

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution



Llywodraeth Cymru
Welsh Government

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

16 February 2023

Dear Huw,

Retained EU (Revocation and Reform) Law Bill

You will recall that the Welsh Government has very serious concerns about this Bill, as set out in the Legislative Consent Memorandum of 3 November and my most recent letter of 19 January to the Committee. For information I attach a letter that I have sent today to certain members of the House of Lords, setting out amendments that might mitigate some of our concerns on the Bill, at least to an extent. Of course, the Bill would remain very problematic even with such changes, as its essential motivation and construct are flawed.

I hope that sharing this letter is of use, and I would welcome an early meeting with you as Chair, after the half term recess, to discuss latest developments on this fast-moving issue.

Yours sincerely,

Mick Antoniw AS/MS
Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution

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

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



Ein cyf/Our ref: CG/PO/54/2023

16 February 2023

Dear Baroness Bloomfield of Hinton Waldrist,

In the meeting last month relating to the Welsh Government's position on UK Bills, to which you were invited, I indicated that the Welsh Government has very serious concerns on many aspects of the UK Government's Retained EU Law (Revocation and Reform) Bill.

The concerns are significantly about the jeopardising of fundamental protections across the UK in fields such as the environment, employment, food standards, animal welfare and consumer issues. They also relate to fundamental constitutional matters around respect for the devolution settlement, the functioning of the statute book, and conferring powers in devolved areas on UK Government Ministers without the consent of devolved Ministers and legislatures.

The Welsh Government set out our concerns in the Legislative Consent Memorandum submitted to the Senedd on 3 November 2022¹, with a recommendation that the Senedd withholds its consent for the Bill. We know that our concerns are shared by many businesses, trade unions, voluntary sector organisations, environmental NGOs, legal commentators, and academics.

As I mentioned during the discussion in January, our concerns in relation to this Bill are also shared by the Scottish Government. In this context you may have seen that the Scottish Government has published a number of potential amendments to the Bill that seek to mitigate some of its worst impacts². In the context of our mutual concerns on the Bill, we have – with the agreement of the Scottish Government – extended these potential amendments to also cover Wales. A copy of the amendments is annexed to this letter. I hope that sharing these is of use ahead of the forthcoming stages of scrutiny of the Bill in the House of Lords. We would welcome your assistance in seeking changes of this nature to the Bill, which would at least go some way to addressing our concerns with the Bill.

I should note that the attached amendments do not cover specific points raised in relation to the Law Officers, because the role of the Lord Advocate in Scotland is significantly different

¹ [LEGISLATIVE CONSENT MEMORANDUM \(senedd.wales\)](https://www.senedd.wales/legislative-consent-memorandum)

² <https://www.gov.scot/publications/retained-eu-law-bill-letter-to-uk-gov-february-2023/>

from that of the Counsel General in Wales, and so amendments would need to be cast differently as regards Wales. However, we continue to believe that the proposed powers for UK Law Officers should be broadened such that all matters, even those which are reserved but that have an effect in devolved areas, can be referred.

I have also attached a note outlining our concerns more broadly on the UK Government's legislative programme and the Sewel Convention, updating on the discussions at the meeting in January. This includes our position on specific UK Government Bills where the Senedd has refused legislative consent, or where the Welsh Government is not able to recommend that the Senedd gives consent, to the Bill as currently drafted.

I remain deeply grateful for your interest in the constitutional and devolution implications of the UK Government's legislative programme, and I thank you in advance for any assistance that you might be able to provide in relation to the UK Government's Retained EU Law (Revocation and Reform) Bill, and the other Bills referred to in the accompanying note.

Yours sincerely,

A handwritten signature in blue ink, reading "Mick Antoniw". The signature is written in a cursive style with a horizontal line underneath the name.

Mick Antoniw AS/MS

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

Retained EU Law (Revocation and Reform) Bill – Devolution Related Amendments¹

The amendments set out below illustrate how some of the serious concerns on the Retained EU Law (Revocation and Reform) Bill and its effect on devolution could be mitigated, at least to some extent.

The amendments cover four broad areas:

- The Sunset of Retained EU Law: within which four potential options are outlined:
 - Option 1: Remove the sunset in clause 1 from the Bill entirely (Amendments 2, 3 and 4);
 - Option 2: Remove devolved areas from the sunset in clause 1 from the Bill (Amendment 1);
 - Option 3: Keep the sunset but move it to a later date and enable the Scottish or Welsh Ministers to extend it in respect of their devolved areas (Amendments 5, 6, 7 and 9); and
 - Option 4: Enable the Scottish and Welsh Ministers to extend the sunset date in clause 1 (Amendment 8).
- Powers conferred on UK Ministers in Devolved Areas: ensuring UK Ministers can use concurrent powers in devolved areas only with the consent of the Scottish or Welsh Ministers respectively (Amendment 10);
- Scope of powers: addressing concerns that Ministers would have powers to make wholesale changes by secondary legislation to subject areas currently governed by retained EU law (Amendment 11); and
- Consequential amendment powers: Conferring equivalent consequential amendment powers on the Scottish and Welsh Ministers as the Bill provides for UK Ministers (Amendments 18 and 19).

Potential Amendments to the Retained EU Law (Revocation and Reform) Bill

LORD SPONSOR

1

Clause 1, page 1, line 6, at end insert—

- “(1A) Subsection (1) does not apply to an instrument, or a provision of an instrument, that—
- (a) would be within the legislative competence of the Scottish Parliament if it were contained in an Act of the Scottish Parliament,
 - (b) could be made in subordinate legislation by the Scottish Ministers, the First Minister or the Lord Advocate acting alone.

¹ There are no amendments numbered 12 to 17 in this document in order to ensure alignment with the numbering in the equivalent amendments which have been proposed in relation to Scotland.

(c) would be within the legislative competence of Senedd Cymru if it were contained in an Act of Senedd Cymru (ignoring any requirement for consent of a Minister of the Crown imposed under Schedule 7B to the Government of Wales Act 2006), or

(d) could be made in subordinate legislation by the Welsh Ministers acting alone.”

Explanatory statement

This amendment restricts the automatic revocation or “sunsetting” of EU-derived subordinate legislation and retained direct EU legislation under clause 1 of the Bill so that it does not apply to legislation that is within Scottish or Welsh legislative or executive competence.

—

LORD SPONSOR

2

Leave out Clause 1

Explanatory statement

This amendment, together with amendment 3, leaves out the automatic revocation or “sunsetting” of EU-derived subordinate legislation and retained direct EU legislation.

—

LORD SPONSOR

3

Leave out Clause 2

Explanatory statement

This amendment, together with amendment 2, leaves out the automatic revocation or “sunsetting” of EU-derived subordinate legislation and retained direct EU legislation.

—

LORD SPONSOR

4

Leave out Clause 3

Explanatory statement

This amendment leaves out the automatic repeal or “sunsetting” of EU rights, powers liabilities etc retained under section 4 of the European Union (Withdrawal) Act 2018.

LORD SPONSOR

5

Clause 1, page 1, line 4, leave out “2023” and insert “2026”

Explanatory statement

This amendment, together with amendment 6, changes the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation would take effect to the end of 2026.

LORD SPONSOR

6

Clause 2, page 2, line 12, leave out “2023” and insert “2026”

Explanatory statement

This amendment, together with amendment 5, changes the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation would take effect to the end of 2026.

LORD SPONSOR

7

Clause 2, page 2, line 19, leave out “2026” and insert “2029”

Explanatory statement

This amendment changes the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation may be extended to, up to a final deadline of 23 June 2029.

To move the following clause—

“Extension of sunset under section 1 by Scottish or Welsh Ministers

(1) The Scottish Ministers may by regulations provide that section 1, as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b), has effect as if the reference in section 1(1) to the end of 2023 were a reference to a later specified time.

(2) The Welsh Ministers may by regulations provide that section 1, as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b), has effect as if the reference in section 1(1) to the end of 2023 were a reference to a later specified time.

(3) In subsections (1) and (2) “specified” means specified in the regulations.

(4) Regulations under subsection (1) or (2) may not specify a time later than the end of 23 June 2026.”

Explanatory statement

This amendment would give the Scottish Ministers and the Welsh Ministers a power to extend the sunset date for devolved retained EU law, equivalent to that conferred on a Minister of the Crown by Clause 2 of the Bill. It confers powers on the Scottish Ministers and the Welsh Ministers to modify the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation may take effect, to a date no later than 23 June 2026. As a result of Schedule 3 this power is exercisable only within devolved competence.

To move the following clause—

“Extension of sunset under section 1 by Scottish or Welsh Ministers

(1) The Scottish Ministers may by regulations provide that section 1, as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b), has effect as if the reference in section 1(1) to the end of 2026 were a reference to a later specified time.

(2) The Welsh Ministers may by regulations provide that section 1, as it applies in relation to a specified instrument or a specified description of legislation within section 1(1)(a) or (b), has

effect as if the reference in section 1(1) to the end of 2023 were a reference to a later specified time.

(3) In subsections (1) and (2) “specified” means specified in the regulations.

(4) Regulations under subsection (1) or (2) may not specify a time later than the end of 23 June 2029.”

Explanatory statement

This amendment is similar to amendment 8 except that it permits the extension of the sunset to 2029 rather than 2026. It confers powers on the Scottish Ministers and the Welsh Ministers to modify the date that the revocation of EU-derived subordinate legislation and retained direct EU legislation may take effect, to a date no later than 23 June 2029. As a result of Schedule 3 this power is exercisable only within devolved competence.

—

LORD SPONSOR

10

Schedule 4, page 39, line 38, at end insert—

“Consent of Scottish Ministers or Welsh Ministers

[] A Minister of the Crown must obtain the consent of the Scottish Ministers before making regulations to which this Part of this Schedule applies, if the regulations contain a provision that—

(a) would be within the legislative competence of the Scottish Parliament if it were contained in an Act of the Scottish Parliament, or

(b) could be made in subordinate legislation by the Scottish Ministers, the First Minister or the Lord Advocate acting alone.

[] A Minister of the Crown must obtain the consent of the Welsh Ministers before making regulations to which this Part of this Schedule applies, if the regulations contain a provision that—

(a) would be within the legislative competence of Senedd Cymru if it were contained in an Act of Senedd Cymru (ignoring any requirement for consent of a Minister of the Crown imposed under Schedule 7B to the Government of Wales Act 2006), or

(b) could be made in subordinate legislation by the Welsh Ministers acting alone.”

Explanatory statement

This amendment modifies the powers which are conferred on Ministers of the Crown in devolved areas so that they may only be exercised with the consent of the Scottish Ministers and the Welsh Ministers.

—

LORD SPONSOR

11

Leave out Clause 15

Explanatory statement

This amendment leaves out clause 15 of the Bill, on powers to revoke and replace secondary retained EU law, in its entirety.

—

LORD SPONSOR

18

Clause 6, page 4, line 34, at end insert—

“(6A) The Scottish Ministers may by regulations make provision amending an enactment in consequence of the name of a thing being changed by subsection (1) (including by virtue of regulations under section 19).

() The Welsh Ministers may by regulations make provision amending an enactment in consequence of the name of a thing being changed by subsection (1) (including by virtue of regulations under section 19).”

Explanatory statement

This amendment would give the Scottish Ministers and the Welsh Ministers a power to make regulations to amend legislation in consequence of the change in terminology from “retained EU law” to “assimilated law” made by clause 6. This would be equivalent to the existing power for Ministers of the Crown in clause 19 read in conjunction with clause 6(6).

—

LORD SPONSOR

19

Clause 22, page 23, line 39, at end insert—

“() The Scottish Ministers may by regulations make such transitional, transitory or saving provision as they consider appropriate in connection with—

- (a) the coming into force of any provision of this Act,
- (b) the revocation of anything by section 1, or
- (c) anything ceasing to be recognised or available in domestic law (and, accordingly, ceasing to be enforced, allowed or followed) as a result of section 3.”

() The Welsh Ministers may by regulations make such transitional, transitory or saving provision as they consider appropriate in connection with—

- (a) the coming into force of any provision of this Act,
- (b) the revocation of anything by section 1, or
- (c) anything ceasing to be recognised or available in domestic law (and, accordingly, ceasing to be enforced, allowed or followed) as a result of section 3.”

Explanatory statement

This amendment would give the Scottish or Welsh Ministers a power to make transitional, transitory or saving provision in consequence of the coming into force of the Bill: including in consequence of the revocation of retained EU law provided for in clause 1 of the Bill, and any gaps in domestic law within the Scottish or Welsh Ministers’ devolved competencies that occur as a result. This would be equivalent to the power for UK Ministers in clause 22(4) of the Bill.

Overview of Welsh Government positions on UK Primary Legislation

1. **The UK Government's legislative programme is significant for the Welsh Government and for Wales:**
 - a. Bills on non-devolved matters often apply to Wales and in many cases have a significant impact on our economy or the wellbeing of people in Wales.
 - b. Bills relating to devolved matters necessarily impact very directly in Wales and, as a matter of constitutional principle, also require the consent of the Senedd in line with the Sewel Convention (that is, that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Senedd).
2. The Welsh Government has serious concerns about UK Government's adherence to principles of devolution and its compliance with the Sewel Convention and with effective inter-governmental working.
3. **Effective engagement** by UK Government with Welsh Government is one of the biggest obstacles to the smooth operation of the current legislative consent process. Whilst there have been some positive experiences, the position generally is one of poor engagement. This places significant constraints on our ability to consider legislation in a timely manner, as well as the ability of the Senedd to scrutinise legislation. Whilst there have been some improvements more recently by UK Government, the lack of engagement prior to the introduction of the Strikes (Minimum Service Levels) Bill is an unfortunately familiar example.
4. The number of occasions where the UK Government did not respect the **Sewel Convention** in recent Parliamentary sessions is unacceptable and completely unjustified by circumstances. We believe that the Sewel Convention needs codification. At the very least, UK Government should set out the decision-making process they go through when they come to a decision to that a situation is 'not normal'.
5. **In this current session, several specific Bills give cause for concern.** The Senedd has refused consent to the Northern Ireland Protocol Bill, the Genetic Technology (Precision Breeding) Bill, and the Trade (Australia and New Zealand) Bill. Whilst the Senedd has not yet voted and these are ongoing issues, Welsh Government has also currently recommended consent be withheld in relation to the Levelling-up and Regeneration Bill and the Retained EU Law Bill. Our detailed position in relation to each of those Bills can be found in the relevant legislative consent memoranda. We have not yet laid a memorandum for the Bill of Rights but have similarly set out our public opposition to the Bill. We have laid a Legislative Consent Memorandum for the Strikes (Minimum Service Levels) Bill and recommended consent be withheld.

6. At the briefing session on 9 January, I set out an overview of my concerns relating to **the Retained EU Law Bill** the main aspects of which are set out in the letter to which this is an annex, and the Legislative Consent Memorandum referred to therein.
7. **Concurrent powers** – that is, powers which confer the ability to make secondary legislation on both Welsh Ministers and UK Ministers – should not be created in devolved areas. They do not reflect, or respect devolution – they give UK Government powers to act in areas which Parliament has determined are devolved. As a result, they fundamentally change the devolution settlement and the Senedd’s legislative competence. However, as seen in the Retained EU Law Bill amongst other Bills, the UK Government have demonstrated a worrying trend in their reliance on concurrent powers. In limited circumstances, concurrent powers might be acceptable; but that is only the case if the ability of a UK Minister to exercise the power in Wales is subject to the consent of the Welsh Ministers.

Access to Welsh Government and Senedd detailed positions on UK Bills

8. The Senedd’s [website](#) hosts a ‘legislative consent’ page⁽¹⁾ containing the Welsh Government’s legislative consent memoranda, and Senedd Committee reports relating to UK Bills. Our legislative consent memoranda include commentary on whether Bills make appropriate provision for Wales, and as such provide detailed information on areas of concern and engagement between Welsh Government and UK Government. Members may find this information useful when seeking to take part in debates, raising questions and scrutinising the impact of UK Government Bills on Wales.

⁽¹⁾ <https://senedd.wales/senedd-business/legislative-consent/>