

Agenda Supplement – Legislation, Justice and Constitution Committee

Meeting Venue:

For further information contact:

Video conference via Zoom

P Gareth Williams

Meeting date: 5 June 2023

Committee Clerk

Meeting time: 13.30

0300 200 6565

SeneddLJC@senedd.wales

Remote – Supplementary Pack

Please note the documents below are in addition to those published in the main Agenda and Reports pack for this Meeting

5 Inter–Institutional Relations Agreement

(13.45 – 13.50)

5.4 Correspondence from the Minister for Health & Social Services: Healthcare (International Arrangements) (EU Exit) Regulations 2023

(Pages 1 – 10)

Attached Documents:

LJC(6)–17–23 – Paper 30 – Letter from the Minister for Health & Social
Services, 2 June 2023

LJC(6)–17–23 – Paper 31 – Letter to the Minister for Health & Social Services,
15 May 2023

6 Papers to note

(13.50 – 14.00)

6.8 Correspondence from the Finance Committee to the Minister for Finance and Local Government: Legislative Consent Memorandum on the Non–Domestic Rating Bill

(Page 11)



Attached Documents:

LJC(6)-17-23 – Paper 21a – Letter from the Minister for Finance and Local Government to the Finance Committee, 2 June 2023

8 Supplementary Legislative Consent Memorandum on the Illegal Migration Bill

(14.00 – 14.10)

(Pages 12 – 16)

Attached Documents:

LJC(6)-17-23 – Paper 23 – Legal Advice Note

9 Legislative Consent Memorandum on the Protection from Sex-based Harassment in Public Bill: Draft report

(14.10 – 14.25)

(Pages 17 – 28)

Attached Documents:

LJC(6)-17-23 – Paper 24 – Draft report

LJC(6)-17-23 – Paper 24a – Memorandum of Understanding

10 Supplementary Legislative Consent Memorandum on the Retained EU Law (Revocation and Reform) Bill

(14.25 – 14.35)

(Pages 29 – 41)

Attached Documents:

LJC(6)-17-23 – Paper 25a – Letter from the Counsel General and Minister for the Constitution, 2 June 2023

LJC(6)-17-23 – Paper 25b – Letter to the Counsel General and Minister for the Constitution, 16 May 2023

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

SeneddLJC@senedd.wales

2 June 2023

Dear Huw

Thank you for your letter of 15 May concerning the Healthcare (International Arrangements) (EU Exit) Regulations 2023 (“the HIA Regulations”). I have addressed your questions regarding the HIA Regulations below.

Question 1

In the letter you state that the HIA Regulations “will be made in exercise of powers conferred on the Secretary of State by the Healthcare (International Arrangements) Act 2019 (“the Act”) (formerly titled the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 but to be renamed by section 162 of the Health and Care Act 2022). When section 162 is brought into force, it will commence the main enabling power for the HIA Regulations”. When will section 162 of the Health and Care Act 2022 (the 2022 Act) be brought into force?

My officials expect the commencement to be this summer based on the information provided by their UK Government counterparts.

Question 2

In your letter you state “The HIA Regulations are to a large extent similar to the HEEASA Regulations, but broaden the scope of the legal framework to healthcare agreements between the UK Government and Rest of the World countries.” You also state “The replacement legislative provision made by the HIA Regulations in relation to the UK’s regime for reciprocal healthcare broadly retains the status quo under the current HEEASA Regulations.” We would be grateful to receive further clarity on the specific differences between the HIA Regulations and the HEEASA Regulations and what is meant by the phrase “broadly retains the status quo”.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The Healthcare (European Economic Area and Switzerland Arrangements) (EU Exit) Regulations 2019 (“HEEASA regulations”):

- confer a duty on the UK NHS Business Services Authority (NHS BSA) to, subject to instructions given by the Secretary of State, make payments on a UK wide basis under section 1 of the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 (“the 2019 Act”) (which enables the Secretary of State to make payments, or arrange for payments to be made, in respect of the cost of healthcare provided in an EEA State or Switzerland), and to assist the Secretary of State with the exercise of the Secretary of State’s functions in relation to making such payments, giving effect to healthcare agreements and arrangements and the provision of healthcare in member states;
- confer functions to give effect to obligations and commitments of the UK under healthcare agreements or arrangements, on NHS BSA and the Secretary of State;
- impose information and advice functions on NHS BSA (i.e. to establish and maintain a public information and advice service);
- confer S2 planned treatment functions on NHS England, Welsh Local Health Boards (LHBs) and Scottish health boards (i.e. to carry out clinical determination of applications in accordance with international healthcare agreements and arrangements);
- provide for the Secretary of State and Ministers of the Devolved Governments to be able to determine, along with relevant health boards, the NHS S2 (planned) treatment applications.

The HIA Regulations ‘broadly retain the status quo’ as the roles of the Secretary of State, NHS BSA, and relevant health boards (e.g. Welsh LHBs in relation to Wales) within the legal framework broadly remain the same.

Section 162 of the Health and Care Act 2022 (“the 2022 Act”) removed the Secretary of State’s wider power to make healthcare payments in section 1 of the 2019 Act and the power to make regulations in relation to healthcare and healthcare agreements in section 2 of the 2019 Act. Those powers were created to support people to access healthcare in the EEA and Switzerland in the event of leaving the EU without an agreement and such measures were no longer needed. Section 162 replaced the previous powers with a healthcare agreements and payments discretionary regulation-making power. As a result, the HIA Regulations enable the Secretary of State to, on a UK wide basis, make a payment and arrange for the making of the payment, in respect of healthcare provided in a listed country under a healthcare agreement and to make payments (otherwise than under a healthcare agreement) in respect of healthcare provided in a listed country where the Secretary of State considers exceptional circumstances justify the payment (with the ability for referrals for applications or claims for such payments to be made by NHS BSA, NHS England, Welsh LHBs and Scottish local health boards).

Under the HIA Regulations, the NHS BSA is still required to give effect to the obligations and commitments of the UK under relevant healthcare agreements, to assist the Secretary of State with their exercise of functions in relation to relevant healthcare agreements and the provision of healthcare in listed countries and to establish and maintain a public information and advice service. Relevant health boards (e.g. Welsh LHBs in relation to Wales) are also still required to carry out clinical determinations of S2 planned treatment applications, in accordance with relevant healthcare agreements.

In addition, along with a number of technical changes the HIA Regulations also:

- list countries party to international healthcare agreements with the UK (whereas the HEEASA Regulations required the Secretary of State to publish and maintain a separate list of international healthcare agreements);
- require the Secretary of State, NHS BSA, NHS England, Welsh LHBs and Scottish health boards to establish and publish procedures for the determination of applications and claims within their remit, which must include provision for a review process.

The HIA Regulations do not carry forward the power from HEEASA enabling the Secretary of State and Ministers of the Devolved Governments to determine, along with relevant health boards, NHS S2 (planned) treatment applications. However, this power in the HEEASA Regulations has never been used in Wales and there are no foreseeable circumstances where the Welsh Ministers would wish to determine an S2 (planned) treatment application, as such applications are subject to clinical assessment which sits with the LHBs. The Welsh Government does not have the required clinical expertise to make such a determination and therefore provide the relevant advice to Ministers in this regard.

As section 162 of the 2022 Act also enabled regulations to be made in this area which implement comprehensive reciprocal agreements with countries outside the EEA and Switzerland, the HIA Regulations apply to listed relevant healthcare agreements with Rest of the World countries.

Question 3

You will be aware that, in our report on The Welsh Government's Legislative Consent Memorandum on the Health and Care Bill (December 2021 report) and in our subsequent report on The Welsh Government's Supplementary Legislative Consent Memoranda (Memorandum No. 2 and Memorandum No. 3) on the Health and Care Bill (February 2022 report), we expressed concerns about what became section 162 of the 2022 Act, the breadth of delegated powers it provided to Ministers, and the consequences such regulations could have for NHS bodies in Wales.

Conclusion 6 in our February 2022 report said "The Welsh Ministers should make any necessary regulations in devolved areas for the purpose of giving effect to international healthcare agreements. Where they do not do so, and the power to confer relevant functions onto the Local Health Boards regarding healthcare agreements is instead exercised by the Secretary of State, the Welsh Ministers must provide full detail and an explanation to the Senedd in advance of such regulations being made by the Secretary of State."

We acknowledge that your letter of 25 April does notify the Senedd of the planned making of the HIA Regulations by the Secretary of State. We would welcome confirmation and clarity as to how Welsh Local Health Boards have been consulted on the HIA Regulations

The LHBs have been kept updated by my officials on the progress of the HIA Regulations and specifically consulted on the area of the HIA Regulations that imposes a new duty on them (ie, the requirement for LHBs to establish and publish procedures for the determination of S2 applications, which include provision for a review process). The LHBs have also been consulted by UK Government on the process and guidance for applying to the Secretary of State for healthcare payments in exceptional circumstances as these may be sought on behalf of a patient by their LHB.

Question 4

In your letter you state “Countries covered by International Healthcare Agreements are listed in a Schedule to the HIA Regulations. Given the UK Government is seeking agreements with a number of countries in the coming years and that each time countries are listed in the Schedule will need to be amended by affirmative procedure, I regard it as more pragmatic and efficient to have UK Government carry out this work on our behalf.” As highlighted in the previous question, conclusion 6 in our February 2022 report recommended that the Welsh Government should make any necessary regulations in devolved areas for the purpose of giving effect to international healthcare agreements.

a) Can you explain why you consider it “more pragmatic and efficient to have UK Government carry out this work on [your] behalf”.

Each time the UK Government enters into a new healthcare agreement with a country or territory, the HIA Regulations will need to be amended to add that country or territory to the Schedule on a UK wide basis, to give effect to and implement the agreement across the UK. Given that UK Government intends to seek agreements with a number of countries in the coming years, there could be a necessity for an ongoing series of amendments to be made to the Schedule. The UK Government will be required to amend the Schedule each time they enter into a new healthcare agreement, at least in relation to England. As they also have the competence to amend the Schedule on a UK wide basis, it is pragmatic and efficient for them to apply any such amendment to Wales, given that an equivalent amendment would be required in relation to Wales in any event.

In addition, as set out below, the impact on the LHBs of listing such agreements in the HIA Regulations is likely to be extremely low and I thus consider legislating separately for Wales when a new agreement is required to be listed would be neither the most appropriate way to give effect to the necessary changes, nor a prudent use of Welsh Government resources given other important priorities.

b) Can you confirm that, when the power to confer relevant functions onto the Local Health Boards regarding healthcare agreements is exercised by the Secretary of State in the future, the Welsh Ministers will provide full details and an explanation to the Senedd in advance of such regulations being made.

I can confirm that the WG will continue to inform the Senedd where the UK Government exercises a delegated legislative power in a devolved area in relation to Wales explaining the rationale for this.

c) What assessments will be undertaken by the Welsh Government of the implications for Welsh Local Health Boards before any consent is given to the UK Government to make further regulations which add countries to the Schedule?

There is no statutory requirement for UK Government to seek the Welsh Minister’s consent in respect of further regulations adding further countries to the Schedule. Following the commencement of section 162 of the Health and Care Act 2022 and the coming into force of the HIA Regulations, section 5 of the Healthcare (International Arrangements) Act 2019 (formerly titled the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019), will contain a statutory requirement for the Secretary of State to consult with Welsh Ministers before making regulations that contain provision which is within the legislative competence of the Senedd. This should be carried out under the terms of the Intergovernmental Memorandum of Understanding in Respect of the Consultation Process for International Healthcare Agreements and their Implementation Regulations (“the MOU”) (annexed to this letter).

The impact on LHBs of the listing of further agreements within the Schedule to the HIA Regulations is likely to be minimal, as the only duties placed on LHBs by the HIA Regulations are those relating to S2 planned treatment. These impacts will, however, be considered as a part of the consideration by the Welsh Government of the impacts of each individual agreement.

The majority of healthcare agreements do not provide for UK residents seeking planned healthcare abroad, and this is expected to continue in future agreements. The numbers of Welsh residents seeking planned healthcare in the EU or Switzerland (the only agreements which currently provide for this) are low. Though the UK is currently negotiating a Social Security Convention likely to include a planned healthcare provision with the European Economic Area/ European Free Trade Association States of Lichtenstein, Iceland and Norway, however this would not be expected to significantly increase the number of Welsh patients seeking planned treatment abroad. In addition, the costs for Welsh patients of the treatment itself (other than those costs which must be met by the patient) are met by the UK Government.

Please note that agreements between the UK and other countries are binding on the UK as a whole and Wales is required to implement and observe them. Thus the LHBs would in practice have to undertake a similar duty with regard to S2 planned treatment applications whether new agreements are listed in the Schedule to the HIA Regulations or not.

d) Can you confirm if you are aware of any upcoming international healthcare agreements.

I can confirm that a Social Security Convention including elements of reciprocal healthcare is currently being negotiated with European Economic Area/ European Free Trade Association States of Lichtenstein, Iceland and Norway (a Social Security Convention having been signed last year with Switzerland).

I can also confirm that new or revised agreements are being progressed by the UK Government with a number of UK Overseas Territories and with Jersey and the Isle of Man.

e) How are the Welsh Government and Welsh Local Health Boards being included in negotiations, or being sufficiently consulted, about ongoing and future agreements with other countries?

My officials meet regularly with UK officials under the terms of the MOU and input into the drafting of agreements shared by the UK Government as appropriate.

There is no requirement under the MOU for LHBs to be consulted by UK Government on international healthcare agreements however the LHBs are aware of the ongoing UK Government work in this area and meet regularly with my officials around issues such as overseas visitors and planned health care.

f) Can you confirm whether these Regulations are being taken through the processes outlined in the intergovernmental Memorandum of Understanding in Respect of the Consultation Process for International Healthcare Agreements and their Implementation (a version of which was made available to us in February 2022).

I can confirm that the process set out Section 8 ("Regulations under HIAA") of the MOU has been followed in the development of the HIA Regulations.

Question 5

In your letter you state “The replacement legislative provision made by the HIA Regulations in relation to the UK’s regime for reciprocal healthcare broadly retains the status quo under the current HEEASA Regulations. This means that provision which the Secretary of State would make in the HIA Regulations in relation to Wales and in devolved areas would be equivalent to the provision we would make in Wales only regulations. Therefore, having the UK Government make this provision for Wales would not be detrimental to the policy position in this area. This approach also does not preclude the Welsh Ministers from making Wales only regulations under section 2A of the Act in future.” We would welcome further explanation and clarity on your statement that “having the UK Government make this provision for Wales would not be detrimental to the policy position in this area”.

Our policy position in this regard is the currently same as the UK Government’s and I do not anticipate this changing. The provisions of the HIA regulations thus align with our policy. As set out above, should our policies in this area diverge in the future we have the power under section 2A of the Healthcare (International Arrangements) Act 2019 to make our own regulations to implement certain changes in Wales, provided those changes are within devolved competence, the scope of which is prescribed by section 2A(2) and (4)(b) of the Act. Thus, having the UK Government make this provision for Wales is not detrimental to current or future Welsh policy in this area.

I trust this answers your questions.

This letter has been copied to Russell George MS, the Chair of the Health and Social Care Committee.

Yours sincerely



Eluned Morgan AS/MS

Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services

Eluned Morgan MS
Minister for Health and Social Services

15 May 2023

Dear Eluned

Healthcare (International Arrangements) (EU Exit) Regulations 2023

At our meeting on 2 May 2023 we considered your letter of 25 April in which you advised my Committee that the UK Government intends to make and lay the Healthcare (International Arrangements) (EU Exit) Regulations 2023 (the HIA Regulations) in early June.

We noted that the HIA Regulations will extend to the whole of the UK and that they will replace the UK legal framework for implementing healthcare arrangements provided for in existing regulations, the Healthcare (European Economic Area and Switzerland Arrangements) (EU Exit) Regulations 2019 (the HEEASA Regulations), which are made in relation to the provision of reciprocal healthcare in European Economic Area (EEA) states and Switzerland.

We have a number of questions to ask you on the HIA Regulations. I would be grateful to receive a response to the questions set out in the Annex by 31 May.

I am copying this letter to the Health and Social Care Committee.

Yours sincerely,



Huw Irranca-Davies
Chair

ANNEX

Question 1:

In the letter you state that the HIA Regulations “will be made in exercise of powers conferred on the Secretary of State by the Healthcare (International Arrangements) Act 2019 (“the Act”) (formerly titled the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019 but to be renamed by section 162 of the Health and Care Act 2022). When section 162 is brought into force, it will commence the main enabling power for the HIA Regulations”. When will section 162 of the Health and Care Act 2022 (the 2022 Act) be brought into force?

Question 2:

In your letter you state “The HIA Regulations are to a large extent similar to the HEEASA Regulations, but broaden the scope of the legal framework to healthcare agreements between the UK Government and Rest of the World countries.” You also state “The replacement legislative provision made by the HIA Regulations in relation to the UK’s regime for reciprocal healthcare broadly retains the status quo under the current HEEASA Regulations.” We would be grateful to receive further clarity on the specific differences between the HIA Regulations and the HEEASA Regulations and what is meant by the phrase “broadly retains the status quo”.

Question 3:

You will be aware that, in our [report on The Welsh Government’s Legislative Consent Memorandum on the Health and Care Bill](#) (December 2021 report) and in our subsequent [report on The Welsh Government’s Supplementary Legislative Consent Memoranda \(Memorandum No. 2 and Memorandum No. 3\) on the Health and Care Bill](#) (February 2022 report), we expressed concerns about what became section 162 of the 2022 Act, the breadth of delegated powers it provided to Ministers, and the consequences such regulations could have for NHS bodies in Wales.

Conclusion 6 in our February 2022 report said “The Welsh Ministers should make any necessary regulations in devolved areas for the purpose of giving effect to international healthcare agreements. Where they do not do so, and the power to confer relevant functions onto the Local Health Boards regarding healthcare agreements is instead exercised by the Secretary of State, the Welsh Ministers must provide full detail and an explanation to the Senedd in advance of such regulations being made by the Secretary of State.”

We acknowledge that your letter of 25 April does notify the Senedd of the planned making of the HIA Regulations by the Secretary of State. We would welcome confirmation and clarity as to how Welsh Local Health Boards have been consulted on the HIA Regulations.

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As highlighted in the previous question, conclusion 6 in our February 2022 report recommended that the Welsh Government should make any necessary regulations in devolved areas for the purpose of giving effect to international healthcare agreements.

- a) Can you explain why you consider it "more pragmatic and efficient to have UK Government carry out this work on [your] behalf".
- b) Can you confirm that, when the power to confer relevant functions onto the Local Health Boards regarding healthcare agreements is exercised by the Secretary of State in the future, the Welsh Ministers will provide full details and an explanation to the Senedd in advance of such regulations being made.
- c) What assessments will be undertaken by the Welsh Government of the implications for Welsh Local Health Boards before any consent is given to the UK Government to make further regulations which add countries to the Schedule?
- d) Can you confirm if you are aware of any upcoming international healthcare agreements.
- e) How are the Welsh Government and Welsh Local Health Boards being included in negotiations, or being sufficiently consulted, about ongoing and future agreements with other countries?
- f) Can you confirm whether these Regulations are being taken through the processes outlined in the intergovernmental Memorandum of Understanding in Respect of the Consultation Process for International Healthcare Agreements and their Implementation (a version of which was made [available](#) to us in February 2022).

Question 5:

In your letter you state "The replacement legislative provision made by the HIA Regulations in relation to the UK's regime for reciprocal healthcare broadly retains the status quo under the current HEEASA Regulations. This means that provision which the Secretary of State would make in the HIA Regulations in relation to Wales and in devolved areas would be equivalent to the provision we would make in Wales only regulations. Therefore, having the UK Government make this provision for Wales would not be detrimental to the policy position in this area. This approach also does not preclude the Welsh Ministers from making Wales only regulations under section 2A of the Act in future."

We would welcome further explanation and clarity on your statement that "having the UK Government make this provision for Wales would not be detrimental to the policy position in this area".



Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MA/RE/0660/23

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02 June 2023

Dear Peredur,

The Welsh Government's Legislative Consent Memorandum on the Non-Domestic Rating Bill

I am writing in response to your letter of 26 May about the Finance Committee's consideration of the Memorandum on the Non-Domestic Rating Bill (the Bill). I note your comments reflect the questions expressed by the Legislation, Justice and Constitution Committee in its letter of 18 May. I have since written to the Legislation, Justice and Constitution Committee in answer to those questions. My response was copied to the Finance Committee (among others).

I am copying this letter to the Local Government and Housing Committee, the Economy, Trade and Rural Affairs Committee, and the Legislation, Justice and Constitution Committee.

Yours sincerely,

Rebecca Evans AS/MS
Y Gweinidog Cyllid a Llywodraeth Leol
Minister for Finance and Local Government

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Agenda Item 8

By virtue of paragraph(s) vi of Standing Order 17.42

Document is Restricted

Document is Restricted

Memorandum of Understanding

Between

The Welsh Ministers

And

The Secretary of State for the Home Department

1 June 2023

Memorandum of Understanding

The participants in this Memorandum of Understanding (“MoU”) are:

(1) The Welsh Ministers; and

(2) The Secretary of State for the Home Department.

(together “the Participants”)

1. Background

The Protection from Sex-based Harassment in Public Bill (“the Bill”) was introduced in the UK Parliament, on 15 June 2022.

The Bill makes provision in the following areas:

- a) Clause 1 provides for the new offence of ‘Intentional harassment, alarm or distress on account of sex’ to be inserted into the Public Order Act 1986.
- b) Clause 2 provides that the Secretary of State must issue and publish guidance to police about the offence, and in particular include guidance about the reasonable conduct defence in section 4A(3)(b)¹ of the Public Order Act 1986.
- c) Clause 3 makes consequential amendments to the Football Spectators Act 1989, the Police Act 1997, and the Elections Act 2022 as a result of the creation of the offence in Clause 1.
- d) Clause 4 confirms the extent, commencement and short title of the Bill.

The Bill, as amended, extends to England and Wales (the consequential amendments in clause 3 have the same extent as the provisions amended). Clauses 1, 3 and 4 (the latter in so far as it relates to the commencement of clauses 1 and 3) make provision within the legislative competence of the Senedd.

On 17 April 2023, the Welsh Government laid a legislative consent memorandum recommending that the Senedd provides its consent to the relevant provisions in the Bill.

Clause 4(3) of the Bill grants the Secretary of State the power to make a statutory instrument appointing the commencement date of clauses 1, 2 and 3 of the Bill. Clause 4(4) allows for different dates to be appointed for different purposes.

This MoU sets out the process for the Participants to agree the commencement date for clauses 1 and 3 (“the Relevant Provisions”) of the Bill.

¹ Section 4A(3) It is a defence for the accused to prove— (b)that his conduct was reasonable.

2. Operation of the MoU

The Secretary of State agrees to:

- Write to the Welsh Ministers and propose a commencement date (the same date to cover commencement in both Wales and England) for the Relevant Provisions before exercising the power under the Bill to make a statutory instrument appointing a commencement date for the Relevant Provisions.
- Provide the Welsh Ministers a reasonable time to respond to the proposed commencement date before making any statutory instrument appointing a commencement date for the Relevant Provisions.

The Welsh Ministers agree to:

- Respond within a reasonable time and either agree to the proposed commencement date or propose an alternative commencement date for the Relevant Provisions.

The Participants agree that:

- This MoU is not legally binding on the Participants.
- This MoU will come into effect upon the date when both Participants have signed the MoU and will remain effective until the Relevant Provisions come into force.
- If the Welsh Ministers propose an alternative commencement date and the Secretary of State does not agree with it, the Participants will arrange a meeting between officials to discuss and seek to agree a suitable commencement date.

In witness thereof, this MoU has been prepared in both English and Welsh and once completed the Participants must each retain a copy.

[For the Welsh Ministers]



Signed:

Name: Jane Hutt MS

Date: 01/06/2023

Minister for Social Justice and Chief Whip

[For the Secretary of State for the Home Department]

Signed:



Name: Sarah Dines MP

Date: 01/06/2023

Minister for Safeguarding

Mick Antoniw AS/MS

Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

Agenda Item 10

Ein cyf/Our ref: CG/PO/161/2023



Llywodraeth Cymru
Welsh Government

Huw Irranca-Davies MS
Chair
Legislation, Justice and Constitution Committee
Senedd Cymru
SeneddLJC@Senedd.Wales

02 June 2023

Dear Huw,

Thank you for your letter of 16 May 2023 seeking responses to questions in relation to the latest developments surrounding the Retained EU Law (Revocation and Reform) Bill, following the UK Government's announcement on its new approach to retained EU law and sunseting at the end of 2023.

As the Bill is progressing at significant pace in Parliament, responses to your questions have been considered separately, rather than in a Supplementary Legislative Consent Memorandum (SLCM), in order that an SLCM concerning the UK Government's changes to the Bill could be completed quickly, thereby giving the Senedd as much time as possible to consider it. The responses to your questions are set out in an Annex to this letter, though I trust that the Committee will have found the SLCM helpful in answering many of these already. In order to contextualise my comments correctly, I would like to provide an overall observation on the Bill, which builds on earlier statements to the Committee.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

While the Government amendments that were recently adopted at report stage in the Lords, which remove the automatic sunset at the end of 2023 in favour of a new approach that will list in a Schedule to the Bill the REUL instruments to be revoked by the 31 December deadline, are an improvement on the previous version of the Bill, concerns with the Bill remain, as set out in the recent SLCM.

Of these, the principal one is that the Bill, as drafted, would give Ministers of the Crown powers to amend or revoke REUL in devolved areas (including Senedd-made REUL) until 23 June 2026 without the consent of the Welsh Ministers or the Senedd. Welsh Ministers have consistently called on the UK Government to include in the Bill a requirement for UK Ministers to obtain consent before using concurrent powers.

These concerns remain valid and explain why I have continued to recommend to the Senedd that it withholds consent to the Bill.

A handwritten signature in blue ink, reading "Mick Antoniw", with a horizontal line underneath the name.

Mick Antoniw AS/MS

Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

ANNEX

Amendment to clause(1) of the Bill removing the current 31 December 2023 sunset date for retained EU law and instead providing that retained EU law to be revoked is listed in a new Schedule

Question 1: What is the Welsh Government's view of the new approach proposed by the UK Government?

As stated in the SLCM laid on 26 May, the revised approach fundamentally alters the nature of the Bill and removes the risk of REUL disappearing without any scrutiny by legislatures and even inadvertently.

While this change of approach is a positive development, concerns about the overall rationale for the Bill remain. Clauses that remove the established principles by which REUL, and EU law more generally, have been interpreted to date ("the interpretive provisions") remain in the Bill. Powers in the Bill to replace or update REUL remain of concern and the Bill still includes some provisions that Welsh Ministers consider constitutionally unacceptable, in that they give Ministers of the Crown concurrent powers in devolved areas without a requirement on the face of the Bill to obtain the consent of the Welsh Ministers before these powers are exercised. These concerns were raised in paragraphs 84, 88, 89 and 90 of the original LCM of 3 November.

Question 2: Did the UK Government consult the Welsh Government on this new approach before tabling the relevant amendments for Lords' Report Stage? If so, were any matters and/or concerns raised by the Welsh Government taken on board by the UK Government?

While there was some official level engagement before the UK Government amendments were tabled this was not sufficiently meaningful or detailed for the Welsh Government to know what form those amendments would take nor what instruments would be included in the new Schedule of REUL to be revoked. As matters progressed, concerns were raised that the speed of the new approach would mean that instruments in devolved areas had been placed in the Schedule without the consent of the Welsh Ministers.

Question 3: Does the list of retained EU law to be revoked, as set out in the new Schedule amendment, include instruments in devolved areas?

The Welsh Government was only able to review the full list at the same time as the LJC Committee and, as such, we are still working through the details. However, as you will note from the SLCM(5) that was laid on 26 May, the Schedule does include legislation within devolved areas.

Question 4: What is the Welsh Government's view of the list of retained EU law set out in the new Schedule amendment?

The Welsh Government is working through each of the instruments in the Schedule and has been engaging with the UK Government regarding those of concern.

Question 5: To what extent did the Welsh Government and UK Government work together on the list of retained EU law in the new Schedule amendment?

The Welsh Government was not engaged by the UK Government on the formulation of the list of REUL in the new schedule.

Question 6: Does the Welsh Government have concerns about anything listed or not listed in the new Schedule amendment?

Please see the response to Question 4

Amendment replacing subsections (3) and (4) of clause 1 with a new regulation-making power for both the Welsh Ministers and the UK Ministers to exclude retained EU law listed in the Schedule from revocation (regulations to be subject to the affirmative procedure to be made by 31 October 2023)

Question 7: Did the UK Government consult the Welsh Government about this amendment and giving this power to the Welsh Ministers?

The Welsh Government was not consulted in the process of developing this amendment. The Welsh Government has, however, made strong representations both at a Ministerial and official level to ensure powers in the Bill are made available to Welsh Ministers in relation to their devolved legislative competence.

Question 8: What is the Welsh Government's view on the timescales involved in reviewing the Schedule list and laying any necessary regulations before the Senedd for scrutiny and approval before the expiration date of 31 October 2023?

The Welsh Government was only able to review the full list of instruments in the Schedule at the same time as the LJC Committee and as such we are still working through the details.

The Welsh Government has made a commitment to keep the Senedd informed, especially in relation to any plans to make Welsh regulations. As this work is developed, we will communicate these plans and inform the Senedd.

Question 9: How and when would the Welsh Government go about using this power?

The Welsh Government has made a commitment to keep the Senedd informed especially in relation to any plans to make Welsh regulations. As this work is developed, we will communicate these plans and inform the Senedd.

Question 10: To what extent will the Welsh Government and the UK Government work together on identifying and excluding retained EU law from the Schedule list? How will disagreements, if they arise, be resolved?

Policy teams across the Welsh Government have been actively engaging in discussions about REUL, with these extending to consideration of the suitability of legislation remaining in the Schedule. As indicated above, the full list of instruments in the Schedule was not shared in advance of its publication.

The sunseting of directly effective rights and obligations (the repeal of section 4 of the European Union (Withdrawal) Act 2018) remains 31 December 2023

Question 11: What does the Welsh Government consider to be the impact of this sunseting of directly effective rights and obligations? Will it impact on the exercise of the new regulation-making power to be included in new clause 1(3), and on the power to restate, reproduce, revoke, replace or update in clauses 13 to 17?

The Welsh Government is not satisfied that the UK Government has carried out sufficient analysis to understand the potential impact of these provisions and what might be the likely effect of the sunseting of directly effective rights and obligations. The Welsh Government has conveyed these concerns both at Ministerial and official levels and continues to press the UK Government further for information on this and on how and when it envisages powers in the Bill being used to reinstate the principle of supremacy or other retained principles.

Question 12: Amendment 15 will require the Welsh Ministers to make a statement to the Senedd before the end of October 2023 of any right, power, liability, obligation, restriction, remedy or procedure that will fall at the end of December 2023, and would give the Senedd the opportunity to resolve that any such rights etc be retained. What is the Welsh Government's view of amendment 15 being agreed?

The Welsh Government is committed to keeping the Senedd informed and will communicate, as appropriate, on any intentions to bring forward regulations. At this point in time, we have no intention to use powers to revoke REUL by the end of December 2023. Powers in the Bill to restate, reproduce, revoke, replace or update have not been changed.

Question 13: What is the Welsh Government's view of the fact that the powers in clauses 13 to 17 of the Bill to restate, reproduce, revoke, replace and update retained EU law have not been changed?

As stated in paragraph 27 of the SLCM, despite the amendments, the Bill still includes provisions Welsh Ministers consider unacceptable, including those that remove the established principles by which REUL is to be interpreted ('the interpretive provisions') and those giving Ministers of the Crown concurrent powers in devolved areas without a requirement on the face of the Bill to obtain the consent of the Welsh Ministers before those powers are exercised.

Question 14: Does the Welsh Government anticipate that the UK Government will use the clause 15 powers to revoke or reform further areas of retained EU law before the end of this year? If so, is the Welsh Government engaged in any discussions on this, and does it know if such future regulations are likely to cover devolved areas?

We do not currently know what UK Government's intentions are. We continue to press for further information at Ministerial and official level and will keep the Senedd informed.

Question 15: Does the Welsh Government intend to use any powers provided to it in the Bill to revoke, amend, replace or update any Senedd made or devolved retained EU law by the end of this year?

As per question 8, the Welsh Government has made a commitment to keep the Senedd informed especially in relation to any plans to make Welsh regulations.

Concurrent powers remain in the Bill

Question 16: What is Welsh Government's current position on the use of concurrent powers by UK Ministers on matters which are devolved to Wales?

I have previously written on the point about concurrent powers, and I can confirm the position has not changed. The Welsh Government has recommended to the Senedd that it withholds consent to this Bill on the basis that powers in the Bill could see a Minister of the Crown legislating in devolved areas without the consent of the Welsh Ministers. We are fundamentally opposed to this and see it as a significant issue and as a further example of the UK Government not upholding its own commitment to honour the Sewel convention. I have recently written to the Rt Hon. Michael Gove MP; Secretary of State for Levelling Up, Housing and Communities and Minister for Intergovernmental Relations, reiterating these concerns.

Question 17: In what circumstances, if any, would the Welsh Government be content for the UK Government to make regulations under the Bill in devolved areas?

I have previously stated that there should be a requirement on the face of the Bill for Ministers of the Crown to obtain the consent of devolved Ministers before legislating in devolved areas, to honour the commitment the UK Government has made to respecting the integrity of the devolution settlement and the Sewel convention.

Amendments to clauses 20 and 23 - consequential, transitional, supplementary etc powers will be given to the Welsh Ministers

Question 18: Did the UK Government consult the Welsh Government before giving these powers to the Welsh Ministers?

The UK Government did not consult with the Welsh Government on the detail of these amendments, though we had been pressing for amendments to be made to confer these powers on the devolved Ministers.

Question 19: The power in clause 20 includes the express power to amend the Bill itself. Does the Welsh Government intend to use this power?

As per question 8, the Welsh Government has made a commitment to keep the Senedd informed especially in relation to any plans to make Welsh regulations. At this time, there is no intention to exercise these powers.

General matters

Question 20: What is the Welsh Government's general view of the Bill as amended at Lords' Report Stage?

The SLCM laid on 26 May outlines the Welsh Government's general view of the Bill.

Question 21: What is the Welsh Government's revised strategy for dealing with the Bill in light of amendments agreed in the House of Lords to the Bill?

The Welsh Government continues to work at pace to consider the amendments and to clarify their implications. As stated above (Q8) the Welsh Government has committed to keep the Senedd informed. Our overall strategy for the Bill has been to work to defend the devolution settlement.

UK Government Department for Business and Trade, Smarter Regulation to Grow the Economy policy paper

Question 22: Was the Welsh Government consulted on the development of the UK Government's Smarter Regulation to Grow the Economy policy paper?

The Welsh Government was not consulted.

Question 23: What are the Welsh Government's views on the proposals contained in the paper?

The Welsh Government will need to consider the proposals outlined in the White Paper in greater detail before we can form a comprehensive view on what they contain and assess any implications for Wales, including what legislation the UK Government intends to bring forward and when. We cannot support an agenda that would see the high standards and protections around the environment, health and employment being eroded or diminished.

Question 24: What is the Welsh Government's view on the new criteria set out in the paper for the reform or removal of legislation "no longer fit for purpose"?

As this policy initiative develops, the Welsh Government will press the UK Government for further information on what it means in practice, including what legislation it intends to bring forward, and when, so that we can assess the implications of this for Wales.

Question 25: What is the Welsh Government's view on the addition of reviewing domestic regulation in addition to regulations which originated from the EU.

As above, until we have considered the full detail and impact of proposals by the UK Government, we cannot fully form views. However, we await the response to the consultation exercise and, as the initiative proceeds, we will press the UK Government for information as it begins developing new policy, so that we can assess the implications for Wales.

Mick Antoniw MS
Counsel General and Minister for the Constitution

16 May 2023

Dear Mick

The Retained EU Law (Revocation and Reform) Bill

At this week's meeting we discussed the latest developments surrounding the Retained EU Law (Revocation and Reform) Bill and last week's announcement by the UK Government regarding the Bill; in particular we discussed its new position on the retained EU law to be revoked at the end of 2023.

We appreciate that developments with the Bill appear to be moving at a fast pace and we are further mindful that intergovernmental discussions about the Bill have not been optimal to date.

Nonetheless, given the significance of the recent developments, there are a number of matters which will be of great importance to the Senedd, not least if Members of the Senedd are asked to make a further consent decision linked to the Bill following amendments at House of Lords' Report Stage.

We ask that the questions we raise below are addressed in the further supplementary legislative consent memorandum we anticipate you will lay before the Senedd. We would also welcome confirmation in correspondence to us that this has been actioned.

I am copying this letter to the Llywydd, Chair of the Business Committee.

Yours sincerely,

Huw Irranca-Davies

Huw Irranca-Davies

Chair



ANNEX

Amendment to clause(1) of the Bill removing the current 31 December 2023 sunset date for retained EU law and instead providing that retained EU law to be revoked is listed in a new Schedule

Question 1: What is the Welsh Government's view of the new approach proposed by the UK Government?

Question 2: Did the UK Government consult the Welsh Government on this new approach before tabling the relevant amendments for Lords' Report Stage? If so, were any matters and/or concerns raised by the Welsh Government taken on board by the UK Government?

Question 3: Does the list of retained EU law to be revoked, as set out in the new Schedule amendment, include instruments in devolved areas?

Question 4: What is the Welsh Government's view of the list of retained EU law set out in the new Schedule amendment?

Question 5: To what extent did the Welsh Government and UK Government work together on the list of retained EU law in the new Schedule amendment?

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Powers in the Bill to restate, reproduce, revoke, replace or update have not been changed

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