's not a question of whether we want them; we will probably have no choice because if we want to do anything about retaining legislation that maintains standards and so on, things that we agree with them in devolved areas, then we're going to have to exercise them”⁵⁴.

112. On the concurrent powers in the Bill, the Counsel General stated that “it can't be right that the UK Government should be able to revoke or allow legislation to be revoked in devolved areas, that this is a matter that we should have and that

⁵¹ LJC Committee, 5 December 2022, RoP [251]

⁵² Letter from the Counsel General, 19 January 2023, response to question 1

⁵³ Welsh Government, [Press release, Power grab fears over new UK government legislation](#), 23 September 2022

⁵⁴ LJC Committee, 5 December 2022, RoP [291]

those powers should be with us". He added that, at the very least, the powers should be concurrent plus powers.⁵⁵

113. We asked the Counsel General if he had requested that the Bill be amended to uplift the scrutiny procedures attached to the powers if and when they are exercised by the Welsh Ministers but this was not confirmed.⁵⁶

Regulatory landscape

114. In Chapter 3, we highlight the Counsel General's opposition to clause 15 of the Bill, whereby Ministers are prohibited from increasing regulatory burdens when revoking or replacing retained EU law.

115. The Welsh Government wants to improve pre-Brexit standards.⁵⁷

116. The Counsel General has told us that standards are a "big area" for the Welsh Government and that "we want to retain law and not see any diminution of standards"⁵⁸.

117. The Counsel General described the combined impact of this Bill with the Internal Market Act in a **written statement** on 27 June 2022, stating that the Welsh Government "will continue to fight any moves to force us into a race to the bottom".

The Welsh Government's approach to the Bill

Intergovernmental working

118. On 20 September 2022, shortly before the Bill's introduction to the UK Parliament, the Counsel General **wrote** to the former Secretary of State for Business, Energy and Industrial Strategy and described how the Welsh Government had little involvement with the Bill.

119. Lord Callanan and the Minister for Industry and Investment Security, Ms Nusrat Ghani MP, have told the UK Parliament that the UK Government has "spoken extensively to the devolved administrations on their role" and that

⁵⁵ LJC Committee, 5 December 2022, RoP [267]

⁵⁶ LJC Committee, 5 December 2022, RoP [267]

⁵⁷ Letter from the Counsel General, 4 August 2022

⁵⁸ LJC Committee, 5 December 2022, RoP [269]

considerable work has been done with the devolved authorities for over 18 months.⁵⁹

120. The Counsel General also told us that Welsh Government officials have worked with counterparts across Whitehall departments but that the information had not been comprehensive and Welsh Government is continuing to receive the information “in something of a piecemeal fashion”⁶⁰.

Alternative options to the Bill

121. As noted above, the Counsel General told us that the Welsh Government, prior to the Bill's introduction, had no plans to revisit retained EU law collectively, rather it expected to review retained EU law as needed “with evidence-gathering, public consultation, and legislative scrutiny in the normal way”⁶¹.

122. Key stakeholders in their evidence to us agreed that any changes to retained EU law should involve such an approach.⁶²

Seeking amendments to the Bill

123. The Counsel General confirmed to us that the Welsh Government had requested only one amendment to the Bill, to grant the power to extend the sunset date in clause 2 to the Welsh Ministers in relation to retained EU law on areas within devolved competence.

124. The Counsel General has made several references to us regarding changes it wishes to see in the Bill. Some of these are captured in its legislative consent memoranda.

125. We asked for details on what specific changes to the Bill the Welsh Government was seeking and why it had not requested an amendment to remove the constraint in clause 15 of the Bill which would prevent an increase in

⁵⁹ Secondary Legislation Scrutiny Committee, 6 December 2022, question 1 and Hansard, 18 January 2023, Column 392

⁶⁰ LJC Committee, 5 December 2022, RoP [242] and [277]. See also Letter from the Counsel General, 19 January 2023, response to question 2

⁶¹ Letter from the Counsel General, 19 January 2023

⁶² See [Letter from NFU Cymru](#), 16 November 2022; [Letter from UK Environmental Law Association](#), 17 November 2022; [Letter from Public Law Project](#), 18 November 2022; [Letter from Food and Drink Federation Cymru](#), 18 November 2022; [Letter from Wales Environment Link](#), 18 November 2022; and [Letter from Wales Governance Centre and Wales Council for Voluntary Action](#), 18 November 2022

the regulatory burden when revoking or replacing retained EU law. However, such specific details were not provided to us.⁶³

126. The Counsel General has also advised that the Welsh Government is relying on changes put forward by “others” to achieve its desired outcomes.⁶⁴

Identifying and reviewing retained EU law

127. As far as we are aware, the Welsh Government is the only devolved government not to carry out its own assessment of retained EU law. The Scottish Government is going through retained EU law independently from the UK Government, including to ascertain how many regulations would be covered by the Bill. We also understand that Northern Ireland departments have conducted initial reviews of retained EU law within their remit.⁶⁵

128. On 4 August 2022, the Counsel General said the Welsh Government will not go through retained EU law independently from the UK Government. He told us:

“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.”⁶⁶

129. In terms of reviewing retained EU law, the Counsel General told us that he suspected that the Welsh Government, along with the government in Scotland and departments in Northern Ireland were “all actually very much in the same boat and very much in the same position”.⁶⁷

130. The Welsh Government has told us that it must wait to see what actions the UK Government will take before making decisions.

⁶³ Letter from the Counsel General, 19 January 2023, response to questions 10 and 11

⁶⁴ LJC Committee, 5 December 2022, RoP [289]

⁶⁵ See Hansard, Retained EU Law (Revocation and Reform Bill), 8 November 2022, Column 78, and Letter from Dr. Gravey and Dr. Whitten, 15 November 2022

⁶⁶ Letter from the Counsel General, 4 August 2022. See also LJC Committee, 5 December 2022, RoP [241] to [251]

⁶⁷ LJC Committee, 5 December 2022, RoP [241]. See also RoP [244].

131. On 5 December 2022, the Counsel General said that if the UK Government “decides that what they should do is retain a large number of them, then that actually solves part of that problem”⁶⁸.

132. On 16 January 2023, the Counsel General told us that, while the Welsh Government has been doing some work to identify retained EU law made in Wales, the Welsh Government was “waiting to see what the UK Government's precise intentions are to do with retained EU law as it applies across the UK, GB wide, England and Wales, or even England specific”⁶⁹.

The Welsh Government's legislative programme

133. The Counsel General told us he is not planning to “shelve anything”⁷⁰ from the Welsh Government's legislative programme, despite telling the Senedd and us that the Welsh Government would be “overwhelmed”⁷¹.

134. The First Minister later told the Senedd's Committee for the Scrutiny of the First Minister that capacity would need to be diverted from elsewhere in the Welsh Government to cope with the Bill.⁷²

Assessing impact

135. The Counsel General told us that the Welsh Government is:

*“...not carrying out our own impact assessment, other than to the extent that we agree with, really, some of the analysis of the impact assessment that's already been made, that it really isn't fit for purpose, that it is very weak, it doesn't do the sort of analysis and scope of what is required within that. It's difficult to do an impact assessment on something where you don't know what the full content of it or what the full scale of it that's going to be involved is”.*⁷³

⁶⁸ LJC Committee, 5 December 2022, RoP [277]

⁶⁹ LJC Committee, 16 January 2023, RoP [147]. See also LJC Committee, 16 January 2023, RoP [87] and Letter from the Counsel General, 19 January 2023, response to questions 9a and 9b.

⁷⁰ LJC Committee, 5 December 2022, RoP [304] and [306]

⁷¹ Plenary, 9 September 2022. See also LJC Committee, 5 December 2022, RoP [237] and [239].

⁷² Committee for the Scrutiny of the First Minister, 9 December 2022, RoP [31]

⁷³ LJC Committee, 5 December 2022, RoP [256]

Memorandum No. 2

136. Memorandum No. 2 acknowledges that proposals for amendments put forward by the Welsh Government were not successful. We asked the Counsel General if that changed his approach to the Bill. He told us it did not “because the flaws in the Bill are particularly clear”.⁷⁴

137. Specifically on the power in the Bill that remains unamended and which allows for the UK Ministers only to extend the sunset date, the Counsel General said:

“...we'll continue making the point on this. I've had an unsatisfactory response, I believe, from Minister Grant Shapps that basically says, 'No, everything is okay, devolution is going to be respected' and so on. Well, the Bill as it stands I don't think does actually do that.”⁷⁵

138. The Counsel General also said that the issue of concurrent powers in the Bill was also a reason why the Welsh Government's approach to the Bill remained unchanged. He said:

“...it seems to me that it's completely wrong that UK Ministers should have powers to be able to change the law in devolved areas. So, that's an area, and, of course, you'll see within the LCM that, as time has gone on, those are the areas why we cannot possibly concede or recommend to the Senedd that that legislation takes place.”⁷⁶

⁷⁴ LJC Committee, 16 January 2023, RoP [131]

⁷⁵ LJC Committee, 16 January 2023, RoP [132]

⁷⁶ LJC Committee, 16 January 2023, RoP [133]

5. Stakeholder views

139. In anticipation of a legislative consent memorandum for the Bill being laid, we wrote to stakeholders on 12 October 2022 and invited them to share with us their views on the Bill. The evidence we received can be found on our [website](#).

Reviewing retained EU law

140. NFU Cymru said that the Welsh Government's decision not to carry out an assessment of retained EU law "will disproportionately impact certain portfolios, particularly those taking in matters such as agriculture and the environment".⁷⁷

141. The RSPCA said that the Welsh Government should fully participate in the UK's joint review but must form a view on each piece of retained EU law from its own assessment. It should clearly set out which retained EU law it believes is devolved with a timetable for its consideration. It warns that:

*"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."*⁷⁸

142. The Marine Conservation Society said the Welsh Government's decision not to review retained EU law independently "potentially hinders the Welsh Governments ability to respond and challenge proposals made under the REUL bill" while acknowledging the demand it would place on the Welsh Government's resources to do so.⁷⁹

The sunset

143. NFU Cymru has called on the UK Government to extend or remove the sunset. It said it would be better placed to properly resource a review of retained EU law and to "work properly with government on post-Brexit regulatory reform"

⁷⁷ Letter from NFU Cymru, 16 November 2022

⁷⁸ Letter from RSPCA, 17 November 2022

⁷⁹ Letter from Marine Conservation Society, 18 November 2022

without the sunset pressure. It spoke of a significant resource demand on stakeholders, as well as Welsh Government departments.⁸⁰

144. The RSPCA has called for the sunset date to be extended as an interim measure. It added that the absence of powers for the Welsh Ministers to extend the sunset date “seems to be penalising the devolved Governments”.⁸¹

145. Professor Jo Hunt from Cardiff University added that “there is no clear justification why that power is not also given, for law within devolved competence, to Welsh Government ministers”.⁸²

146. The Public Law Project agreed with the view expressed by the RSPCA and Professor Hunt in that “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”.⁸³

147. The Food and Drink Federation Cymru suggested that it could see the benefit of the domestication and consolidation of retained EU law now that the UK has left the EU but “it remains unclear 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”.⁸⁴

148. The Wales Governance Centre and the Wales Council for Voluntary Action (WCVA) have also called for the sunset clause to be changed or removed.⁸⁵

149. The Welsh NHS Confederation told us there are “substantial grounds for concern” over the resources required to act before the first sunset on 31 December 2023 and that “important pieces of legislation ... cannot be allowed to be sunsetted due to a lack of oversight”.⁸⁶

150. The Food Standards Agency warned 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”. Whilst it did not believe this was the UK Government’s intention, it told us it was concerned about the timeframe and the

⁸⁰ Letter from NFU Cymru, 16 November 2022

⁸¹ Letter from RSPCA, 17 November 2022

⁸² Letter from Professor Jo Hunt, 21 November 2022

⁸³ Letter from Public Law Project, 18 November 2022

⁸⁴ Letter from Food and Drink Federation Cymru, 18 November 2022

⁸⁵ Letter from Wales Governance Centre and Wales Council for Voluntary Action, 18 November 2022

⁸⁶ Letter from the Welsh NHS Confederation, 17 November 2022

need to advise ministers 'very quickly'. It advocated for a comprehensive food and feed bill in due course.⁸⁷

Legislative gaps

151. On legislative gaps, Dr Viviane Gravey and Dr Lisa-Claire Whitten from Queen's University Belfast explained that:

"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)."*⁸⁸

152. NFU Cymru warned that governments "may find themselves fighting hasty rear-guard actions to close legislative gaps which have opened up. Such a scenario will be damaging for business and consumer confidence and certainty".⁸⁹

153. The Welsh NHS Confederation believes that important public health legislation could be unintentionally lost due to the Bill's timescale, including on nutrition and allergen labelling, and CO² emission performance standards for vehicles. It wants assurances that legislation that impacts public health will be retained and improved, and that Ministers give consideration to the long-term implications for population health and wellbeing.⁹⁰

154. The RSPCA and Wales Environment Link both provided examples of how Wales is reliant on areas for which the UK Government is responsible, and the impact on Wales if this changes, such as energy projects of a certain size and animal welfare legislation.⁹¹

155. The UK Environmental Law Association (UKELA) Wales Working Party warns that whole areas of environmental law such as waste, water and air quality, nature

⁸⁷ Letter from Food Standards Agency, 18 November 2022

⁸⁸ Letter from Dr Gravey and Dr Whitten, 15 November 2022

⁸⁹ Letter from NFU Cymru, 16 November 2022

⁹⁰ Letter from Welsh NHS Confederation, 17 November 2022

⁹¹ Letter from RSPCA, 17 November 2022, and Letter from Wales Environment Link, 18 November 2022

conservation, and the regulation of chemicals could be removed from the statute book overnight. It also said that it “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.”⁹²

156. Dr Gravey and Dr Whitten said that:

*“...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)”.*⁹³

157. The Marine Conservation Society explained that the Bill risks a two-tier system at cross-border marine sites and provided examples where devolved and reserved powers interrelate in the fields of energy and biodiversity targets, where the Bill “may have serious implications to the ability of Welsh Government to deliver the outcomes of its Biodiversity deep dive”.⁹⁴

Capacity and resource

158. NFU Cymru has spoken of a significant resource demand on stakeholders, as well as Welsh Government departments, warning that “insufficient capacity coupled with a tight deadline heightens the risk of errors and oversights”.⁹⁵

159. The Welsh NHS Confederation has described reviewing retained EU law as “an enormous capacity challenge”.⁹⁶

160. Similarly, UKELA said that sifting retained EU law is “a monumental task that will take a significant amount of resource”.⁹⁷

⁹² Letter from UK Environmental Law Association, 17 November 2022

⁹³ Letter from Dr Gravey and Dr Whitten, 15 November 2022

⁹⁴ Letter from Marine Conservation Society, 18 November 2022

⁹⁵ Letter from NFU Cymru, 16 November 2022

⁹⁶ Letter from NHS Confederation, 17 November 2022

⁹⁷ Letter from UK Environmental Law Association, 17 November 2022

Impact on legislative programme

161. Dr Gravey and Dr Whitten told us that, “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”.⁹⁸

162. Wales Environment Link warned of possible delays to legislation on environmental governance, nature recovery targets and the Clean Air Bill.⁹⁹

163. Professor Jo Hunt told us that the Bill places the Welsh Government “up against a deadline not of their making” whereby its “existing programme of government will not have taken into consideration the resources required for this exercise”.¹⁰⁰

Ministerial powers

164. Professor Jo Hunt said that “the absence of any requirement to seek consent from the 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”. She recommends that the Bill is 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.¹⁰¹

165. The Wales Governance Centre and WCVA told us that “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”.¹⁰²

166. Dr Gravey and Dr Whitten concluded that the Bill’s concurrent powers create “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 make decisions about the future of REUL in Wales”.¹⁰³

⁹⁸ Letter from Dr Gravey and Dr Whitten, 15 November 2022

⁹⁹ Letter from Wales Environment Link, 18 November 2022

¹⁰⁰ Letter from Professor Jo Hunt, 21 November 2022

¹⁰¹ Letter from Professor Jo Hunt, 21 November 2022

¹⁰² Letter from Wales Governance Centre and Wales Council for Voluntary Action, 18 November 2022

¹⁰³ Letter from Dr Gravey and Dr Whitten, 15 November 2022

167. NFU Cymru said:

“...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.”¹⁰⁴

168. It would also support the concurrent plus model and would not wish to see any retained EU law discarded without a proper impact assessment being carried out, including stakeholder consultation.¹⁰⁵

169. The Public Law Project told us that the Bill would “confer on ministers a blank cheque to rewrite or repeal valued rights and protections”.¹⁰⁶

170. Wales Environment Link also feel strongly that the Ministerial powers reduce democratic scrutiny.¹⁰⁷

Senedd's role

171. Several stakeholders noted the limited role afforded to parliamentary scrutiny in the Bill and called for a greater role for the Senedd.

172. NFU Cymru said it is “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.” It also raised concerns that the sunset could be “leveraged for the purposes of reducing scrutiny of actions to amend or replace REUL”.¹⁰⁸

173. The RSPCA said that the Senedd should have a role in decisions made for all devolved retained EU law, and that “it is important for the Senedd to sift all legislation relevant to Wales and within its competence”. It also called on the Welsh Government to fully involve the Senedd and to clarify with the UK

¹⁰⁴ Letter from NFU Cymru, 16 November 2022

¹⁰⁵ Letter from NFU Cymru, 16 November 2022

¹⁰⁶ Letter from Public Law Project, 18 November 2022

¹⁰⁷ Letter from Wales Environment Link, 18 November 2022

¹⁰⁸ Letter from NFU Cymru, 16 November 2022

Government how it will take into consideration the views of the Senedd for reserved retained EU law.¹⁰⁹

174. UKELA stated that:

"...if retained EU environmental law is to be fundamentally changed, it should only be done following full and comprehensive domestic scrutiny by the Senedd 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".¹¹⁰

175. The RSPCA raised concerns that the Senedd is being given a "very tight time period" to consider retained EU law.¹¹¹

176. The Wales Governance Centre and WCVA also called for an increased role for the Senedd.¹¹²

177. UKELA believes that none of the UK's democratic institutions will be able to consider retained EU law in the forensic and systematic way that [the UK] Parliament anticipated would be the case when it passed the 2018 Act.¹¹³

178. Dr Gravey and Dr Whitten agree, stating that

"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."¹¹⁴

¹⁰⁹ Letter from RSPCA, 17 November 2022

¹¹⁰ Letter from UK Environmental Law Association, 17 November 2022

¹¹¹ Letter from RSPCA, 17 November 2022

¹¹² Letter from Wales Governance Centre and Wales Council for Voluntary Action, 18 November 2022

¹¹³ Letter from UK Environmental Law Association, 17 November 2022

¹¹⁴ Letter from Dr Gravey and Dr Whitten, 15 November 2022

Regulatory landscape

179. Professor Jo Hunt believes that “the Bill has the potential to generate a number of unwelcome impacts on Wales’ regulatory landscape”. She recommended that the prohibition on increasing regulatory burdens should not apply to laws made by the devolved legislatures and Ministers within devolved competence.¹¹⁵

180. The Wales Governance Centre and WCVA told us that the powers in clause 15 “are clearly drafted with deregulation in mind”, and described the Bill’s definition of ‘regulatory burden’ as “extremely broad”.¹¹⁶

181. The Food Standards Agency said that it:

*“...will not compromise food safety or standards. We will also continue to emphasise the value of regulation to support business, to support trade, to encourage innovation, investment and growth”.*¹¹⁷

182. The Food and Drink Federation Cymru said “the scale of [the Bill’s] impact is potentially of a very significant nature to the food and drink supply chain in Wales” and that the Bill “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”.¹¹⁸

183. Wales Environment Link warned that the Bill’s deregulatory direction “puts vital protections and standards at risk”. They say that this “does not sit well with existing legislation in Wales, for example, the Well-being of Future Generations Act”. They believe that the Bill could not only “cool ambition for improvement, but weaken current standards in a way that directly contradicts Welsh Government policy”.¹¹⁹

184. NFU Cymru agreed that the Bill represents a regulatory ceiling but added that high standards must be properly rewarded from the marketplace, otherwise Welsh producers will simply be placed at a competitive disadvantage. It urged the

¹¹⁵ Letter from Professor Jo Hunt, 21 November 2022

¹¹⁶ Letter from Wales Governance Centre and Wales Council for Voluntary Action, 18 November 2022

¹¹⁷ Letter from the Food Standards Agency, 18 November 2022

¹¹⁸ Letter from the Food and Drink Federation Cymru, 18 November 2022

¹¹⁹ Letter from Wales Environment Link, 18 November 2022

Welsh Government to work with other governments to advocate high standards and resist a race to the bottom.¹²⁰

185. The Welsh NHS Confederation agreed that the Bill “indicates a strong preference towards deregulation, even where that may relate to areas of public health concern.” It also pointed to Welsh legislation and ambition, such as A Healthier Wales and the *Well-Being of Future Generations (Wales) Act 2015*, being “impeded”.¹²¹

186. The RSPCA told us that retained EU law containing “some of the most totemic and important changes in animal welfare” could all be at risk. It raised the prospect of “large widening of standards” between UK nations as a result of the Bill.¹²²

187. The Marine Conservation Society proposed that the Welsh Government should have the right to veto changes that would result in a lowering of standards.¹²³

Common frameworks and the United Kingdom Internal Market Act 2020

188. Professor Jo Hunt stated that the Bill’s approach “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”. She also said that:

*“...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 [...] 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”.*¹²⁴

¹²⁰ Letter from NFU Cymru, 16 November 2022

¹²¹ Letter from Welsh NHS Confederation, 17 November 2022

¹²² Letter from RSPCA, 17 November 2022

¹²³ Letter from Marine Conservation Society, 18 November 2022

¹²⁴ Letter from Professor Jo Hunt, 21 November 2022

189. The Wales Governance Centre and WCVA believe that common frameworks “are unlikely to be an adequate mechanism to manage the level of disruption that could arise”.¹²⁵

190. The RSPCA said the Bill would “conflict with” common frameworks and questions how it will work alongside the Internal Market Act. It said the Bill 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 and IMA20”, including in areas where the Welsh Government wants to improve standards. It also noted that it is not clear how disputes between the governments about retained EU law will be resolved.¹²⁶

191. UKELA, NFU Cymru, Wales Environment Link and the Welsh NHS Confederation all noted that the Bill could impact common frameworks and that it is not clear how the Internal Market Act may affect decisions of the UK governments to take divergent approaches to retained EU law in devolved areas.

192. Wales Environment Link also questioned the impact on the Welsh Government’s ability to retain higher standards than the UK Government.¹²⁷

Impact on rights

193. The Wales Governance Centre and the WCVA explained that the Bill’s equality impact assessment and human rights assessments “note that there is a risk of anti-discrimination protections and retained EU law (REUL) relevant to Convention Rights being caught by the sunset mechanism” and that existing requirements to mitigate this would be removed by the Bill of Rights Bill, as drafted.¹²⁸

194. The Public Law Project told us that, in addition to rights facing a “cliff-edge” as a result of the first sunset, the Bill’s Ministerial powers constitute “a blank cheque to rewrite or repeal valued rights and protections”.¹²⁹

195. The Equality and Human Rights Commission (the Commission) wrote to us on 9 February 2023 drawing our attention to what they describe as the Bill’s

¹²⁵ Letter from Wales Governance Centre and Wales Council for Voluntary Action, 18 November 2022

¹²⁶ Letter from RSPCA, 17 November 2022

¹²⁷ Letter from Wales Environment Link, 18 November 2022

¹²⁸ Letter from Wales Governance Centre and Wales Council for Voluntary Action, 18 November 2022

¹²⁹ Letter from Public Law Project, 18 November 2022

“considerable implications” for, and a “significant impact” on, equality and human rights.¹³⁰

196. The Commission provided examples of rights protected by retained EU law, such as legislation on parental leave, paid annual leave, rights for part-time workers, maximum hours for HGV drivers, and other employment rights. The Commission notes that Bill could also impact laws on minimum rights for refugees, standards for the treatment of refugees, protections for child witnesses in sexual offence cases, asylum seekers and displaced persons, and measures to support disabled people's access to rail and air travel.

197. It sets out how the Bill could disproportionately negatively affect women because the workers' rights at risk, such as maternity and equal pay, and parental leave, disproportionately affect women. The Commission also notes that there may also be negative economic impacts if the ability of women to participate in the labour market is eroded.

198. It also warns that there is “likely to be insufficient time for the UK Government to comply with its legal obligations in respect of each item of REUL under the Public Sector Equality Duty of the Equality Act 2010”. This requires departments, when considering changes to the law, to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, to advance equality of opportunity between people who share a protected characteristic and those who do not, and to foster good relations between groups of people.

199. The Commission notes that public authorities in Wales and Scotland have specific duties under the *Equality Act 2010* to assist with their compliance with the Public Sector Equality Duty. It is concerned that:

“the volume and speed of changes required by the Bill will make it hard for devolved governments and public bodies in Wales and Scotland to comply with the law such as by publishing equality impact assessments. This risks regression in equality and human rights standards”.

¹³⁰ Equality and Human Rights Commission briefing for House of Lords Second Reading on the Retained EU Law (Revocation and Reform) Bill, February 2023

200. Among other recommendations, the Commission calls for the Bill to be amended to ensure the effective scrutiny of any regulations which could result in changes to equality and human rights protections.

6. Committee consideration

201. We considered the Memorandum on 5 December 2022, Memorandum No. 2 on 16 January 2023, and Memorandum No. 3 on 13 February 2023¹³¹.

202. We draw on the evidence from the Counsel General and from stakeholders in the following paragraphs as we set out our conclusions on the Bill and the Welsh Government's legislative consent memoranda for the Bill.

203. Our scrutiny has, of necessity, not only considered the Memoranda themselves but also, given the nature of the Bill, considered the Bill's potential impact and the approach of the Welsh Government. This is because of the significant and exceptionally wide powers being provided to the Welsh Ministers should the Bill become law.

204. Our report was agreed on 13 February 2023.

205. The views set out in following paragraphs are, in places, the views of the majority of the Committee. Where a view is not shared by the Committee as a whole, a statement acknowledging that fact is included.

206. Should the Bill proceed, despite the concerns of us and many others, the recommendations we set out in this Chapter are designed to achieve important improvements to the Bill.

The Bill

Our view

The sunset

207. We acknowledge that the governments in the UK may decide to revisit retained EU law as and when they develop new policies and strategies following the UK's exit from the European Union. Indeed, we note that some stakeholders gave examples to us of policy areas where a longer term review of retained EU law following meaningful consultation would be sensible and/or desirable.

¹³¹ LJC Committee, 13 February 2023

208. However, we believe that the system envisaged by the Bill does not allow for the consultative, considered and purposeful approach that such a review requires. This is a majority view of the Committee.

209. We have been provided with no evidence of a need to sunset retained EU law on 31 December 2023, although we recognise the UK Government may want to conclude this matter by the end of the current UK Parliamentary term.

210. It would appear to us that stakeholders, across a range of sectors, are united in their deep concern about the sunseting of retained EU law. We are concerned by their warnings that the first sunset date would place significant pressures on their resources, in addition to the capacity and resource concerns raised for the Welsh Government and Senedd, which could lead to unforced or unintended errors.

211. Ahead of formally reporting to the Senedd on the Welsh Government's legislative consent memoranda for the Bill, we took the decision to write to the UK Government on 21 December 2022.¹³² We urged the UK Government to listen to stakeholders and reconsider the 31 December 2023 sunset date contained in the Bill. To date, a response from the UK Government has not been received.

212. The majority of the Committee consider that:

- any sunset date, regardless of that date, will cause [major] issues for governments, stakeholders and the legislatures in the UK;
- the evidence that there is a need for a sunset date at all is unconvincing;
- retained EU law should be reviewed on a case-by-case basis;
- the 31 December 2023 sunset date should be removed from the Bill.

213. If a sunset provision is to remain in the Bill, we agree with stakeholders that there is no obvious and discernible reason as to why the sunset extension power, granted to UK Ministers by clause 2 of the Bill, has not also been granted to the Welsh Ministers in relation to devolved matters. This is a majority view of the Committee.

214. We note that the second sunset date in the Bill, of 23 June 2026, would present issues unique to the devolved parliaments, insofar as the next Senedd

¹³² Letter to Rt Hon Grant Shapps MP, Secretary of State for Business, Energy and Industrial Strategy, and Nusrat Ghani MP, Minister for Industry and Investment Security, 21 December 2022

elections will be held in May 2026. This reduces further the limited time available before the second sunset for the Senedd and for the Welsh Government, given that dissolution of the Sixth Senedd will likely occur at the start of April 2026. This gives rise to several issues, including that, following the election, committees of the Seventh Senedd may not be constituted in time to perform the sifting duties under the Bill immediately before the sunset.

Recommendation 1. The 31 December 2023 sunset date should be removed from the Bill.

Recommendation 2. If the 31 December 2023 sunset date remains in the Bill, the Bill should be amended so that the power in clause 2 to extend the sunset date is also granted to the Welsh Ministers in relation to devolved matters.

215. Recommendations 1 and 2 are recommendations made by the majority of the Committee.

Recommendation 3. If the 23 June 2026 sunset date remains in the Bill, the Welsh Government should, as a matter of urgency, raise with the UK Government the unique issue of the 2026 Senedd election and its conflict with the 23 June 2026 sunset date.

Recommendation 4. If the 23 June 2026 sunset date remains in the Bill, the Welsh Government should ensure that the Senedd dissolution period ahead of the election for the Seventh Senedd is factored in to long-term planning for all regulations that may need to be made before that sunset date.

Recommendation 5. If the 23 June 2026 sunset date remains in the Bill, the Business Committee, in its preparation for the Seventh Senedd, should ensure that its successor is aware that there will be a priority need for an appropriate committee to be urgently established so that regulations to be made before that sunset date may be considered and, further, that Plenary sittings may be needed for Members of the new Seventh Senedd to consider and vote on any regulations subject to the draft affirmative procedure.

216. Recommendations 3, 4 and 5 are recommendations endorsed by the whole Committee.

Identifying retained EU law

217. It is clear that quantifying retained EU law and its effects presents enormous challenges for all governments, legislatures and stakeholders, and that it requires a considered approach.

218. Efforts to date to identify retained EU law demonstrate the vast scale of this task and the risk of significant legislative errors and gaps were the Bill to proceed.

219. We note that the House of Lords' Secondary Legislation Scrutiny (SLS) Committee, in its report on the Bill published on 2 February 2023, has said:

*"The scale of the task, both in terms of cataloguing a definitive list of relevant legislation and the deadline by which it has to be achieved, as a result of the sunset provisions is extraordinary and deeply troubling. The work is still ongoing, and we remain wholly unconvinced that there is not a significant risk of inadvertent omission and that some pieces of REUL will fall by accident."*¹³³

Conclusion 1. As the Senedd Committee with overall responsibility for the scrutiny of secondary legislation, and as the Committee which takes a broad role in seeking to assess and improve Welsh law, we cannot overestimate our concerns as to the effect this Bill could have on the certainty and quality of law as it applies in Wales.

220. It is a concern to us that the UK Government's retained EU law dashboard does not identify retained EU law in devolved areas or contain retained EU law made by the devolved governments. We acknowledge that the Welsh Government has committed to sharing its own list of Welsh-made retained EU law as soon as possible.

221. We acknowledge that, on 30 January 2023, the UK Government updated the dashboard to identify the territorial extent of the retained EU law captured by the dashboard. However, territorial extent is not the same as whether a matter impacts on devolved competence. We are therefore concerned that such information could risk confusion or, at worst, mislead Members of the UK Parliament who are actively scrutinising the Bill.

¹³³ House of Lords' Secondary Legislation Scrutiny Committee, 28th Report of Session 2022-23, 2 February 2023, paragraph 28

222. Given the need for good law-making and certainty for the statute book – across the UK and not just for Wales – we cannot understand how a Bill that would sunset retained EU law was brought forward by the UK Government before it was certain of what retained EU law exists. This is a majority view of the Committee.

Recommendation 6. We support the Welsh Government's call for the UK Government's dashboard to identify how each piece of retained EU law falls across reserved and devolved competencies.

Recommendation 7. The Welsh Government should share its own list of Welsh-made retained EU law with our Committee and with the UK Government as soon as possible.

Recommendation 8. The Welsh Government should request that Welsh-made retained EU law should be added to the dashboard.

Ministerial powers

223. We have seen no evidence that the UK or Welsh Ministers need extremely broad overarching executive powers to save, reform or remove retained EU law without proper and constitutionally appropriate oversight from legislatures.

224. We acknowledge that stakeholders have explicitly called for the Senedd to be provided with a greater role in the oversight of powers when exercised by the Welsh Ministers.

225. We further note that amendments to increase the legislative oversight of powers in the Bill have attracted cross-party support.¹³⁴

226. It also appears to us that the Welsh Government's criticism of the breadth of powers granted to UK Ministers applies as easily and equally to those powers granted in the Bill to the Welsh Ministers.

227. Indeed, we note that the Counsel General's own statement that the powers delegated to Ministers in the Bill are "powers that, in normal circumstances, you would not wish to give to governments".

228. We are therefore disappointed that, when we expressly asked the Counsel General if he had requested that the Bill be amended to uplift the scrutiny

¹³⁴ Hansard, 18 January 2023, Column 431

procedures attached to the powers if and when they are exercised by the Welsh Ministers, he did not provide a satisfactory answer.

229. On the contrary, we received the response that the Welsh Government “will have to exercise the powers conferred on the Welsh Ministers” and that the exercise of the powers “will likely not provide sufficient time for effective consultation on proposed modifications to retained EU law, which could result in unidentified issues and potential negative impacts, for example on protected groups”.¹³⁵ This response is regrettable, not least because we consider that knowing there are possible negative impacts on protected groups is unacceptable. The Bill's impact on rights, principles and the courts is discussed later in this Chapter.

230. It is also regrettable that concerns expressed by the Welsh Government have not been channelled into seeking a stronger role for the Senedd. We believe such action would be supported and welcomed by stakeholders and Members of the Senedd.

231. Nonetheless, we do not consider it appropriate that the Welsh Ministers are placed at a disadvantage and under more pressure by the Bill's provisions, which give different powers to the Welsh Ministers when compared with the UK Ministers. Given that the power to extend the sunset date is a power given only to the UK Ministers, it possibly means that the Welsh Government will be either required to act at an even faster pace than counterparts in the UK Government, will be wholly reliant on UK Ministers for sunset extensions, or will have no option but to increase their reliance on the UK Ministers to act in devolved areas. All of these situations could, and should, be avoided.

232. Furthermore, we believe that it is also wholly inappropriate for the Bill to contain concurrent powers¹³⁶.

233. While we share the Counsel General's concerns on the inclusion of concurrent powers in the Bill, we also would not consider it sufficient were the Bill to be amended to provide for concurrent plus provision, where UK Ministers would be required to seek the consent of Welsh Ministers before powers are exercised in devolved areas. A consenting role for the Welsh Ministers again bypasses the Senedd's role.

¹³⁵ Letter from the Counsel General, 19 January 2023, response to question 12

¹³⁶ For definitions of concurrent and concurrent plus powers (from guidance for Welsh Government staff) see [letter from the Minister for Climate Change](#), 6 August 2021

234. The combination of concurrent functions and Henry VIII powers in the Bill means that UK Ministers could, without consent, exercise their regulation-making powers to amend Senedd Acts and regulations made by the Welsh Ministers. We do not consider this to be acceptable.

Conclusion 2. As a Senedd Committee, we are very concerned that the Bill's provisions do not sufficiently engage or acknowledge the role of a legislature in a parliamentary democracy.

235. As the Senedd Committee with overall responsibility for monitoring the use of delegated powers in primary legislation, we consistently highlight and express reservations about the granting of broad executive powers, particularly Henry VIII powers and especially when these Henry VIII powers allow for the amendment of any enactment. That the Bill contains such powers only serves to bolster our view that the Bill is severely lacking in terms of appropriate and constitutionally acceptable oversight by the legislatures of executive action.

236. On 2 February 2023, the House of Lords' Delegated Powers and Regulatory Reform (DPRR) Committee published its report on the Bill.¹³⁷ The DPRR Committee has described the powers conferred on Ministers by the Bill as "even more significant"¹³⁸ than the powers contained within the 2018 Act – a Bill which also received heavy criticism by parliamentary committees across the UK because of the inclusion of wide executive powers. We note that this view is shared by the House of Lords' SLS Committee.¹³⁹

237. The fact that the DPRR Committee, as the UK Parliamentary Committee with responsibility for reporting on whether the provisions of any UK Bill inappropriately delegates legislative power, has described the Bill as "hyper-skeletal" should act as a profound warning.¹⁴⁰

238. We note the following commentary offered by the DPRR Committee in paragraphs 9 and 10 of its report:

¹³⁷ House of Lords' Delegated Powers and Regulatory Reform Committee, 25th Report of Session 2022-23, 2 February 2023

¹³⁸ Delegated Powers and Regulatory Reform Committee, 25th Report of Session 2022-23, paragraph 7

¹³⁹ Secondary Legislation Scrutiny Committee, 28th Report of Session 2022-23, 2 February 2023, paragraph 11

¹⁴⁰ Delegated Powers and Regulatory Reform Committee, 25th Report of Session 2022-23, paragraph 63

"The Bill is sufficiently lacking in substance not even to be described as "skeletal". It is a mechanism that gives Ministers the power to decide what becomes of whole swathes of UK law deriving from our membership of the EU. Ministers, not Parliament, will be responsible for determining what stays, what goes and what, if anything, is to replace what goes.

We criticise wide regulation-making powers in Bills covering just one policy area. Here we have very wide powers to make provision across multiple policy areas. If we were considering an open-ended delegated power in, say, an Employment Bill allowing Ministers to re-write the law on working time, we would express concern. This Bill is tantamount to creating scores of such powers."

239. We further acknowledge that the DPRR Committee has made the following recommendations:

- The powers conferred by clause 1(2), when read with clause 1(1), are inappropriate and should be removed from the Bill.
- The power in clause 2(1) of the Bill merits affirmative procedure scrutiny.
- Clause 10 should be removed from the Bill as it is "an unacceptable interference with the position in the *European Union (Withdrawal) Act 2018* that substantial policy changes should be for Parliament to decide in primary legislation rather than for Ministers to decide in secondary legislation".
- Clauses 12 and 13 should be removed from the Bill because they inappropriately delegate legislative power, the effects of which ought instead to belong to Parliament and be achieved in subject-specific primary legislation.
- Clause 15 contains an inappropriate delegation of legislative power and should be removed from the Bill, as it "gives Ministers an extraordinarily wide discretion to revoke and replace secondary REUL merely where Ministers regard it as appropriate to do so" and it "contravenes the commitment given at the time of the 2018 Act, a commitment that was enshrined in section 8 of the 2018 Act, that substantial policy changes to REUL should be for Parliament in primary legislation rather than for Ministers in secondary legislation".

Conclusion 3. The Bill enables an unacceptable power imbalance between executive and legislature. We support the calls by the DPRR Committee and others to remove from the Bill the unlimited and unnecessary Ministerial powers.

Constitutional impact

240. Of great concern to us, as legislators and representatives of the legislature, is the fact that the Bill would enable Ministers, rather than parliaments, to significantly alter the UK's regulatory and legal landscape.

241. We note with interest and agree with the following comments made by the DPRR Committee in paragraphs 2 and 3 of its report:

"According to the Memorandum (page 1) the main purpose of the Bill is twofold: "to remove the precedence given to retained EU law ("REUL") 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.

The second purpose has not been achieved by this Bill. Far from Parliament being restored to a place of primacy in relation to REUL, the Bill gives Ministers extraordinary powers exercised by statutory instrument to dispose of, retain or rewrite REUL—including powers that involve significant and contentious policy issues. The Bill contradicts pledges by the Government since 2018 that Parliament would be the agent of substantive policy change in these areas. After all, the principal constitutional argument for Brexit was that Parliament in primary legislation would make laws rather than the institutions of the EU. Instead, the Bill is full of law-making powers in relation to REUL that are given to Ministers to exercise by statutory instrument."

242. Even if we had been persuaded of the need for new executive powers to address the retained EU law which exists on our statute book, the UK Government – through the Bill – is asking the UK Parliament and the devolved legislatures to sign a blank cheque because neither the UK Government or the Welsh Government can successfully and confidently identify retained EU law. Even if the governments did know how much retained EU law there was in the UK, this does not mitigate the other safeguards being lost as a result of the Bill.

243. As well as stakeholders expressing this view, the DPRR Committee has arrived at the same conclusion and also described the Bill as a “blank cheque placed in the hands of Ministers”¹⁴¹.

244. We also note that the SLS Committee has concerns that:

*“Even if a definitive list of the relevant law were eventually compiled in time for the deadline set out in the Bill, there will be no parliamentary scrutiny of the decisions of ministers that specific pieces of law should fall or the implications of their revocation.”*¹⁴²

245. We believe the rating of the Bill's impact assessment by the RPC as “not fit for purpose” also emphasises our conclusion that the Bill embodies a blank cheque for governments.

246. To make matters worse, laws may ‘fall off’ the statute book without the UK Government or devolved governments having even informed the UK Parliament or a devolved legislature that this has happened.

247. The UK Parliament and devolved legislatures would have no way of determining whether this was by accident or design – an error or a deliberate choice. This would create further demands on legislatures seeking to understand a series of events that have already taken place.

Recommendation 9. The Bill should be amended so as to require Ministers to lay before the legislatures of the UK by 30 September 2023 the details of the retained EU law which is not to be saved or reformed – i.e. that which will be deliberately revoked and not replaced, and that which will be subject to the 31 December 2023 sunset provision (if this sunset date remains in the Bill).

248. We believe that the legislatures in the UK should be given timely notice of any retained EU law which is not to be saved or reformed by governments so that, should elected Members of the legislatures not agree, there is time to make any necessary objections which can then be considered by governments. We have recommended that such information should be made available by the end of September because, as we highlight in paragraph 279, certain regulation-making

¹⁴¹ Delegated Powers and Regulatory Reform Committee, 25th Report of Session 2022-23, paragraph 13

¹⁴² Secondary Legislation Scrutiny Committee, 28th Report of Session 2022-23, 2 February 2023, paragraph 31

powers in the Bill (and the associated scrutiny requirements) will mean governments will need to act no later than October 2023.

Regulatory landscape

249. We agree with the Counsel General that the Bill's prohibition on Ministers increasing the regulatory burden when exercising powers under clause 15 is "totally unacceptable". This is a majority view of the Committee.

250. We note that the Counsel General has confirmed that separate legislation will be required to increase standards in future. This will in effect mean that an additional step will be needed if the Welsh Government is to deliver on its ambition to increase pre-Brexit standards in Wales, by first taking action to save retained EU law using the powers in the Bill, before bringing forward proposals for higher standards in new legislation.

251. We welcome the Welsh Government's general position that it does not wish to see a diminution of standards in Wales. However, we echo the concerns of stakeholders and regret that the Counsel General did not provide sufficient assurance that important standards will not be lost.

252. We also note the concern of stakeholders that the Bill is deregulatory in nature.

Impact of changes made elsewhere

253. We note how changes made outside of Wales, to both reserved and devolved retained EU law, will impact Wales.

254. We are unclear as to what role, if any, the Welsh Government has, or will have, in monitoring or influencing such changes. The Counsel General has indicated that changes and disputes could be discussed in intergovernmental forums, including common frameworks¹⁴³. However, he has also noted that not all REUL is covered by a common framework¹⁴⁴.

255. We note the concerns of stakeholders that changes elsewhere could have important repercussions for Wales.

256. As the responsible committee for constitutional aspects of international affairs and for non-trade international agreements, we welcome the commitment

¹⁴³ LJC Committee, 5 December 2022, RoP [345]

¹⁴⁴ Letter from the Counsel General, 19 January 2023

made by the UK Government to preserve retained EU law where it underpins international obligations. Nevertheless, we note that there is a risk that this retained EU law may sunset if it is not identified and preserved before 31 December 2023.

Recommendation 10. We call on the Welsh Government to ensure that Wales remains compliant with international obligations, as required by the devolution settlement and by the Welsh Government's Ministerial Code.

Recommendation 11. The Welsh Government should clarify with the UK Government how it will take into consideration the views of the Senedd in respect of changes to reserved retained EU law particularly in areas not covered by common frameworks.

Common frameworks and the UK Internal Market Act 2020

257. The Bill will operate alongside common frameworks and the Internal Market Act.

258. We share the uncertainty of stakeholders, as set out in Chapter 5.

Recommendation 12. We call on the Welsh Government to urgently provide an assessment of the combined impact of the Bill, common frameworks and the UK Internal Market Act 2020.

259. We share the concerns of stakeholders that the timetable raises significant questions about the ability of governments to use the relevant common frameworks processes to discuss and agree changes to the substantial body of retained EU law covered by them and restricts the ability of governments to make full use of the dispute avoidance and resolution processes contained within the common frameworks.

Recommendation 13. The Welsh and UK Governments should provide an assurance that all changes being made to retained EU law within an area covered by a common framework is taken through the relevant common framework process before it is saved, sunsetted, revoked, or reformed.

260. We are also concerned that, in some instances, the effect of the Internal Market Act's market access principles means a decision by the Welsh Government in relation to a specific piece of retained EU Law could nonetheless be undermined by another government taking a divergent position. This is why we believe proper intergovernmental consultation and cooperation, even within the

short timescales allowed by the Bill as drafted, is vital. This is a majority view of the Committee.

Reliance of Welsh legislation on retained EU law

261. We have considered the Agriculture (Wales) Bill at the same time that we have been considering this Bill. The Agriculture (Wales) Bill relies on the continued operation of specific pieces of retained EU law.

262. Our report on the Agriculture (Wales) Bill noted that the Welsh Government's responses to our questions on how its provisions will be impacted by this Bill were not sufficient. We therefore recommended that the Minister for Rural Affairs and North Wales, and Trefnydd provided a more definitive view on this issue by the start of Stage 3 proceedings.¹⁴⁵ At the time of agreeing this report the Minister had not responded to this recommendation.

263. We believe that this example illustrates the risks posed by this Bill to legislation currently in development, and to future laws which rely on the continued operation of retained EU law.

264. We believe that there is a risk that, in future, the Senedd may find that existing legislation, including Welsh legislation, relies on the continued operation of retained EU law which may have been revoked, by accident or design, including as a result of decisions made by the UK Government. This is a majority view of the Committee.

Impact on rights, principles and the courts

265. The Bill will automatically sunset EU-derived rights etc on 31 December 2023, with no option to extend this sunset date. However, Ministers can replicate the effects of such rights etc using powers up to 23 June 2026.

266. A majority of the Committee is concerned that there is no guarantee in the Bill that EU-derived rights etc, which protect our citizens and on which they have come to rely, will be protected.

267. We echo the warnings of the Equality and Human Rights Commission, the First Minister and the Counsel General, that the Bill potentially poses a risk to human rights and to protected groups.

¹⁴⁵ LJC Committee, *Report on the Agriculture (Wales) Bill*, January 2023, paragraphs 88 to 90 and recommendation 3

268. We are concerned that EU-derived rights are being eliminated with no specific parliamentary authorisation. This is a majority view of the Committee.

269. We support the Commission's calls for the Bill to be amended to ensure the effective scrutiny of any regulations which could result in changes to equality and human rights protections. This is a majority view of the Committee.

270. We recognise the concern of the Commission that the Bill risks a regression in equality and human rights..

271. We also share the Counsel General's concerns about the Bill's impact on the Courts and role of the law officers.

Implications for Senedd business

Our view

272. Given the Counsel General's stated implications for the capacity of the Welsh Government and on Senedd business, we wrote to the Business Committee on 21 December 2022 before formally reporting on the legislative consent memoranda.¹⁴⁶

273. Given the Bill's broad implications, we also wrote to relevant Senedd Committees¹⁴⁷ and drew to their attention to the stakeholder evidence we had received.

274. We wrote again to the Business Committee on 27 January 2023, and drew to its attention the letter we received from the Counsel General on 19 January 2023. This letter was also shared with relevant Senedd Committees.

Conclusion 4. Given what we know the Bill will do, the views expressed by the Welsh Government, and based on the little information we have been given by the Welsh Government as regards any strategic plan, we must conclude that the timetable for the Bill, caused by the sunset date of 31 December 2023, means we and the Senedd could likely be confronted with an unprecedented workload in the autumn of 2023.

¹⁴⁶ Letter to the Business Committee, 21 December 2022

¹⁴⁷ Letter to the Economy, Trade and Rural Affairs Committee, 14 December 2022; Letter to the Equality and Social Justice Committee, 14 December 2022; Letter to the Climate Change, Environment and Infrastructure Committee, 14 December 2022; Letter to the Health and Social Care Committee, 14 December 2022; Letter to the Business Committee, 27 January 2023

275. Again we note that the DPRR Committee has arrived at a similar conclusion, stating:

*"The combination of (a) the cliff-edge sunset clause in clause 1, and (b) the extraordinary amount of legislation that may be produced in exercise of the powers in the Bill, risks such a deluge of subordinate legislation in a relatively short period of time (less than 12 months) that Parliament's limited powers to scrutinise the changes are likely to be wholly compromised."*¹⁴⁸

276. Further to this, and as discussed earlier in this Chapter, the 23 June 2026 sunset date also has implications unique to the devolved parliaments because of, in Wales for example, the likely dissolution of the Sixth Senedd in April 2026 ahead of the Senedd election in May 2026.

277. We are also aware that the Scottish Government's Cabinet Secretary for the Constitution, External Affairs and Culture, Angus Robertson MSP, said during evidence to the Public Bill Committee on 8 November 2022, that:

*"We are talking about massive displacement activity in our Parliament here in Scotland. That is hugely challenging."*¹⁴⁹

278. We note that Lord Callanan has informed the House of Lords that the UK Government believes, at this stage, approximately 1000 pieces of subordinate legislation will be needed which will be more detailed than those which came forward under the 2018 Act. We further note that Lord Callanan has also said that the UK Government is working on a programme for this subordinate legislation.

Conclusion 5. It is vital that the Welsh Government makes urgent progress with its plan on how it will approach the requirements of the Bill, if and when it is enacted.

Conclusion 6. The Welsh Government needs to engage urgently with the Senedd and closely coordinate with it on the implications of the Bill, if and when it is enacted, on the Welsh Government's programme for government and the impact on Senedd business.

¹⁴⁸ Delegated Powers and Regulatory Reform Committee, 25th Report of Session 2022–23, paragraph 14

¹⁴⁹ Hansard, Retained EU Law (Revocation and Reform Bill), 8 November 2022, Column 78

279. As an example of the implications of the Bill's scrutiny requirements for certain regulations to be made under clauses 12, 13 or 15 of the Bill, should the Welsh Government seek to make such regulations using the negative procedure, we believe the sift requirement would first be engaged. In order to accommodate a recommendation from us that the regulations should instead be made via the draft affirmative procedure, we believe the latest such regulations could be laid before the Senedd is late October this year.

280. In December 2022 the Senedd was placed in a very difficult situation when, because of the imminent 'switching off' of a delegated power in the 2018 Act, the Welsh Government asked the Senedd to approve regulations with several known defects.¹⁵⁰ With this very recent experience fresh in our minds, we believe it is critical that the Welsh Government and the Senedd are prepared to schedule additional time (and be able to respond with agility should it be needed) in the autumn term of 2023 so that the respective functions of both institutions can be properly discharged.

281. As a Committee we will be making plans for how we will accommodate the likely increase in workload. However, should there be a requirement for a significant number of regulations that arise from the Bill to be subject to the draft affirmative procedure, it is Plenary time that will also need to be secured.

Recommendation 14. The Business Committee should urgently consider whether the autumn term should be extended to 22 December 2023, in order to accommodate additional meetings of this Committee and additional Plenary sittings which may be required for the consideration of regulations arising from the Bill.

Legislative consent

Our view

282. We note the Welsh Government's assessment that the Senedd's consent should be sought for all clauses of and Schedules to the Bill, with the exception of clause 18, as set out in the Memoranda, and that the UK Government's view does not align with that of the Welsh Government.

¹⁵⁰ See [The Trade in Animals and Related Products \(Amendment and Legislative Functions\) and Animal Health \(Miscellaneous Amendments\) \(Wales\) \(EU Exit\) Regulations 2022](#), and [The Food and Feed \(Miscellaneous Amendments\) \(Wales\) \(EU Exit\) Regulations 2022](#)

283. We further note that the Senedd's consent is being sought for clauses 3 to 11 (and Schedule 1) because these provisions in the Bill modify the Senedd's legislative competence.

Conclusion 7. We agree with the Welsh Government's assessment that the Senedd's consent should be sought for all clauses of and Schedules to the Bill, with the exception of clause 18.

Conclusion 8. A majority of the Committee agrees with the Counsel General that the Senedd should withhold its consent to the Bill; not all members of the Committee are of the view that consent should be refused.

The Welsh Government's approach to the Bill

Our view

284. While the Welsh Government's approach to the Bill may be peripheral to our consideration of the legislative consent memoranda for the Bill and the urgent and serious matters raised by the Bill itself, it cannot be excluded from our consideration.

Intergovernmental working

285. We acknowledge that the Counsel General and the Welsh Government have said there was little intergovernmental working on the Bill before its introduction, which is disappointing.

286. However, we also note that this appears to be slightly at odds with comments made by UK Government Ministers.

287. We are concerned, at the very least, that this difference in view demonstrates poor communication between governments. At its worst, it possibly demonstrates a lack of respect between the governments, possibly as a result of significant disagreements on the subject matter of the Bill.

288. Whatever the reason, the result of the poor intergovernmental relations is that the Senedd is faced with two problems:

- The Welsh Government is accountable to the Senedd and, as such, we as a Senedd Committee must ask it questions about any UK Bill which is the subject of Welsh Government legislative consent memoranda. When intergovernmental working has been severely impaired, the Welsh

Government is often not in a position to answer our questions with satisfactory and sufficient clarity.

- As much as we have concerns with the excessive numbers of UK Bills which contain provisions in devolved areas (or which modify the legislative competence of the Senedd), recent times have proven that such Bills which are not the product of close intergovernmental cooperation are more likely to contain provisions which will be of concern to the Welsh Government and to the Senedd.

Alternative options to the Bill

289. We accept that, prior to the Bill's introduction, the Welsh Government had no plans to revisit retained EU law as a collective body and rather it had expected to review retained EU law as and when needed. As such, in terms of the programme it developed in 2021 at the beginning of the Sixth Senedd, the Welsh Government will likely not have forecasted for the work the Bill has and will generate in the coming months.

290. We also acknowledge that stakeholders in their evidence to us agreed with such an approach, that retained EU law should be considered in a more structured and needs-based way.

291. However, the Welsh Government has known for over a year that the UK Government was planning to introduce legislation relating to 'Brexit freedoms' – which became the Bill – and we are concerned with how the Welsh Government has approached the Bill since its introduction.

292. We accept that a Bill can and will change as it passes through any legislature. However, to mitigate against risk, we find it difficult to understand why the Welsh Government does not yet appear to have been engaged in its own proper scenario planning should the Bill be enacted.

293. We have not been convinced that the Welsh Government has adopted a clear and strategic approach to understanding how and when the Bill will impact upon individual departments in the Welsh Government and priority work streams therein.

294. In making these points we note that the Scottish Government and Northern Ireland departments appear to have adopted different approaches to that of the Welsh Government and are seeking to identify retained EU law as it affects Scotland and Northern Ireland.

295. We highlight further issues and concerns in the following paragraphs.

The Welsh Government's overall approach and strategy

296. In our view, the Welsh Government's approach produces three immediate and troubling implications for the Senedd:

1. Firstly, it increases the likelihood that UK Ministers will legislate in devolved areas for Wales, as the Welsh Ministers' time runs out and their reliance on UK Ministers increases.
2. Secondly, if the Welsh Ministers are to act after UK Ministers, this increases the likelihood that decisions will be made as late as possible, potentially up to 23:59 on 31 December 2023. We, as the Senedd Committee responsible for considering all Welsh subordinate legislation, would then return to consider these regulations made during the Senedd's Christmas recess in January 2024.
3. Thirdly, by its own account, the Welsh Government will not have a full picture of the impact of decisions taken elsewhere on Wales. In waiting on decisions to be taken by the UK Ministers, the Welsh Ministers will not likely be in a position to assess, nor to continually reassess, the impact of such decisions in order to determine which steps are needed to reach their desired outcome.

297. As regards point 2 above, while we would consider in January 2024 any clause 1(2) regulations laid before the Senedd in late December 2023, the options available to elected Members of the Senedd to raise concerns with negative instruments are very limited. If we as a Committee identify issues, or if a Member of the Senedd objects to even a small part of an instrument on policy grounds, the only option available is to table a motion to annul the instrument. If such a motion is approved, the whole instrument would be lost along with all of the retained EU law saved by the instrument, i.e. that retained EU law would no longer be saved from the sunset. It is very unclear what alternative action could then be taken given that the powers in the Bill to save retained EU law from the sunset will have 'switched off'.

298. We have struggled to identify what clear strategy the Welsh Government has as regards its approach to retained EU law. We acknowledge that the Welsh Government is opposed to the Bill and that it believes retained EU law is broadly working well, and it therefore had no plans to revisit retained EU law en masse.

299. However, the UK Government's plans have been in the public domain for some time (18 months) and we are therefore surprised that the Welsh Government's planning and preparations are at a premature stage.

300. We agree with the Welsh Government that a more considered approach to the reviewing of retained EU law is required than what is proposed by the Bill in its current form.

301. However, if the Bill is enacted, the Welsh Government needs to urgently articulate a clear strategy. To date, we are not convinced that the Welsh Government has put forward consistent messages. It has talked about saving retained EU law, also to having a triage approach to identifying priority retained EU law, and then also to saving unless there is a very good reason not to. Whilst it may need to consider approaches to individual pieces of law in the context of decisions taken in other nations in the UK, the Welsh Government should have a clearly articulated, independent strategy in accordance with which it will take these individual decisions.

302. Furthermore, the Welsh Government needs to communicate this strategy to stakeholders and engage with them as a matter of priority.

Conclusion 9. We believe that decisions taken under the Bill's regime (if and when enacted) should be made on a case-by-case basis with full stakeholder consultation and parliamentary oversight.

303. As we indicate earlier, it remains the case that, if the Bill becomes law, the Welsh Ministers will be provided with exceptionally broad powers to change existing law through subordinate legislation on matters that we would potentially expect to be dealt with through primary legislation.

Conclusion 10. We consider the current approach by the UK and Welsh governments means that the risk of the Senedd being bypassed is very high.

304. As regards the Welsh Government's decision not to assess the Bill's impact on Wales, we acknowledge that some challenges exist. However, we believe that this demonstrates all the more reason for an impact assessment to be carried out.

Recommendation 15. The Welsh Government should assess the Bill's impact on Wales as a matter of urgency to assist the Senedd and stakeholders to better understand the Bill's implications for Wales.

Seeking amendments to the Bill

305. We note what the Welsh Government has and has not done in terms of seeking amendments to the Bill.

306. The fact that the Counsel General has provided limited information on what amendments the Welsh Government has actively sought creates barriers to our scrutiny in assessing to what degree, if any, the Welsh Government's concerns have been represented, communicated or addressed.

307. It also raises questions as to whether the Welsh Government would be in a position to recommend consent if its concerns listed in the legislative consent memoranda were to be addressed by the UK Government to the Welsh Government's satisfaction.

308. We find this to be an deeply unsatisfactory element of our scrutiny to date.

309. The Counsel General has also advised that the Welsh Government is relying on changes put forward by "others" to achieve its desired outcomes.

310. We find it difficult to reconcile this approach with the Welsh Government's warnings about the Bill intensifying since its introduction in September 2022.

311. As such, we are unclear if the Welsh Government's preferred approach is for the Bill to be withdrawn in its entirety or if there are any circumstances under which it may recommend consent is given to the Bill.

312. This lack of clarity is demonstrated by the Counsel General's confirmation, since the laying of Memorandum No. 2, that the Welsh Government has not adapted its approach to the Bill despite its attempts at seeking amendments to the Bill not having succeeded to date.

Recommendation 16. The Counsel General should:

- confirm whether there would be circumstances under which the Welsh Government would recommend the Senedd's consent is given to the Bill and explain what these are;
- provide to us a comprehensive list of the amendments to the Bill the Welsh Government has sought and/or supported.

The Welsh Government's legislative programme

313. Finally, we are unconvinced by the Welsh Government's explanations about the potential impact of the Bill on its own legislative programme and therefore on delivering legislation for Wales.

314. We note that the Counsel General has said that the Welsh Government is not planning to "shelve anything" from its legislative programme. We find this comment difficult to reconcile with the Counsel General's repeated statements that the Welsh Government would be "overwhelmed" by the requirements of the Bill (if and when enacted).

315. The lack of a clear picture on this matter is further demonstrated by comments made by the First Minister that capacity would need to be diverted from elsewhere in the Welsh Government to cope with the Bill.

316. The Welsh Government has committed to bring forward legislation by 2026 in relation to important issues for Wales, including legislation relating to clean air, the integration of health and social care services, the reform of local government elections, as well as legislation to reform the Senedd.

317. If such legislation is to be delayed, or if any Welsh Government priorities are determined to be undeliverable, the Welsh Government must make this clear to the Senedd and to stakeholders.

Recommendation 17. The Welsh Government must clarify and set out a frank and candid assessment about the resource and capacity implications for the Welsh Government of implementing the Retained EU Law (Revocation and Reform) Bill (should it be enacted), and clearly set out what, if any, other legislative activity will need to be displaced in order to ensure that it can deliver on the tasks it will need to complete by the end of 2023.