

IEPAW

Interim Environmental Protection Assessor Wales

February 2023

The Retained EU Law (Revocation and Reform) Bill

Contents

Role of the Interim Environmental Protection Assessor for Wales	Page 3
Purpose of the report	Page 3
The Retained EU Law (Revocation and Reform) Bill	Page 4
Call for evidence	Page 5
Overall view of the REUL Bill	Page 6
Sunset clause	Page 7
Powers granted by the REUL Bill	Page 12
Maintaining environmental standards	Page 14
Impacts on the devolution settlement	Page 16
Conclusion	Page 18
Recommendations	Page 19

Role of the Interim Environmental Protection Assessor for Wales

1. The Interim Environmental Protection Assessor for Wales (IEPAW) considers concerns raised by members of the public about the functioning of environmental law in Wales. The IEPAW advises the Welsh Ministers on whether the submissions raised are valid and makes recommendations for any action they consider may need to be taken.
2. The interim measures are non-statutory. Their main purpose is to provide oversight of the functioning of environmental law in Wales, considering systemic issues relating to such law. The functioning of environmental law could mean considering whether:
 - the law is fit for purpose or still relevant;
 - information or explanatory material on the law is accessible; or
 - the practical implementation of the law is prevented in any way.
3. The scope of the interim measures does not cover:
 - breaches in environmental law;
 - areas of non-compliance of environmental law; and
 - issues raised that are covered by another complaints mechanism or process.
4. The aim of the interim measures is to identify where action may need to be taken to correct functioning issues that will improve environmental outcomes. Their strategic objectives are to:
 - provide a service to the public that allows them to make submissions to the IEPAW;
 - advise the Welsh Ministers on any action that may be required; and
 - contribute to the development of the permanent approach to environmental governance in Wales.

Purpose of the report

5. The IEPAW has received a number of concerns from stakeholders about the UK Government's proposed [Retained EU Law \(Revocation and Reform\) Bill](#). These stakeholders expressed the view that this Bill, as currently drafted, has the potential to cause significant issues for environmental law in Wales.
6. Given the scale of the potential issues raised by stakeholders and their impact on environmental protection in Wales, the IEPAW has opted to produce a short report on this topic for the Welsh Ministers. The focus of this report will be the potential

impact of this Bill on environmental law in Wales, although the overall impact of this Bill will be far wider than this, affecting a broad suite of legislation across the UK (which is beyond the scope of this Report).

The Retained EU Law (Revocation and Reform) Bill

7. When the UK exited the European Union, the EU (Withdrawal) Act 2018 converted existing EU law into UK domestic law, referred to as ‘retained EU law’ (REUL). The aim of this process was to minimise disruption, maintaining the existing legal framework thereby reducing uncertainty for individuals and businesses. The UK and devolved Parliaments were then free to legislate to diverge from these legal standards over time.
8. The Retained EU Law (Revocation and Reform) Bill (“the REUL Bill”) was introduced to the UK Parliament on 22nd September 2022. The purpose of this Bill is to grant Ministers the power to revoke or amend certain types of REUL¹ and to remove the current status such law has in the UK legal system. To achieve these aims, the Bill will:
 - Repeal or assimilate certain REUL by the end of 2023;
 - Repeal the principle of supremacy of EU law;
 - Make it easier for domestic courts to depart from retained EU case law;
 - Provide a mechanism for the UK and devolved governments to intervene in cases regarding retained case law;
 - Repeal directly effective EU law rights and obligations by the end of 2023;
 - Abolish general principles of EU law in UK law by the end of 2023;
 - Establish a new priority rule requiring retained direct EU legislation (RDEUL) to be interpreted and applied consistently with domestic legislation;
 - Downgrade the status of REUL for the purpose of amending it more easily; and
 - Create powers for REUL to be revoked or replaced, restated or updated and removed or amended to reduce burdens.²
9. According to the UK Government’s [REUL dashboard](#), there are an estimated 2,400 pieces of legislation that are within scope of the REUL Bill, although reports

¹ Namely EU-derived subordinate legislation and retained direct EU legislation –Retained EU Law (Revocation and Reform) Bill (as introduced), clause 1(1)

² Department of Business, Energy and Industrial Strategy, *Explanatory note for the Retained EU Law (Revocation and Reform) Bill*, (Bill 156 EN 2022-23) <<https://publications.parliament.uk/pa/bills/cbill/58-03/0156/en/220156en.pdf>> accessed 1 February 2023

suggest that the real figure may be over 4,000.³ This includes an estimated 570 pieces of legislation on the environment, food and rural affairs.⁴ It is worth noting, however, that the dashboard does not include REUL made by Welsh Ministers, and so this picture may be incomplete.⁵ The REUL dashboard is limited in terms of identifying precisely all legislation that will be impacted or affected by the REUL Bill. Also, the dashboard provides no indication of what legislation is reserved, what legislation is devolved, nor what legislation is jointly owned by the UK Government and devolved administrations.

Call for evidence

10. To inform this report, the IEPAW sought evidence from a range of stakeholders with expertise in environmental law. In particular, the IEPAW sought views and evidence on the following issues:

- What impact the Bill is likely to have on the functioning of environmental law in Wales?
- What concerns, if any, did they have about the protection of the environment in Wales if the Bill was enacted?
- Were there any amendments that could be made to the existing draft of the Bill that would address any of the above concerns in relation to Wales? If so, what are they?
- The Bill contains a sunset clause. What are their views on this clause? How would it apply in Wales?

11. This call for evidence was launched on 6 December 2022 and closed on 22 December 2022. The IEPAW received 11 responses from the following organisations:

- AECoW (Association of Environmental Clerks of Works)
- Association of Local Government Ecologists
- Carmarthenshire Nature Partnership
- Joint Nature Conservancy Council (JNCC)
- Marine Conservation Society

³ Peter Foster and George Parker, 'What is the UK's Retained EU Law Bill and why is it so controversial?', *Financial Times* (London, 17 January 2023) <<https://www.ft.com/content/834ca974-440a-4c68-98eb-9fd79733fb3c>> accessed 1 February 2023

⁴ The actual figure may be higher than this. The Wildlife Trusts have indicated that they consider there to be a further 300 more pieces of legislation to be added to the dashboard. The Wildlife Trusts, 'Briefing for Media' <<https://www.wildlifetrusts.org/sites/default/files/2022-10/Retained%20EU%20Law%20Bill%20-%20Briefing%20from%20The%20Wildlife%20Trusts.pdf>> accessed 1 February 2023

⁵ Welsh Parliament Senedd Research, 'Retained EU (Revocation and Reform) Bill Research Briefing' (November 2022) <<https://research.senedd.wales/media/fqfhrteg/22-67-eng-web.pdf>> accessed 1 February 2023

- Natural Resources Wales (NRW)⁶
- NFU Cymru
- UK Environmental Law Association (UKELA)
- Wales Environment Link
- Welsh Local Government Association
- Woodland Trust

Overall view of the REUL Bill

12. Evidence submitted to the IEPAW in response to the call for evidence broadly opposed the proposed REUL Bill.
13. Although there was a recognition among some stakeholders that there may be benefits to reviewing retained EU legislation in order to identify where there may be potential to make improvements, stakeholders agreed that the proposed approach was not the right way to undertake such a review. For example, NFU Cymru noted that, while they considered there to be opportunities to review regulation relating to the agricultural sector, they did not want to see any existing regulation discarded without a proper assessment, including stakeholder consultation, on whether it ought to be retained, amended, or revoked, or indeed whether it would be sensible to prepare entirely new regulations or regulatory approach.⁷
14. Respondents to the call for evidence agreed that responding to the REUL process will place considerable pressures on legislators in Wales. Although we do not yet know the true scale of the changes to environmental law that may be made as a result were the REUL Bill to be enacted, it is anticipated by respondents that reacting to them will take up a considerable amount of the legislative bandwidth within the Welsh Government and the Senedd. Respondents to the call for views agreed that this creates a material risk that the Welsh Government's Programme for Government could be seriously undermined as resources and legislative space would need to be redirected to this process and so would not be available to deliver on the Welsh Government's own priorities, which include climate change.
15. Several respondents also raised concerns around the fact that the Welsh Government has chosen not to carry out its own assessment of REUL, including forming its own views on what is devolved and reserved.⁸ Instead, the devolved administrations have made representations to the UK Government requesting that

⁶ Written evidence submitted on 20 January 2023 after a request for more time

⁷ NFU Cymru, written evidence submitted to the IEPAW, 9 December 2022

⁸ Marine Conservation Society, written evidence submitted to the IEPAW, 7 December 2022; Wales Environment Link, written evidence submitted to the Legislation, Justice and Constitution Committee, 18 November 2022

they share their analysis of the split between devolved and reserved REUL.⁹ There were concerns raised by stakeholders that the UK Government has not been doing enough to share such analysis with the devolved administrations, potentially undermining their ability to respond and challenge changes made under the REUL Bill. However, there was also some recognition that carrying out its own assessment would entail significant resource implications for the Welsh Government, and that it would not be fair to expect the devolved administrations to carry out this work in parallel with the UK Government.¹⁰

16. Another issue raised by a number of respondents was the legal uncertainty that the Bill could create for businesses across the UK. Changes to the existing legal framework could mean that a lot of time could be spent in UK Courts re-testing precedents, a process that could be further complicated by divergences in the law between the different nations of the UK. Also, Clause 7 of the REUL Bill makes it easier for domestic Courts to depart from retained EU case law. As such, even if legislation is not amended, there may still be uncertainty in the application of law as it would be unclear whether existing precedents would continue to be followed.

Recommendation 1: The Welsh Government should set out:

- 1) what processes it is putting in place to ensure that the potential impacts from the REUL Bill on environmental law in Wales are properly considered and managed; and
- 2) what resource it is making available to manage these processes.

Sunset clause

17. One of the principal features of the proposed REUL Bill is Clause 1 which contains a sunset clause providing that certain EU law will be revoked on 31 December 2023, unless a relevant national authority¹¹ decides to retain it under Clause 1(2) through regulations specifying the REUL to be retained. Alternatively, a relevant national authority may choose to restate, replace, or update the REUL under the powers granted by Clauses 12-17 of the draft Bill. Any EU law retained beyond this date will be referred to as ‘assimilated law’.¹²

⁹ Letter from the Counsel General and Minister for the Constitution to the Chair of the Legislation, Justice and Constitution Committee (4 August 2022) <<https://business.senedd.wales/documents/s129323/LJC6-23-22%20-%20Paper%2052%20-%20Letter%20from%20the%20Counsel%20General%20and%20Minister%20for%20the%20Constitution%204%20August.pdf>> accessed 1 February 2023

¹⁰ Marine Conservation Society, written evidence submitted to the IEPAW, 7 December 2022

¹¹ Retained EU Law (Revocation and Reform) Bill (as introduced), clause 21(1) defines ‘relevant national authority’ as: (a) a Minister of the Crown, (b) a devolved authority, or (c) a Minister of the Crown acting jointly with one or more devolved authorities

¹² Retained EU Law (Revocation and Reform) Bill (as introduced), clause 6

18. Expert evidence received by the IEPAW broadly opposed the sunset clause. One respondent described it as a 'legislative sledgehammer', arguing that the 'cliff edge' approach created by this clause constituted irresponsible law making that was not consistent with an evidence-driven, targeted, and cost-effective process.¹³
19. All the expert evidence received by the IEPAW concurred that the sunset date was set too early and did not give legislators sufficient time to properly consider the substantial body of REUL, particularly if the aim was for significant changes to be made to this framework. In particular, the JNCC noted that the Conservation of Habitats and Species Regulations 2017 and the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017, if not retained in their current form, could take considerable time to review and adequately amend in the various parts of the UK.¹⁴ Similarly, it was noted that the sunset clause did not allow implementing authorities sufficient time to adapt to legislative changes so that they could be communicated and understood by the user. NRW observed that to date, analysis of the Bill by the UK Government appears to be limited to the primary legislative changes with little consideration given to the secondary legislative impacts and process changes needed when legislation is altered.¹⁵ As a result, concerns were raised about the impact this may have on the functioning of environmental law in Wales if the Bill were enacted.
20. NRW noted that environmental legislation in Wales is already extremely complex as Wales still operates under England and Wales legislation in many areas. They noted that there had been a move towards codifying and simplifying legislation in recent years, which was welcome. However, it was considered by respondents that the Bill is likely to halt that process and may also compound the problem.¹⁶
21. There was also agreement that the use of a sunset clause was inappropriate, and that it would be preferable to take a more considered approach to the review of REUL, ensuring there was sufficient time for changes to be properly consulted on and scrutinised. The respondents noted that there existed a significant risk that important legislation could be revoked automatically by mistake simply because it had not been identified in time, as the evidence in paragraph 9 above supports.
22. In line with the expert evidence received, the IEPAW considers that the 31 December 2023 deadline does not provide sufficient time for the body of law to be properly assessed, nor does it provide sufficient time for replacement legislation to be brought forward. As mentioned above, there exist around 570 pieces of retained EU law in the area of environment, food, and rural affairs. These cover a range of

¹³ Wales Environment Link, written evidence submitted to the IEPAW, 22 December 2022

¹⁴ JNCC, written evidence submitted to the IEPAW, 21 December 2022

¹⁵ NRW, written evidence submitted to the IEPAW, 20 January 2023

¹⁶ NRW, written evidence submitted to the IEPAW, 20 January 2023

important issues, including water quality, air quality and habitat protection. In their written evidence, NRW highlighted the complexity involved in undertaking this work and noted that it will be difficult to untangle such interconnected legislation in an understandable way. This will place considerable pressure on both the UK and devolved governments, and there exists a material risk that mistakes may be made if this work is carried out over such a short timescale. As noted by the respondents, it is possible that important legislation may be missed, resulting in its revocation, or that existing legislation may be replaced by UK legislation that has been rushed, without proper consideration of its impacts.

23. As the Office for Environmental Protection noted in their evidence provided to the House of Commons Retained EU Law (Revocation and Reform) Bill Committee, a preferable alternative to the sunset clause would be to enable the UK and devolved governments to make positive choices to reform specific areas of environmental retained EU law where they identify room for improvement.¹⁷ This would enable legislation to be reviewed in a more considered manner based on prioritisation, evidence, consultation and analysis, without the risks created by the sunset clause. The IEPAW believes that there would be benefits of a more tailored, area specific approach given that this would address the concerns raised by the respondents to its call for evidence regarding the unrealistic timeframe for the sunset clause and that it would grant legislators the time they need to properly consider where changes to the legislation could deliver better environmental outcomes, as well as giving them the time they need to properly assess the impact of any changes, working in collaboration with stakeholders. This would also complement the work of the IEPAW which considers any issues in relation to the functioning of environmental law based on concerns raised by the public and stakeholders which may involve suggested reform to existing environmental law in Wales.

24. For the devolved governments, the time constraints imposed by Clause 1 are potentially more pressing than they are for the UK Government. This is because these administrations risk being placed in a position where they must react to changes brought forward by the UK Government, possibly with limited foreknowledge and certainty of what those changes are and what they involve. In response to this consultation, a number of stakeholders raised concerns that the UK Government had not done enough to make the devolved administrations aware of the changes to REUL that were under consideration. By the time these administrations have a full sense of the changes that the UK Government intends to propose, the 2023 sunset clause deadline is likely to be more imminent, resulting in insufficient time remaining for full consideration of the impacts of such changes.

¹⁷ Written Evidence from the Office for Environmental Protection (OEP) to the House of Commons Public Bill Committee for the Retained EU Law (Revocation and Reform) Bill (22 November 2022) <<https://www.theoep.org.uk/report/oep-submission-retained-eu-law-bill-committee>> accessed 1 February 2023.

25. The draft REUL Bill does make provision for the sunset date to be extended. However, such an extension can only be made by a Minister of the Crown, not devolved administrations, and such extension cannot exceed 23 June 2026 (the tenth anniversary of the Brexit referendum).¹⁸ A number of stakeholders noted that this was an anomalous situation, particularly given that the devolved administrations have the power to retain REUL in perpetuity under Clause 1(2). The expert stakeholders were in agreement that the power to extend the sunset date should also be granted to the devolved administrations.¹⁹ Based on the evidence received, the IEPAW agrees with this proposal.

Recommendation 2: The Welsh Government should press the UK Government to remove the sunset clause in relation to environmental law or to grant the devolved governments of Wales, Scotland and Northern Ireland the power to extend the deadline themselves. As a minimum, the UK Government should be encouraged to extend the sunset deadline so that it gives sufficient time for REUL to be fully assessed and for the governments in the different parts of the UK to fully consider what new legislation could be brought forward to improve environmental outcomes.

Recommendation 3: The Welsh Government should press the UK Government to publish an exhaustive list of the legislation across all devolved administrations that will be affected by the REUL Bill as soon as possible and also to provide the full analysis of legislation impacted by the Bill as soon as possible. Such publication must occur at the outset. Following this, sufficient time must be allowed for impacted parties and stakeholders to give full consideration to the Bill's impact before it is passed.

26. One potential solution to some of these issues raised by the proposed sunset clause could be for Welsh Government to explore the possibility of legislating to retain the environmental REUL in Wales that is within the scope of its devolved competence. This would have the effect of maintaining the status quo in Wales, at least in areas that are fully devolved, giving policymakers sufficient time to consider the legal framework and to identify where improvements could be made.

27. In a research briefing published by the Senedd, it is noted that Clause 1(2) of the REUL Bill would allow Welsh Ministers to retain REUL *en bloc* through a single set of regulations listing hundreds of pieces of devolved REUL that it wishes to save. These regulations would be subject to the negative procedure, giving the Senedd 40 days to object and annul. Welsh Ministers would then have the power to restate

¹⁸ Retained EU Law (Revocation and Reform) Bill (as introduced), clause 2

¹⁹ Wales Environment Link, written evidence submitted to the IEPAW 22 December 2022; NFU Cymru, written evidence submitted to the IEPAW, 9 December 2022

and/or update such assimilated law up to 23 June 2026.²⁰ After this date, any future changes to this assimilated law may need to occur through primary legislation which may take time to achieve to allow for proper scrutiny and if by secondary legislation may be criticised for the lack of scrutiny thereon

28. It is worth noting, however, that introducing regulations, such as those referred to in the previous paragraph, would result in significant divergence between the environmental laws in the different nations of the UK. The impacts of such divergence on the environment would need to be carefully considered taking in to account, amongst other things, the impacts on environmental media and ecosystems which do not adhere to political and administrative boundaries, regulators and businesses.
29. Also, as noted by the Wales Environment Link in their written submission to the IEPAW, in addition to the risk of losing regulations that are within the competence of the Senedd, there is a substantial risk that changes in areas solely within UK Government control may have an impact on environmental protections in Wales. For example, the UK Government is responsible for consenting energy projects in Wales over a certain size (50MW on land and 350 MW at sea). Changes to the rules governing the UK Government's assessment of environmental impacts and responsibilities to protect nature in such an area could have a significant impact on Wales' natural environment.²²
30. Finally, as outlined below, there is the potential risk that any regulations brought forward by the Welsh Government may conflict with UK Government regulations, particularly in areas that have shared competence. It is not clear at this time how such conflicts would be resolved, nor which legislation would take precedence.

Recommendation 4: The Welsh Government should explore the possibility of bringing forward regulations aimed at retaining environmental REUL in Wales. These regulations should not contain any sunset clause. The regulations should ensure that policymakers are able to fully consider where improvements can be made to the existing framework of environmental law. In areas where improvements can be made, Welsh Government should ensure that there is wide-reaching, clear and timely consultation and that draft regulations are subject to full parliamentary scrutiny in the Senedd.

²⁰ Retained EU Law (Revocation and Reform) Bill (as introduced), clause 13

²¹ Welsh Parliament Senedd Research, 'Retained EU (Revocation and Reform) Bill Research Briefing' (November 2022) <<https://research.senedd.wales/media/fqfhrteg/22-67-eng-web.pdf>> accessed 1 February 2023

²² Wales Environment Link, written evidence submitted to the IEPAW, 22 December 2022

Powers granted by the REUL Bill

31. Clauses 12-17 of the REUL Bill (as introduced) grant UK and devolved Government Ministers broad powers to amend and replace REUL legislation through secondary legislation. In broad terms, the powers granted by these clauses are as follows:

- **Clauses 12 and 13** grant national authorities the power to restate REUL and assimilated law respectively;
- **Clause 15** grants national authorities the power to revoke or replace REUL;
- **Clause 16** introduces a power to update REUL and assimilated law to take into account changes in technology or developments in scientific understanding; and
- **Clause 17** introduces a power to remove or reduce burdens.

32. Stakeholders responding to the consultation raised concerns with the scope of these powers, arguing that they were overly broad and ill-defined. Respondents also objected to the use of secondary legislation to effect these changes on the grounds that such legislation is subject to lower levels of scrutiny than primary legislation. Respondents argued that the scope of these powers, coupled with the reduced scrutiny, ran counter to good law and policy-making principles.

33. Several stakeholders noted that Clause 15 (power to revoke or replace REUL) is particularly broad in scope and has been referred to as a “do whatever you like” provision by some commentators.²³ This clause grants national authorities extremely wide powers to revoke or replace REUL. Under this clause, such legislation may be replaced with domestic legislation containing either “such provision as the relevant national authority considers to be appropriate to achieve the same or similar objectives”²⁴ or “such alternative provision as the relevant national authority considers appropriate”.²⁵ A number of respondents noted that the subjective nature of the term “appropriate”, accompanied by a limited link to the objectives of the original legislation, creates the potential for existing environmental protections to be replaced by legislation with significantly divergent aims and outcomes.

²³ The Hansard Society, ‘Five problems with the Retained EU Law (Revocation and Reform) Bill’ (24 October 2022)

<https://assets.ctfassets.net/n4ncz0i02v4l/92Se5TjP16LbAeBIKGCQE/fe6a83322be99844cefd6d2bae363377/5_Problems_with_the_REUL_-_Revocation_and_Reform_-_Bill_-_Oct_2022.pdf?utm_source=https://www.hansardsociety.org.uk> accessed 1 February 2023

²⁴ Retained EU Law (Revocation and Reform) Bill (as introduced), clause 15(2)

²⁵ Retained EU Law (Revocation and Reform) Bill (as introduced), clause 15(3)

34. Concerns were also raised about Clause 16, which grants a power to update REUL to take into account changes in technology or developments in scientific understanding. Stakeholders noted that these terms are ill-defined, leading to potential for considerable legal uncertainty. Also, unlike the other powers granted by the Bill, this power does not cease to apply after a specified date and would remain in force indefinitely.
35. Given the importance of the framework of environmental protections contained within the existing body of REUL, it is the IEPAW's view that any changes must be subject to proper oversight and scrutiny. The imposition of wide-ranging powers granting national authorities the ability to make sweeping changes with limited scrutiny is not conducive to good law and policy making and risks undermining the existing framework of environmental protections.
36. In particular, the IEPAW has significant concerns, based on the evidence presented by the respondents to this call for evidence, around the fact that any legislation that is not actively retained by national authorities will be turned off automatically. Should this occur then such revocation would be subject to no parliamentary oversight whatsoever due to the 'cliff edge' nature of the sunset clause. As noted by the Hansard Society, this means that the UK Parliament would effectively have no say in whether a piece of REUL is repealed, making it entirely a ministerial decision.²⁶ This lack of oversight increases the risk that deleterious changes may be made to environmental legislation without proper consideration of their impact, or without the express consent of legislators.
37. It is worth noting that the UK is a signatory to the Aarhus Convention, an international agreement that establishes a number of rights for individuals and civil society organizations with regard to the environment. Among these rights is the right for citizens to participate during the preparation of regulations or other legally binding rules that may have a significant effect on the environment.²⁷ As such, depriving the public of the opportunity to contribute to changes in environmental law through consultation could be considered a breach of the convention.

²⁶The Hansard Society, 'Five problems with the Retained EU Law (Revocation and Reform) Bill' (24 October 2022)

<https://assets.ctfassets.net/n4ncz0i02v4l/92Se5TjP16LbAeBIKGCQE/fe6a83322be99844cefd6d2bae363377/5_Problems_with_the_REUL_-_Revocation_and_Reform_-_Bill_-_Oct_2022.pdf?utm_source=https://www.hansardsociety.org.uk>

accessed 1 February 2023

²⁷ Article 8 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus Convention") 2161 UNTS 447' (25AD)

<<http://www.unece.org/env/pp/treatytext.html>> accessed 1 February

Recommendation 5: The Welsh Government should press the UK Government to ensure that the powers granted by this Bill are not overly broad. The Bill should also contain a requirement to ensure that any legislation brought forward under these powers are subject to full scrutiny in their respective parliaments and are widely and at an early stage consulted on with interested stakeholders.

In the absence of such assurance, Welsh Government should seek to ensure that any changes to environmental legislation in Wales made under the powers granted by this Bill are subject to robust scrutiny in the Senedd and are fully consulted on, to the extent possible under the timescales imposed by the Bill.

Recommendation 6: The Welsh Government should push for changes to the Bill to prevent environmental legislation from being automatically revoked without the express approval of Parliament and/or the Senedd. Similarly, there should be no revocation of any piece of environmental legislation without consultation and a full assessment of the impact.

Maintaining environmental standards

38. The IEPAW recognises that, in light of the UK's decision to leave the European Union, there now exists the opportunity to consider whether retained EU law is still fit for purposes and whether there is scope for improvements to be made to the existing framework of environmental law to better reflect the national circumstances in the UK and its constituent nations. The IEPAW has no objection, in principle, to the overall objective of reviewing the framework of retained EU law in the UK, provided the aim of such a review is to improve the level of environmental protection or, at the very least, to ensure the level of protection is no lower than that which already exists.

39. In their evidence provided to the House of Commons Public Bill Committee, the Office for Environmental Protection (OEP) proposed inserting a 'non-regression' principle into the proposed REUL Bill in relation to environmental law aimed at ensuring that any changes could not result in weaker protection for the environment.²⁸ The IEPAW fully supports this proposal.

40. It is notable, however, that the REUL Bill, as currently drafted, contains a provision preventing any replacement legislation from increasing the overall regulatory burdens.²⁹ The definition of 'burden' in the draft Bill is broadly defined and includes:

²⁸ Written Evidence from the Office for Environmental Protection (OEP) to the House of Commons Public Bill Committee for the Retained EU Law (Revocation and Reform) Bill (22 November 2022) <<https://www.theoep.org.uk/report/oep-submission-retained-eu-law-bill-committee>> accessed 1 February 2023

²⁹ Retained EU Law (Revocation and Reform) Bill (as introduced), clause 15(5)

- a financial cost;
- an administrative inconvenience;
- an obstacle to trade or innovation;
- an obstacle to efficiency, productivity or profitability; or
- a sanction (criminal or otherwise) which affects the carrying on of any lawful activity.³⁰

41. It is the view of the IEPAW that this provision has the potential to act as a serious barrier to the introduction of legislation that provides for a higher level of environmental protection than that which exists at present. Stronger environmental protections would almost certainly result in greater ‘burdens’ for businesses and individuals, but such burdens would need to be balanced against the potential benefits that such protection could deliver. Preventing national authorities from introducing any new regulatory burdens risks creating a ‘regulatory ceiling’, preventing standards from being raised.

42. It is worth noting the UK’s obligations under Article 391 of the UK-EU Trade and Cooperation Agreement. This article provides that neither the UK nor the EU should “...weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period”.³¹

43. The UK Government has recognised that “some retained EU law in the scope of the [REUL Bill] sunset is required to continue to operate [the UK’s] international obligations, including the trade and co-operation agreement” and has committed that the Government will “as a priority, take the necessary action to safeguard the substance of any retained EU law and legal effects required to operate international obligations within domestic law”.³² This is something which requires careful monitoring if the Bill is to be enacted in its current form.

³⁰ Retained EU Law (Revocation and Reform) Bill (as introduced), clause 15(10)

³¹ Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (30 December 2020) TS No.8/2021

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/982648/TS_8.2021_UK_EU_EAEC_Trade_and_Cooperation_Agreement.pdf> accessed 1 February 2023

³² HC Deb (25 October 2022). Vol. 721, col. 189

Recommendation 7: The Welsh Government should press the UK Government to accept the OEP's recommendation for a non-regression principle for environmental law to be included in the REUL Bill. In the absence of this principle at the UK level, the Welsh Government should make a clear commitment that no changes should be made to environmental law in Wales as a result of the REUL Bill unless these result in a greater, or at least equivalent, level of protection for the environment.

Recommendation 8: The Welsh Government should press the UK Government to amend the wording of the Bill so that it cannot be interpreted that there is a barrier to increasing regulatory burdens where this is necessary to achieve better environmental outcomes subject to any increase in regulatory burdens must be subject to a thorough consultation and a full assessment of the potential impacts.

Impacts on the devolution settlement

44. A number of stakeholders raised concerns with the fact that the Bill appears to enable Ministers of the Crown to legislate in devolved areas and to make changes without seeking the consent of the Senedd, an impact that is further compounded by the fact that there can be ambiguity regarding which legislation is devolved and which is reserved. The potential for the UK Government to use this Bill to encroach upon devolved areas has been a source of concern for the Welsh Government and is partly why consent for this Bill has been withheld.³³
45. Schedules 2 and 3 of the Bill set out detailed requirements around consent, but these are aimed at ensuring that the devolved authorities seek consent from Ministers of the Crown before they exercise their competence. On the other hand, the Bill places no such obligations on UK Government ministers to seek consent from the devolved authorities before they restate, reform or repeal REUL in areas of devolved competence.³⁴
46. Responses from expert stakeholders agreed that the Bill should require consent from the devolved administrations before the UK Government sought to restate, reform or repeal REUL in any devolved area and it is suggested a formal procedure to enable that to happen should be agreed and put in place. The IEPAW supports this suggestion.
47. With regards to working arrangements between the different nations of the UK, NRW noted that the new processes for joint working and dispute resolution since

³³ Welsh Government Legislative Consent Memorandum on the Retained EU Law (Revocation and Reform) Bill (3 November 2022) <<https://senedd.wales/media/wu0fwcny/lcm-ld15434-e.pdf>> accessed 1 February 2023

³⁴ Dr Viviane Gravey and Prof Colin T Reid, 'Retained EU Law Bill and Devolution: reigniting tensions in post-Brexit intergovernmental relations' (*Brexit & Environment*, 10 October 2022) <<https://www.brexitenvironment.co.uk/2022/10/10/reul-bill-devolution/>> accessed 1 February 2023

EU exit have yet to be fully established and tested. They also noted there have been a number of appearances at the Supreme Court where matters of devolved competency have been challenged and it is likely that the process of unpicking REUL will not change this trend.³⁵

Recommendation 9: The Welsh Government should continue to press for the inclusion of a provision in the REUL Bill making clear that the UK Government cannot seek to restate, reform or repeal REUL in devolved areas of environmental law without the consent of the devolved administrations.

Recommendation 10: The Welsh Government should press for the creation of a clear process and mechanism which would enable collaborative working between the four nations to analyse impacts of the Bill on environmental law and agree approaches on areas that require or would benefit from a joint approach. This process/mechanism should be established with equal standing for all four nations and be supported by topical working groups.

48. Another issue that has particular significance for the devolved administrations is the interaction between the REUL Bill and the United Kingdom Internal Market Act 2020 (“The UKIM Act”).

49. The UKIM Act is an act of the UK Parliament aimed at preventing barriers to trade within the constituent nations of the United Kingdom. This is achieved, in part, by introducing principles of mutual recognition and non-discrimination of goods and services in the UK.

50. It is the view of the IEPAW that further work is needed by Welsh Government to understand the potential interaction between the REUL Bill and the UKIM Act.

51. As reported elsewhere, the provisions of the UKIM Act have the potential to introduce significant constraints on the exercise of devolved competences by the Welsh Government.^{36,37} In particular, this legislation could undermine the ability of the devolved administrations to introduce regulatory standards that are more restrictive than those provided for in other parts of the UK. Any such standards introduced in Wales could only apply to goods and services created in Wales, and

³⁵ NRW, written evidence submitted to the IEPAW, 20 January 2023.

³⁶ Centre on Constitutional Change, ‘UK Internal Market Bill Devolution and the Union’ <<https://www.centreonconstitutionalchange.ac.uk/publications/uk-internal-market-devolution-and-union>> accessed 9 February 2023.

³⁷ Michael Keating, ‘Taking back control? Brexit and the territorial constitution of the United Kingdom’ (2022) 29(4) JEPP < <https://www.tandfonline.com/doi/full/10.1080/13501763.2021.1876156>> accessed 9 February 2023

there would be no way to prevent goods and services from other parts of the UK from entering the country, even where they do not comply with Welsh standards including those with an environmental element.

52. If one part of the UK were to move in a de-regulatory direction in relation to the environment, it is possible that this could have implications for the UK internal market as a whole. For example, lower environmental standards in relation to goods and services originating in one part of the UK may have the potential to undermine the standards applicable in other parts of the UK that had chosen to maintain standards at their existing level or had chosen to provide for higher levels of protection. Regulatory divergence such as this could result in economic harm for those parts of the UK, as their businesses would be compelled to compete with businesses that are operating to a lower standards. This could in turn disincentivise the application of stronger environmental protections, resulting in a 'race to the bottom' for environmental standards.

Recommendation 11: The Welsh Government should undertake an urgent review of the interaction between the REUL Bill and the UKIM Act, particularly in relation to the potential impacts on environmental law in Wales. Consideration must also be given to what measures may be available to mitigate any negative impacts arising from this interaction.

Conclusion

The evidence submitted further to the call for evidence in relation to the REUL Bill has raised a number of serious concerns about the impact it could have on the functioning of environmental law in Wales if it were enacted. This Report concludes that urgent action is required in relation to a number of matters to address those concerns.

Recommendations

Recommendation 1: The Welsh Government should set out:

- 1) what processes it is putting in place to ensure that the potential impacts from the REUL Bill on environmental law in Wales are properly considered and managed; and
- 2) what resource it is making available to manage these processes.

Recommendation 2: The Welsh Government should press the UK Government to remove the sunset clause in relation to environmental law or to grant the devolved governments of Wales, Scotland and Northern Ireland the power to extend the deadline themselves. As a minimum, the UK Government should be encouraged to extend the sunset deadline so that it gives sufficient time for REUL to be fully assessed and for the governments in the different parts of the UK to fully consider what new legislation could be brought forward to improve environmental outcomes.

Recommendation 3: The Welsh Government should press the UK Government to publish an exhaustive list of the legislation across all devolved administrations that will be affected by the REUL Bill as soon as possible and also to provide the full analysis of legislation impacted by the Bill as soon as possible. Such publication must occur at the outset. Following this, sufficient time must be allowed for impacted parties and stakeholders to give full consideration to the Bill's impact before it is passed.

Recommendation 4: The Welsh Government should explore the possibility of bringing forward regulations aimed at retaining environmental REUL in Wales. These regulations should not contain any sunset clause. The regulations should ensure that policymakers are able to fully consider where improvements can be made to the existing framework of environmental law. In areas where improvements can be made, Welsh Government should ensure that there is wide-reaching, clear and timely consultation and that draft regulations are subject to full parliamentary scrutiny in the Senedd.

Recommendation 5: The Welsh Government should press the UK Government to ensure that the powers granted by this Bill are not overly broad. The Bill should also contain a requirement to ensure that any legislation brought forward under these powers are subject to full scrutiny in their respective parliaments and are widely and at an early stage consulted on with interested stakeholders.

In the absence of such assurance, Welsh Government should seek to ensure that any changes to environmental legislation in Wales made under the powers granted by this Bill are subject to robust scrutiny in the Senedd and are fully consulted on, to the extent possible under the timescales imposed by the Bill.

Recommendation 6: The Welsh Government should push for changes to the Bill to prevent environmental legislation from being automatically revoked without the express approval of Parliament and/or the Senedd. Similarly, there should be no revocation of any piece of environmental legislation without consultation and a full assessment of the impact.

Recommendation 7: The Welsh Government should press the UK Government to accept the OEP's recommendation for a non-regression principle for environmental law to be included in the REUL Bill. In the absence of this principle at the UK level, the Welsh Government should make a clear commitment that no changes should be made to environmental law in Wales as a result of the REUL Bill unless these result in a greater, or at least equivalent, level of protection for the environment.

Recommendation 8: The Welsh Government should press the UK Government to amend the wording of the Bill so that it cannot be interpreted that there is a barrier to increasing regulatory burdens where this is necessary to achieve better environmental outcomes. Any increase in regulatory burdens must be subject to a thorough consultation and a full assessment of the potential impacts.

Recommendation 9: The Welsh Government should continue to press for the inclusion of a provision in the REUL Bill making clear that the UK Government cannot seek to restate, reform or repeal REUL in devolved areas of environmental law without the consent of the devolved administrations.

Recommendation 10: The Welsh Government should press for the creation of a clear process and mechanism which would enable collaborative working between the four nations to analyse impacts of the Bill on environmental law and agree approaches on areas that require or would benefit from a joint approach. This process/mechanism should be established with equal standing for all four nations and be supported by topical working groups.

Recommendation 11: The Welsh Government should undertake an urgent review of the interaction between the REUL Bill and the UKIM Act, particularly in relation to the potential impacts on environmental law in Wales. Consideration must also be given to what measures may be available to mitigate any negative impacts arising from this interaction.

