

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
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19 January 2023

Dear Huw,

Thank you for your letter of 14 December seeking responses to questions following my appearance on 5 December in relation to the Retained EU Law (Revocation and Reform) Bill. We are grateful to the Committee for its dedicated work to consider the implications of this Bill.

The responses to your questions are set out in an Annex to this letter. However, to contextualise these correctly, I would like to make two important and fundamental observations that the Committee might wish to consider in its work on the Bill.

Firstly, the Welsh Government fundamentally opposes the whole intent of the Bill. In general, our position is that retained EU law, like EU law before it, works well. Consequently, beyond gradually amending the law as appropriate with evidence-gathering, public consultation, and legislative scrutiny in the normal way, over time as with any body of law, we had no intention to repeal, revoke or amend REUL to an arbitrary deadline on ideological grounds. However, simply to propose legislation such as this that, by default, would repeal essential economic, social and environmental protections is unacceptable and irresponsible. This is especially true because of the use of valuable time by governments and legislatures when a good deal of this work will be merely to maintain in law those essential provisions that the Bill would otherwise automatically remove. This nugatory work has no demonstrable benefit to anyone and is a regrettable use of finite resource in both the Welsh

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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.

Government and the UK Government, caused by the decisions made by UK Government Ministers.

Secondly, the Bill is essentially an enabling Bill and its full implications will be influenced by policy choices of UK Government Ministers about which pieces of legislation should be retained, amended, or left to sunset. Unless and until that detailed information is provided, we are all working in a very uncertain situation, with the obvious attendant difficulties that that causes both for the Welsh Government, and for your Committee in a scrutiny role. I hope we can continue to engage collaboratively in dealing with this Bill in these regrettable circumstances, recognising our distinctive institutional roles but also common interests in relation to the integrity of the devolution settlement.

Yours sincerely,

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

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ANNEX

Wales-made REUL

- 1. You told us that the Welsh Government's focus "has got to be firstly to ensure that we analyse and retain our own EU retained law, that we focus on that law that's been made within Wales" (RoP, 242). Has that analysis been completed? If not, what is your target date for its completion?**

We are working to have a settled list of this REUL as soon as we are able to do so. This is a complex task and we will be happy to update your Committee on progress.

Reviewing REUL

- 2. You and your officials said that Welsh Government policy teams are working closely with their Whitehall counterparts to analyse spreadsheets of data prepared by those Whitehall departments "to see whether [you] agree with that analysis" (RoP, 242 to 254). What is the target date for the completion of that work?**

While we have received some information from the UK Government this is not comprehensive. We are continuing to receive this in something of a piecemeal fashion but are considering and assessing it as we receive it. We hope to have a more complete picture in the near future so that we can conduct a proper assessment of it.

Welsh Government's approach

- 3. Has the Welsh Government had any reassurance from the UK Government that it will not change or remove devolved REUL without the consent of the Welsh Government? If so, does the UK Government intend to amend the Bill to reflect this commitment?**

We remain in dialogue with the UK Government on this issue, but still await the necessary reassurance.

- 4. You told us that "if you don't take measures to be able to identify and understand what it is you want to retain, then everything else is going to go." (RoP, 295). You also told us that you have not yet decided on your approach to retaining REUL but that you want to "make sure that [the Welsh Government] focus on those areas that are most important to us".**

- a. Can you therefore confirm that you do not intend to save all REUL in devolved areas?**
- b. On what basis will you decide which areas are most important to the Welsh Government?**
- c. Can you tell us which areas these are, or if not, when you will be able to tell us?**
- d. What are the risks to the areas deemed not important or less important and how have they been determined?**

- e. How will you mitigate and manage the risks associated with this, particularly if you are not carrying out your own impact assessment (RoP, 256)?**

It is not our intention to allow REUL in devolved areas to come to an end, unless there are very good reasons for this to take place. However, as a matter of good governance, our final position on specific instruments will need to take into account what the UK Government decides in relation to existing REUL for England; or in relation to existing REUL on reserved matters that impacts on devolved matters in Wales. Where the UK Government wishes to review any piece of REUL that impacts on a devolved matter, we would expect the UK Government to work collaboratively and pro-actively with us on this.

Further to this our ambition is to retain all REUL pertaining to Wales, subject to the caveat above.

- 5. You told us that you may adopt a “triage approach”, where you try to “identify those that are most obviously relating to devolved issues that may be the most important issues, rather than technical issues, so that we make sure we focus on those areas that are most important to us” (RoP, 277). What do you mean by “technical issues”?**

We await a mature and comprehensive list of REUL, and statements of policy intent regarding REUL instruments, from the UK Government. Given the complexity of the interrelationships between and within REUL across the UK, knowledge of the detail of the UK Government’s intentions will help to inform our analysis of the pieces of REUL that could be retained without creating complexities (and so require a technical piece of work to preserve them but no more), and those which require a more substantive consideration of whether we should retain them and how, for example because the UK Government is proposing to repeal or amend them in relation to England or in relation to reserved matters that impact on devolved matters in Wales.

- 6. You told us that you think the Bill has created a great deal of uncertainty for the Welsh Government. However, stakeholders have accused you of ‘fuelling’ / exacerbating this by not clearly setting out your approach. To what extent could the Welsh Government reduce this uncertainty?**

- 7. What will the Welsh Government do to reassure stakeholders of its overall strategy in relation to REUL and about the steps it is taking to address their concerns?**

Regarding Questions 6 and 7, as set out in the covering letter, the Bill is a UK Government initiative with which we do not agree. It is its commitment to the Bill, without clarity on what will happen to each piece of legislation, which is creating the uncertainty. Our ability to mitigate that for stakeholders in Wales is very limited until we have that clarity from the UK Government. We plan to engage with both the Senedd, and with stakeholders, on this work.

- 8. You told us “We will want to retain law and not see any diminution of standards. So, we will want to ensure that we retain those standards out of**

this.” (RoP, 277) How will you maintain or improve standards if they are weakened or reduced under the Bill, either by omission or by action taken by the UK Government?

The Welsh Government’s position is clear as above at Question 4: We have no desire or intention to repeal, or allow to end through the Bill, any REUL that applies to Wales and is within devolved competence, unless there are very good reasons for this to take place. However, as outlined above, the issue of cross-border divergence means that we will want to take into account the UK Government's position and intentions when making our decisions regarding the implications for Wales in certain policy areas of taking particular approaches.

Saving REUL

9. You said “The complexity comes in knowing the scale of what we're going to do. If, for example, in a whole large area of these 3,800-plus pieces of legislation, the UK Government equally decides that what they should do is retain a large number of them, then that actually solves part of that problem. It solves part of that problem and it makes it a lot easier to manage those areas that have not been retained.”

a. This suggests to us that the Welsh Government will defer decision-making and action to the UK Government to make regulations. Is this correct? Do you have concerns for what this approach means for Wales, including the Senedd?

Our preference is to maintain all REUL that applies to Wales, unless there are very good reasons not do this. Broadly, if the UK Government maintains a piece of REUL for England, then we will very likely do the same in relation to devolved matters in Wales. The mechanics by which this would be achieved will also need to be considered.

b. Will the Welsh Government wait to see what the UK Government saves and subsequently decide what it may need to save itself?

As stated in answer to a. above, our preference is to maintain all REUL that applies to Wales, unless there are very good reasons not do this. However, if the UK Government decides to change REUL on the English side of the border, there are complex policy decisions to be made. Each of these areas of change to the status quo initiated by the UK Government would require a proper assessment of the economic, social and environmental implications and risks for Wales. Similar considerations will need to be made in relation to proposed UK Government changes to reserved legislation that impacts on devolved matters in Wales.

Amendments

10. In addition to the single amendment to the Bill we know you have requested (in relation to the Welsh Ministers having the ability to extend the sunset date up to 23 June 2026), you said that you would be “encouraging changes to be made that give us the guarantees that we have sought” and you specifically

mentioned concurrent powers in the Bill and the powers of the law officers in devolved Governments (RoP, 285). You also said that the Welsh Government would “do the normal things in terms of briefings, in terms of discussions, in terms of engagement with the UK Government and interested parties, who will all make their own representations” (RoP, 289).

- a. What specific changes to the Bill are you seeking?
- b. Can you confirm that you have made formal requests to the UK Government and, if not, when will you do so?
- c. Why are your suggested changes not detailed in your LCM, which only lists one amendment put forward, for consideration by this Committee and wider Senedd?
- d. You said that we can expect the Welsh Government to put forward further amendments and that you have set these out. When will the Senedd have the opportunity to scrutinise these?
- e. You mention that an option available to the Welsh Government is to rely on others to bring forward amendments which reflect your position rather than acting collaboratively. Could you provide more information on this and confirm who the “others” might be?

We have engaged with the UK Government over several months on the concerns that we have with the Bill. As set out in the Legislative Consent Memorandum, these include not only who can exercise the power to extend the sunseting deadline but also the issue of consent for the exercise of concurrent powers by UK Government Ministers in devolved areas, the sunseting deadline itself, the regulatory burden and the intervention and reference powers exercisable by the Law Officers within the UK. We have sought changes to the Bill on all these matters. We have raised these concerns in correspondence with the lead UK Ministers for the Bill, in Ministerial meetings and in my written response to the Public Bill Committee on the Bill, with the objective of having them addressed through amendments.

While we have hoped for progress and for common sense to prevail, UK Government Ministers have yet to give us reassurance that they are willing to make changes to the Bill to address our concerns.

Alongside seeking to secure changes to the Bill from UKG, the Bill was among those topics discussed with members of the House of Lords last week.

11. Under clause 15 of the Bill, Ministers will be prevented from increasing the regulatory burden when revoking or replacing REUL. You described this as a “constraint that is totally unacceptable” (RoP, 269). Why have you not, therefore, requested an amendment to remove this constraint from the Bill?

Please see the answer to question 10 above.

12. You have previously commented on the enormous powers that will be given to Ministers via this Bill. You told us that these are “powers that, in normal circumstances, you would not wish to give to governments”. You also said “it’s not a question of whether we want them; we will probably have no choice because if we want to do anything about retaining legislation that maintains

standards and so on, things that we agree with them in devolved areas, then we're going to have to exercise them” (RoP, 291). Have you requested that the Bill be amended to uplift the scrutiny procedures attached to the powers if and when they are exercised by the Welsh Ministers?

As noted above, we have strongly expressed our concerns about the Bill to the UK Government. However, if passed as drafted we will have to exercise the powers conferred on the Welsh Ministers in order to make decisions about REUL in devolved areas, where possible, as part of our work to defend the devolution settlement. However, the Legislative Consent Memorandum sets out our concerns that the sunset provision will mean that parliament and the devolved legislatures will have no scrutiny or oversight role where REUL is allowed to sunset automatically and will likely not provide sufficient time for effective consultation on proposed modifications to REUL, which could result in unidentified issues and potential negative impacts, for example on protected groups.

Divergence and disputes

13. Have you identified any areas where you have policy intentions which diverge from those of the other governments of the UK?

Since the detailed and comprehensive policy intentions of the UK Government in any given area are either not yet clear or are just emerging, it is not possible to give a definitive answer to this at this stage.

14. When we asked you how disputes could be resolved you told us that the new inter-governmental process that has been established “is probably not going to be particularly ideal process” and “It may be that you can create something specifically to try and resolve those disagreements” (RoP, 279).

- a. Can you clarify why the recently created structures for intergovernmental dispute resolution would not be the appropriate structures to use to resolve any disputes in this area?
- b. Can you confirm that, where relevant, disputes would go through the relevant common framework process in the first instance?
- c. Given the need for timely action because of the 31 December 2023 sunset date, how realistic is it that a new dispute resolution process could be created?

We will always reserve the right to escalate issues within the Dispute Avoidance and Resolution procedure agreed following the joint Review of Intergovernmental Relations (IGRR), wherever it becomes appropriate to do so. The resolution process in the IGRR should be seen as part of a much wider system of active IGR, and as a process of last resort. This is embedded into the machinery it sets up – it is agreed that machinery should “promote dispute avoidance by ensuring there are effective communication and governance structures at all levels, from working-level officials to ministers”. As you will know, the Dispute Avoidance arrangements are without prejudice to the legal provisions within the devolution settlements which govern matters relating to legislative competence. We would always need to consider the

appropriate forum to which to take our concerns, particularly where there is a dispute as to whose competence a piece of legislation is within.

Common Frameworks will play some part in elements of dispute resolution related to REUL, though the timescale available to undertake this work will massively impact the ability to engage fully in this process, along with the fact that not all areas of REUL are covered by a Common Framework.

The current sunseting deadline means it is unrealistic that a suitable dispute resolution process could be created in time to service the process appropriately. This is the responsibility of the UK Government, not the Welsh Government.

Capacity and resource

15. The First Minister told the Scrutiny of the First Minister Committee on 9 December that, as the Welsh Government has no spare capacity, “diverted capacity” will be needed away from its legislative programme to work on the Bill. Given the First Minister's comments, when will decisions be taken about when and where resources will be diverted, and will you commit to updating the Senedd as soon as decisions are made?

16. You told us that the Welsh Government wants to deliver its legislative programme but there was uncertainty around the demands the Bill will place on resources. Are you coordinating Cabinet discussions regarding your concerns about delivery of the legislative programme?

Regarding Questions 15 and 16, for the reasons set out above, it is not possible to assess fully the scale of the impact on the legislative programme until we know the detail of the UK Government's plans for REUL as it applies in England, particularly the extent to which it intends to amend this body of law.

Discussions on this matter will continue between Ministers as the situation develops as will our liaison with the Senedd on the legislative programme.

Impact and role of the Senedd

17. You also said “I think one thing is clear: it makes the sort of detailed scrutiny and the timescale for that scrutiny incredibly difficult” and “we have to look at how that will work”. You told us that there is “going to be a need for very close co-operation between the Government and the Senedd in terms of an understanding as to precisely what is required, what is happening and how we best manage that. It's not just an issue for the Welsh Government; obviously, it's an issue for the Senedd itself, in terms of how it scrutinises and assesses those steps as well” (RoP, 307).

- a. How will the Welsh Government maximise the scrutiny opportunities afforded to the Senedd?
- b. How will the Welsh Government involve the Senedd in determining what is required as a consequence of the Bill?

In general, it is premature to answer this question with complete precision as we are again seeking comprehensive information from the UK Government about its decisions.

I would expect the Senedd to have the opportunity, in the normal way, to scrutinise any proposals regarding REUL. We will engage with the Senedd on this.

The task of determining what is required is difficult to quantify, or to identify precisely. I would expect Ministers to keep the Senedd informed by way of Ministerial Statements once the task is clearer.

18. You did not confirm to us that you are liaising with the Llywydd and the Business Committee regarding the potential impact on the Senedd's timetable. Could you confirm that discussions are taking place? If not, is the Welsh Government waiting on clarity from the UK Government before doing so?

We will certainly be in contact with the Llywydd and Business Committee regarding the Senedd's timetable once we have sufficient information from the UK Government to be able to have meaningful discussions about the potential implications.

Regulatory landscape

19. Would the Bill introduce a regulatory ceiling?

The power within clause 15 of the Bill to revoke or replace includes a requirement that any changes to, or replacement for, a piece of REUL, cannot "increase the regulatory burden". However, the precise meaning of this in the context of the Bill is not clear, though the Bill appears to have been drafted so as to mean that what could be considered a regulatory burden can be interpreted very widely. Moreover, the UK Government has made no particular policy statement on the meaning of this provision.

However, the nature of the Bill, and potential UK Government changes to REUL, may arguably increase the regulatory burden for some businesses, at least in the short term, as they adjust to new standards, even if they are lower.

20. How could the Bill impact the Welsh Government's policy and ability to improve standards, where possible, post-Brexit?

The Bill fundamentally fails to appreciate how the principles of devolution need to be applied in the field of regulatory policy in the UK, now that it has left the EU. There are also concerns that the effects of the UK Internal Market Act will have further impacts should regulatory divergence occur (for example through the UK Government amending or repealing REUL for England). This could have significant implications for the ability to maintain and improve standards, in effect, in REUL in Wales.

21. The UK Government has stated that environmental protections will not be weakened and that the devolved nations can preserve legislation within

competence. Which environmental protections will the Welsh Government preserve?

The Welsh Government has no intention to weaken existing environmental protections, the majority of which are derived from REUL. We intend to consider all options and, as a minimum, will be working to seek to ensure that REUL on environmental protections is assimilated by the sunset deadline.

Stakeholders

22. You told us “There’s going to have to be engagement with stakeholders because we’re going to have to have that understanding of some of the steps that have been taken. I think the problem is, at this stage, it’s not completely clear who we will be engaging with, to what extent, and within what framework.” (RoP, 350)

- a. Could you clarify whether the Welsh Government is engaging stakeholders on the Bill at this stage, or when it plans to if this is not yet the case?
- b. You identified agriculture and environment as areas where there will be a “big focus” which you anticipate to be “very intense” (RoP, 323). Is the Welsh Government prioritising stakeholder engagement in these fields?
- c. How will you engage stakeholders in order to determine what issues are important to them?

We have already made clear our general concerns about the Bill and opposition to it. The real engagement will need to be with stakeholders on a sectoral basis in light of the UK Government’s decisions about changes to REUL that it intends to make.

The areas you refer to account for a significant amount of the REUL that is within devolved competence. Accordingly, we will expect to engage with stakeholders in those areas as fully as possible, once the UK Government’s approach is clear.

Agriculture Bill

You told us that the Agriculture Bill “contains within it elements of retained EU law, and there may be issues that will arise during this process that need to be addressed; it’s just not clear what they might be at this stage” (RoP, 335).

23. Why was it appropriate to use the Agriculture Bill as a vehicle to provide broad powers for the Welsh Ministers to amend retained EU law when the Welsh Government has undertaken no analysis of the implications of the REUL Bill in this policy area?

As indicated above, we are considering our response to the situation, in effect, imposed by the UK Government on reviewing REUL. In general our position is that retained EU law, like EU law before it, works well and, consequently, beyond gradually amending the law as appropriate over time as with any body of law, we had no

intention to repeal, revoke or amend REUL to an arbitrary deadline on ideological grounds.

Furthermore, there is currently no certainty as to what the final version of the REUL Bill will look like, whether it will actually proceed to Royal Assent, nor what will happen to each piece of REUL. As a result, the Agriculture (Wales) Bill is proceeding on the basis of what is currently known.

24. Is it the Welsh Government's intention to save the REUL on which the Agriculture Bill relies under the REUL Bill? What happens if the REUL on which it relies is revoked by the UK Government? Is the UK Government aware of the Welsh Government's need for the REUL to remain in place for the operation of the Agriculture Bill?

As currently drafted, the REUL Bill has powers which the Welsh Government could exercise to preserve REUL in areas of devolved competence. The Welsh Government is considering how it will respond to this Bill and is working with the UK Government to identify all devolved REUL, including those instruments made by the UK Government and Parliament.

25. When do you anticipate being in a position to understand the breadth and detail of any issues which need to be addressed during the passage of the REUL / Agriculture Bills?

We will continue to engage and, in parallel, are considering how to respond in the coming months as the new UK Government's position on the REUL Bill is understood.

26. Is it your intention to make amendments to the Agriculture Bill to address any such issues?

As above, we will continue to engage and are considering how to respond as the new UK Government's position on the REUL Bill is understood.

27. Does the Welsh Government intend to adopt this approach of taking broad executive powers to deal with the uncertainty of REUL rather than bring forward primary legislation when the picture is clearer

As above, we will continue to engage with the UK Government and are considering how to respond as its position is understood. In the meantime, there are no plans to change the executive powers in the Agriculture (Wales) Bill.