Y Pwyllgor Deddfwriaeth,
Cyfiawnder a'r Cyfansoddiad

Legislation, Justice and
Constitution Committee

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

14 December 2022

Dear Paul

Legislative Consent: Retained EU Law (Revocation and Reform) Bill

You will be aware that the UK Government has introduced to the UK Parliament the Retained EU Law (Revocation and Reform) Bill (the Bill). If passed, the Bill would set in motion the UK Government's plan to retain, revoke or reform thousands of pieces of retained EU law (REUL). It would also begin a countdown to 31 December 2023, when the majority of REUL will automatically expire unless Ministers take action to save or reform it. Of concern to us, as legislators, is the fact that the Bill would enable Ministers, rather than parliaments, to significantly alter the UK's regulatory and legal landscape.

My Committee has, for some time, been keeping a watching eye on the UK Government's plan for REUL, and we began asking questions of the Welsh Government some months ago.

With the laying of the Bill before the UK Parliament, and in anticipation of the Welsh Government bringing forward the likely necessary consent memorandum, my Committee agreed to seek the views of stakeholders both in Wales and across the UK. We sought views on a number of matters including to what extent the Bill might impact Wales' regulatory landscape; what role should the Senedd have in the revocation and reform of REUL in devolved areas; the Welsh Government's decision not to carry out its own assessment of REUL, including not forming its own view on what is devolved and what is reserved; and whether the Bill might introduce new limitations for the Welsh Government, which wants to improve pre-Brexit standards, where possible.

Enclosed are the submissions we received from Dr Gravey and Dr Whitten of Queen's University Belfast, the NFU Cymru, the RSPCA, the Food and Drink Federation Cymru, the Food Standards

Agency, the Marine Conservation Society, the Wales Governance Centre and Wales Council for Voluntary Action, and Professor Jo Hunt of Cardiff School of Law and Politics. We believe this evidence may be of interest to your Committee.

You will also be aware that the Welsh Government has now laid before the Senedd a legislative consent memorandum in respect of the Bill, and that my Committee has lead responsibility for scrutinising the memorandum.

At our meeting on Monday 5 December, we took evidence from Mick Antoniw MS, the Counsel General and Minister for the Constitution, in respect of the Bill and the Welsh Government's legislative consent memorandum. You may wish to note that the Counsel General repeated his concerns that the implementation of the Bill, should it be passed and enacted, has the potential to overwhelm the governments of the UK. You may also wish to note that concerns about implications for Senedd Business and for the Welsh Government's own legislative programme were also discussed.

I am writing to other Senedd Committees to draw attention to the evidence we received which falls within the remit and interests of their Committees.

Yours sincerely,

Huw Irranca-Davies
Chair

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

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

1. the Bill's impact in Wales

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NFU Cymru Consultation Response

To: The Senedd Legislation, Justice and Constitution Committee

Cc:

Date: 16th November 2022

Ref:

Contact:

Tel: [redacted]

Fax:

Email: [redacted]

Dear Committee

The Retained EU Law (Revocation and Reform) Bill

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

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

Regulation and agriculture

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Improving on pre-Brexit standards

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

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

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

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

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

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

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

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

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

Asiantaeth Safonau Bwyd
food.gov.uk
Food Standards Agency

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

E-bost / E-mail [redacted]

By email: seneddLJC@senedd.wales

18 November 2022

Ref: MC2022/00298

Annwyl Weinidog / Dear Mr Irranca-Davies

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

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

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

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

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

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SGÔR HYLENDID BWYD
FOOD HYGIENE RATING

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

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

Yn gywir

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

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FOOD HYGIENE RATING

food.gov.uk/ratings

Legislation, Justice and Constitution Committee response evidence REUL

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

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

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

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

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

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

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

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

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

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

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

[1] Possible link with Net Gain.

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

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

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

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

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

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

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

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

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

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

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

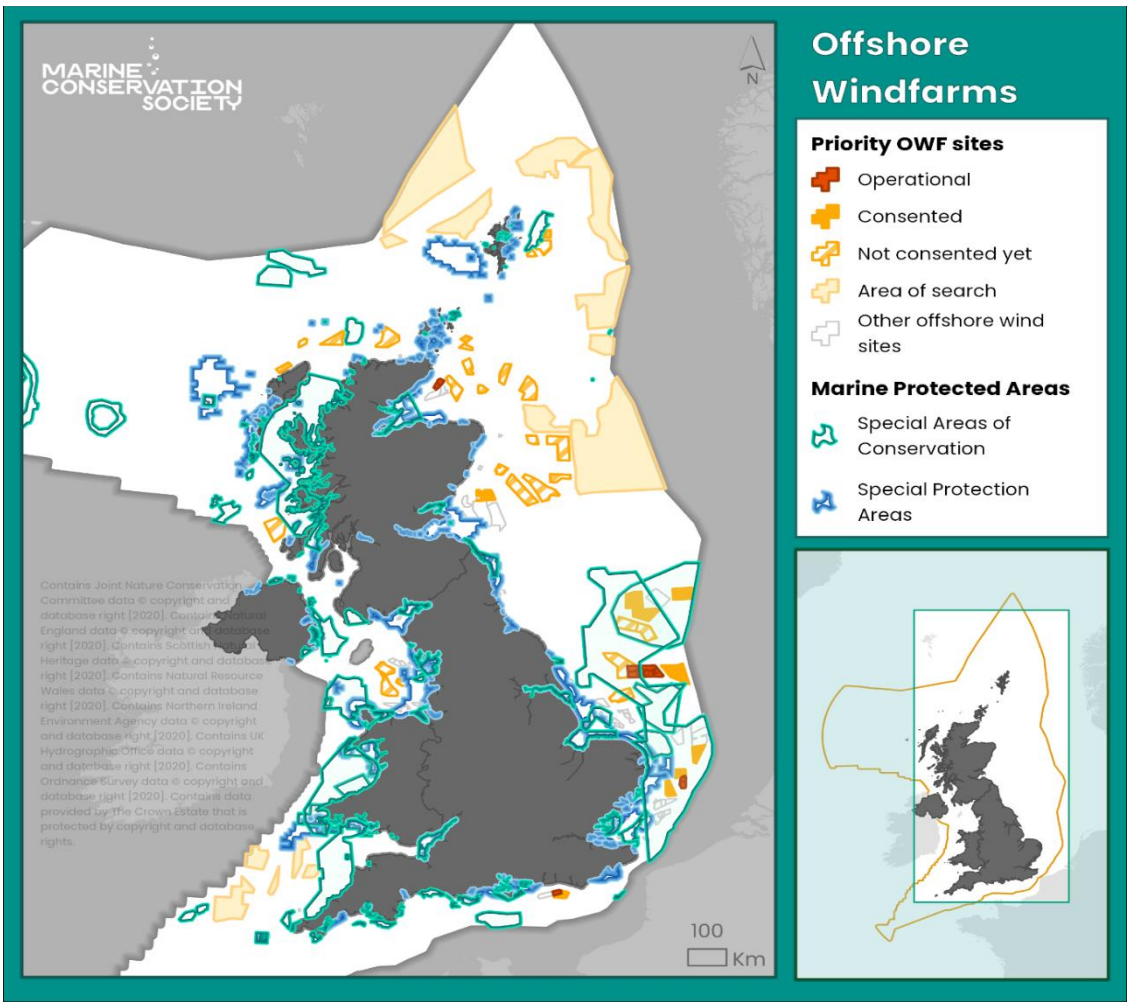
CASE STUDY: OFFSHORE RENEWABLES LICENSING

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

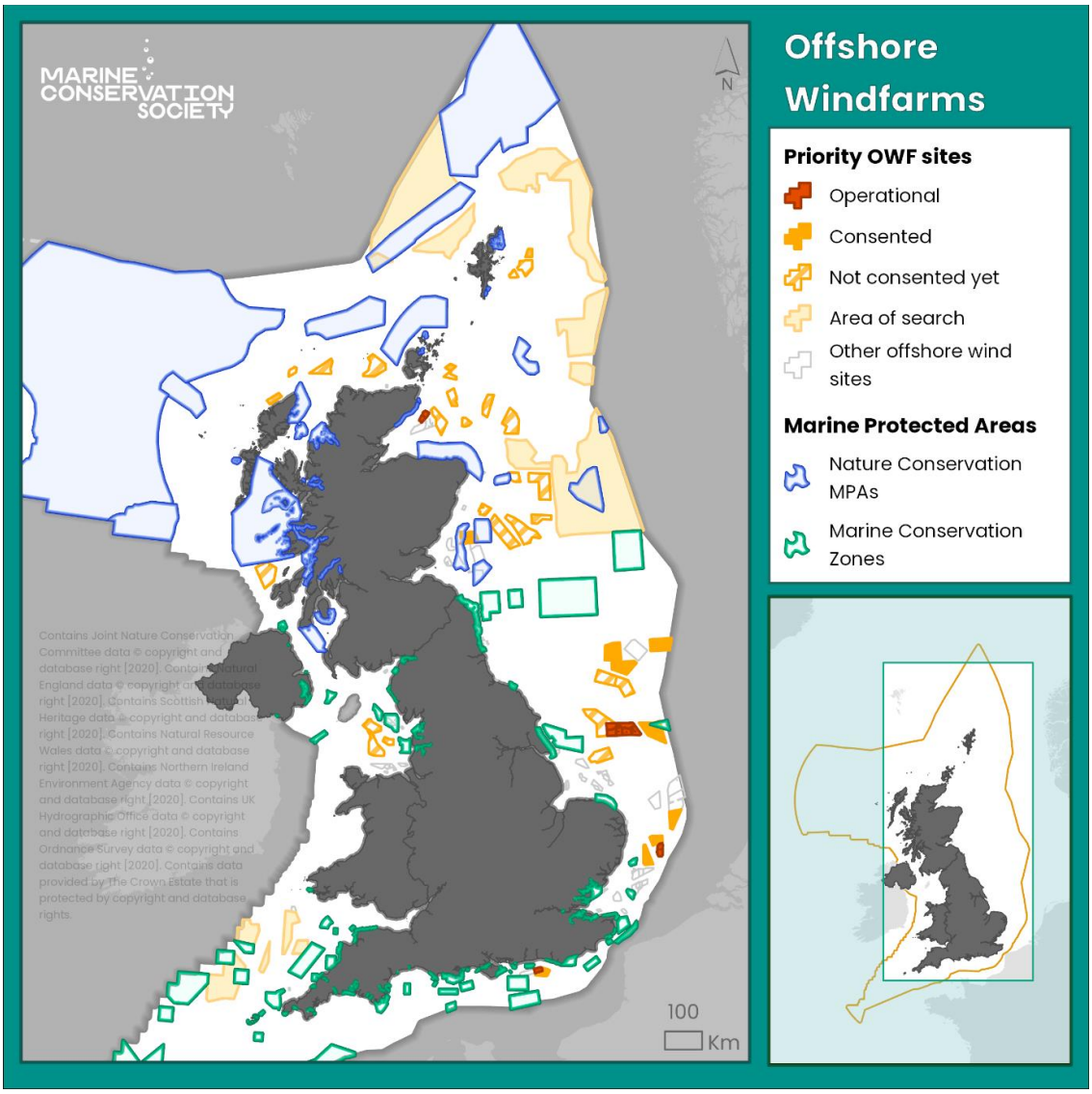
The development of offshore renewables to address climate change is essential, provided such developments *fully take into account the impacts on marine ecosystems and provide appropriate mitigation to eliminate or minimise to a negligible level such damage to these ecosystems.* Current technology enables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

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

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



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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

Examples of where existing powers could be strengthened;

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

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

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

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About this evidence

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

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

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

1. Introduction

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

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

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

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

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

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

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

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

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

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

The potential for and impact of regulatory divergence

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

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

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

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

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

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

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

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

The potential role of the Common Frameworks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 Capacity concerns

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

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

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

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

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

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

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

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

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

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

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

Retained EU Law (Revocation and Reform) Bill

Written Evidence for Legislation, Justice and Constitution Committee, Senedd Cymru/Welsh Parliament

Professor Jo Hunt, Cardiff School of Law and Politics, Wales Governance Centre

Please find my response to selected questions suggested in your call for evidence. I have focused my responses in particular on the constitutional consequences of the Bill and its impact on devolved competence. I would be happy to discuss any of these, and other issues raised by the Bill with the Committee.

The Bill's impact in Wales – General Comments:

The Retained EU Law (Revocation and Reform) Bill (hereinafter REUL Bill) is the most recent in a line of Westminster legislation dealing with the domestic legal and constitutional consequences of the UK's withdrawal from the European Union.

The Bill follows in the same vein as the EU (Withdrawal) Act 2018, and the UK Internal Market Act 2020 in that it provides new challenges to the effective operation of devolved competence, in part in the apparent pursuit of ensuring cross-UK regulatory consistency following the end of EU membership which brought with it a large body of common, harmonised (though not necessarily identical) regulation.

An additional aim appears to be to facilitate the pursuit of a deregulatory agenda, on which there may be different views across the Governments of the UK. Further the Bill seeks to limit regulation which creates obstacles to trade, which, if interpreted to mean intra-UK trade, could have significant repercussions for devolved regulatory competence.

The approach of the proposed legislation does nothing to support the more collaborative and cooperative intergovernmental modes of governance that might operate across the UK, i.e. through the common frameworks process. The frameworks process was introduced as a means of managing (which includes, where appropriate, accommodating) regulatory divergence. There is no acknowledgement in the Bill of the fact that the existing regulations that fall within the scope of the powers to restate, revoke or replace, may form part of a framework. Under the agreed process for the operation of frameworks however, any proposed change in policy and amendment to the law should be raised with the other governments. None of the powers under the Bill come with a trigger for the frameworks process to be engaged. The approach of the Bill risks undermining the frameworks process.

Additionally, the ideologically-driven commitment in the Bill to a sunset clause for retained EU law (except that transposed by Act of Parliament or the Senedd) places resource pressures on Welsh government departments, requiring them to work through the options of restating, replacing, or rejecting existing legislation, and up against a deadline not of their making. The Welsh Government's existing programme of government will not have taken into consideration the resources required for this exercise.

The Bill provides for concurrent powers for UK and Welsh Ministers to restate, revoke or replace the law within areas of devolved competence. The absence of any requirement to seek consent from Welsh Ministers (or the Senedd) before UK Government Ministers can exercise powers in areas of devolved competence is out of line with previous Brexit legislation, and appears anomalous, and without clear justification.

To what extent might the Bill impact Wales' regulatory landscape?

The operation of the powers under the Bill has the potential to generate a number of unwelcome impacts on Wales' regulatory landscape. The potential for *either* government to take actions that restate, revoke or replace existing regulations within devolved competence may create uncertainty, and complexity for those seeking to navigate the statute book applying to Wales.

Further, any attempt to that the Welsh Government may make to improve pre-Brexit standards will engage the requirement in clause 15 (5) that any replacement regulation does not increase the regulatory burden – which is defined in clause 15 (10) as including (among other things)— (a) a financial cost; (b) an administrative inconvenience; (c) *an obstacle to trade* (my emphasis) or innovation; (d) an obstacle to efficiency, productivity or profitability; (e) a sanction (criminal or otherwise) which affects the carrying on of any lawful activity.

This formulation differs from the definition of burden in the Legislative and Regulatory Reform Act 2006, as the Bill includes 'an obstacle to trade' – which might be read as a limitation on the exercise of competence where this may result in regulatory divergence that may impact on intra-UK trade flows. Importantly, if it is interpreted in this way, this would go further than the already problematic UK Internal Market Act, which impacts the effects but not legal capacity to regulate.

The Bill ties the devolved governments to an agenda that has been set elsewhere, cutting into the operation of devolved competence, regardless of policy commitments the Welsh Government might have made.

The Bill should be amended to provide either for the removal of UK Government ministerial powers within areas of devolved competence, or for a consent requirement by at least the Welsh Government for the exercise of these powers. Further, the 'impact on trade' provision in clause 15(10) should be removed, or more broadly the requirement that the regulatory burden is not increased should be excluded from applying to law making by the devolved legislatures and ministers, within devolved competence.

Implications arising from the potential deadlines introduced by the Bill

The initial deadline for action before the operation of the sunset revoking existing retained (and subsequently, assimilated) EU law is set at 'the end of 2023' (Clause 1(1)). This may be extended, to the end of 2026, but the Bill only gives this power to extend to a UK Minister (Clause 2). There is no clear justification why that power is not also given, for law within devolved competence, to Welsh Government ministers.

The date selected for the operation of the sunset does not appear to have been reached on the basis of the feasibility of the task at hand. The true extent of retained EU law within the UK

legal order is a live question, and there is further a lack of detail about measures falling within devolved competence. Against this background, there is an understandable concern that legislation may be sunsetted inadvertently, due to a lack of knowledge.

If a sunset clause is to be incorporated, then it should reflect a more realistic time scale, and should also apply only to positively identified measures, to avoid unforeseen gaps with possible unexpected consequences.

Professor Jo Hunt
Cardiff, November 2022.