

Mick Antoniw AS/MS

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

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



Llywodraeth Cymru
Welsh Government

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

02 June 2023

Dear Huw,

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

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

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

Gohebiaeth.Mick.Antoniw@llyw.cymru
Correspondence.Mick.Antoniw@gov.Wales

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

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

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

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

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

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

Mick Antoniw AS/MS

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

ANNEX

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

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

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

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

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

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

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

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

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

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

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

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

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

Please see the response to Question 4

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Concurrent powers remain in the Bill

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

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

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

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

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

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

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

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

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

General matters

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

The SLCM laid on 26 May outlines the Welsh Governments general view of the Bill.

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

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

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

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

The Welsh Government was not consulted.

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

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

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

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

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

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