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

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About this evidence

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

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

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

1. Introduction

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

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

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

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

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

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

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

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

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

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

The potential for and impact of regulatory divergence

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

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

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

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

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

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

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

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

The potential role of the Common Frameworks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 Capacity concerns

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

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

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

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

4 The scope of the new regulation-making powers and their scrutiny

4.1 The bill will transfer vast amounts of law-making powers from the legislatures to the executives with no meaningful scrutiny, consultation or impact assessment process – **this is constitutionally inappropriate regardless of the level of governance at which it takes place**. It undermines both the role of the Senedd and the democratic scrutiny role provided by wider civic society. Clause 12 (2) (b) would even allow Ministers to amend provisions of primary legislation using the already extreme powers in clause 15. Furthermore**, it will enable, either by intention or**

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[10] See the Financial Times report on 7 November 2022. Available here: https://www.ft.com/content/0c0593a3-19f1-45fe-aad1-2ed25e30b5f8

omission, Ministers to enact policy reform by inaction. It is unclear how, or even whether given the tight deadline, the intention to allow a piece of REUL to sunset would be communicated, let alone challenged.

4.2 Clause 15 is particularly egregious in two regards. Firstly, it is striking in the breadth of powers given to ministers who would be able to revoke and replace REUL with any alternative they consider 'appropriate'. Secondly, despite political reassurances, the tone and mechanisms of clauses 15(5) and 15(10) are clearly deregulatory.

a. Clause 15(5) would place a limitation on the Welsh Government's ability to use the delegated powers in Clause 15 to make any changes that could be interpreted as increasing the 'regulatory burden'.

b. Meanwhile, clause 15(10) establishes an incredibly broad (and open ended) definition of what can amount to a regulatory burden. This includes for example 'obstacles to efficiency, productivity, or profitability', 'financial cost' or even an 'administrative **inconvenience'**. It is unclear how differences in interpretation might be discussed and addressed around these definitions. What one authority considers a burden, another might consider a higher regulatory standard. This would effectively prevent regulatory standards being raised using these powers which, it is important to remember, are exercisable by the UK Government unilaterally in areas of devolved competence. Ordinary legislative processes could be used to re-establish or raise standards, however, there are concerns around legislative time, capacity, and the potential risk of entrenchment of any changes that might be introduced using these ministerial powers.