Y Pwyllgor Deddfwriaeth,
Cyfiawnder a'r Cyfansoddiad

Legislation, Justice and
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Paul Davies AS
Cadeirydd Pwyllgor yr Economi, Masnach a
Materion Gwledig

14 Rhagfyr 2022

Annwyl Paul

Cydsyniad Deddfwriaethol: Bil Cyfraith yr UE a Ddargedwir (Dirymu a Diwygio)

Byddwch yn ymwybodol bod Llywodraeth y DU wedi cyflwyno Bil Cyfraith yr UE a Ddargedwir (Dirymu a Diwygio) ('y Bil') i Senedd y DU. Pe bai'r Bil yn cael ei basio, byddai'n rhoi ar waith gynllun Llywodraeth y DU i ddargadw, dirymu neu ddiwygio miloedd o ddarnau o gyfraith yr UE a ddargedwir. Byddai hefyd yn dechrau'r cloc ar y cyfnod hyd at 31 Rhagfyr 2023, pan fydd y rhan fwyaf o gyfraith yr UE a ddargedwir yn dod i ben yn awtomatig oni bai bod Gweinidogion yn cymryd camau i'w achub neu ei ddiwygio. Yr hyn sy'n destun pryder i ni, fel deddfwyr, yw'r ffaith y byddai'r Bil yn galluogi Gweinidogion, yn hytrach na seneddau, i newid tirwedd reoleiddio a chyfreithiol y DU yn sylweddol.

Mae fy Mhwyllgor i, ers peth amser, wedi bod yn cadw llygad ar gynllun Llywodraeth y DU ar gyfer cyfraith yr UE a ddargedwir, a gwnaethom ddechrau gofyn cwestiynau i Lywodraeth Cymru rai misoedd yn ôl.

Gyda'r Bil yn cael ei gyflwyno gerbron Senedd y DU, a chan ragweld y bydd Llywodraeth Cymru yn cyflwyno'r memorandwm cydsyniad sy'n debygol o fod yn angenrheidiol, cytunodd fy Mhwyllgor i glywed barn rhanddeiliaid yng Nghymru a ledled y DU. Gofynnwyd am safbwyntiau ar nifer o faterion gan gynnwys i ba raddau y gallai'r Bil effeithio ar dirwedd reoleiddiol Cymru; pa rôl ddylai fod gan y Senedd o ran dirymu a diwygio cyfraith yr UE a ddargedwir mewn meysydd datganoledig; penderfyniad Llywodraeth Cymru i beidio â chynnal ei hasesiad ei hun o gyfraith yr UE a ddargedwir, gan gynnwys peidio â ffurfio ei barn ei hun ar yr hyn sydd wedi'i ddatganoli a'r hyn sydd wedi'i gadw;

ac a allai'r Bil gyflwyno cyfyngiadau newydd i Lywodraeth Cymru, sydd am wella'r safonau a oedd ar waith cyn Brexit, lle bo modd.

Amgaeir y dystiolaeth a gawsom gan Dr Gravey a Dr Whitten o Brifysgol Queen's yn Belfast, NFU Cymru, yr RSPCA, Ffederasiwn Bwyd a Diod Cymru, yr Asiantaeth Safonau Bwyd, y Gymdeithas Cadwraeth Forol, Canolfan Llywodraethiant Cymru a Chyngor Gweithredu Gwirfoddol Cymru, a'r Athro Jo Hunt o Ysgol y Gyfraith a Gwleidyddiaeth ym Mhrifysgol Caerdydd. Credwn y gallai'r dystiolaeth hon fod o ddiddordeb i'ch Pwyllgor.

Byddwch hefyd yn ymwybodol bod Llywodraeth Cymru bellach wedi gosod memorandwm cydsyniad deddfwriaethol gerbron y Senedd mewn perthynas â'r Bil, ac mai fy Mhwyllgor i sydd â'r prif gyfrifoldeb am graffu ar y memorandwm.

Yn ein cyfarfod ddydd Llun 5 Rhagfyr, cawsom dystiolaeth gan Mick Antoniw AS, y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad, mewn perthynas â'r Bil a memorandwm cydsyniad deddfwriaethol Llywodraeth Cymru. Efallai yr hoffech nodi bod y Cwnsler Cyffredinol wedi ailadrodd ei bryderon y gallai gweithredu'r Bil, pe bai'n cael ei basio a'i ddeddfu, lethu llywodraethau'r DU. Efallai yr hoffech nodi hefyd y cafodd pryderon ynghylch y goblygiadau i Fusnes y Senedd ac i raglen ddeddfwriaethol Llywodraeth Cymru eu trafod hefyd.

Rwy'n ysgrifennu at bwyllgorau eraill y Senedd i dynnu sylw at y dystiolaeth a gawsom sy'n dod o fewn cylch gwaith a buddiannau eu Pwyllgorau.

Yn gywir,

Huw Irranca-Davies
Cadeirydd

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.

RSPCA RESPONSE TO THE SENEDD LEGISLATION, JUSTICE AND CONSTITUTION COMMITTEE ON THE RETAINED (EU) LAW (REVOCATION AND REFORM) BILL

Summary
There are 44 animal welfare laws that have come across under the European Union (Withdrawal) Act 2018 that need to be filtered and assessed or these will no longer apply. 31 are devolved to Wales including the battery hen ban, cosmetics testing on animals and the labelling of eggs. The RSPCA has three major concerns with the REUL Bill on its impact on devolution and Wales. While the majority of the 44 laws are devolved, the Bill is unclear as to how the Welsh Government can ensure that any laws with reserved powers are carried over and not lost. Also with animal welfare laws that are devolved the Senedd is given a very tight time period to assess all these laws (December 2023) and could see laws being lost due to time constraints. In addition, the filtering process to ascertain if a retained EU law should be maintained is unclear.

Defra, with responsibility for 570 laws which contain the UK's high animal welfare and environmental standards, has the hardest task. It will have to decide which are reserved before negotiating with the Welsh Government which ones they wish to keep. Defra and the Welsh Government will have to agree which ones are devolved and under the competence of Wales. Budgetary reductions now about to be imposed will make this task more difficult. Finally there is clearly a split between the Welsh Government position, of trusting and wishing to keep the devolved EU derived animal welfare laws and the UK Government view of mistrust of EU derived laws so that each needs to be assessed. This could lead to a large widening of standards between the two countries, and conflict on the Common Frameworks process and the interpretation of the Internal Markets Act 2020. The Government has already recommended withholding of consent on this Bill.

1. The RSPCA is pleased to respond to the Legislation, Justice and Constitution Committee on the Retained (EU) Law (Revocation and Reform) Bill and its impact on Wales. The RSPCA is the oldest and largest animal welfare organisation in the world and writes the standards used by RSPCA Assured, the UK's only animal welfare assurance scheme. RSPCA Assured accounts for over 85% of egg production in Wales and 23% of pig production in the UK. The RSPCA undertakes around 85% of enforcement effort under the Animal Welfare Act 2006 in Wales for animal welfare investigations and prosecutions. The RSPCA set up Eurogroup for Animals in 1980 to act as its European coordination office to campaign for and influence European legislation on animal welfare. Since 1980 Eurogroup for Animals has acted as the Secretariat of the Intergroup for Animal Welfare in the European Parliament and has worked on and influenced all 44 pieces of animal welfare legislation that are part of the acquis and were transferred over to UK law under the European Union (Withdrawal) Act 2018.

    - *What is the Bill's impact in Wales*
2. Enormous. All EU derived legislation was carried over into UK and Welsh legislation

by a series of primary or secondary laws depending on whether they were Regulations, Directives or Decisions. When the UK left the EU on 31st December 2020 all the animal welfare legislation in Table 1 (below) had been carried over into Welsh and UK legislation and was only amended from a technical perspective, such as deleting language relating to the European Commission. Legislation was transferred under the principle that it was part of the legislative library, in some cases for nearly 50 years, and was therefore relevant and important to maintain. The Retained EU Law (Revocation and Reform) Bill works in the opposite principle. It deletes all legislation that has been transferred across unless it is proven to be useful. It also does so within a prescribed timetable and without any clear vetting or transparent audit process.

3. There are 570 pieces of legislation that are managed by Defra[1], responsible for the largest number of EU derived laws and so has the greatest burden in sifting and assessing these laws. 44 of these laws promote the welfare of animals. Thirteen of the 44 were Directives that are devolved and so have been implemented into Welsh legislation subsequent to their adoption and 31 were Regulations and Decisions. 18 of these could be devolved, 13 fall into reserved legislation. Legislation was transferred across on a piecemeal basis by Defra and the Senedd between 2018 and 2020 and it is fair to say that the quick time period did result in technical small legislative mistakes being made, some of which were correct in the past two years. Ironically this two time period is longer than the 12 month period prescribed under this Bill.

4. The largest body of animal welfare legislation concerns farm animals with 18 relevant EU laws adopted. All except the animal health ones are all devolved. For instance the five laws setting standards on the way farm animals are reared and produced such as laying hens, veal calves, meat chickens and pigs and the laws on how animals are transported and killed. Legislation covering consumer information, such as mandatory labelling of the provenance of eggs and beef, is also devolved. The legislation setting standards on the management of wildlife is devolved such as the hunting, trapping and protection of habitat and legislation.

5. However there is a large body of animal welfare legislation that is reserved. The RSPCA estimates these as 13 laws. For instance the bans on use of veterinary products such as the use of hormones in cattle, including BST, is reserved. Other EU derived animal welfare laws that are reserved include those part of international treaties such as the law to prohibit the import of wild caught birds, the import ban on seal products due to welfare concerns on the manner in which these animals are kept and killed. The use of animals in research and testing is also reserved.

- *to what extent the Bill might impact Wales' regulatory landscape;*

6. The Bill's impact on Wales' animal welfare regulatory landscape is huge. The 44 animal welfare provisions that are being considered under the REUL Bill brought in some of the most totemic and important changes in animal welfare in Wales such as the prohibition of the conventional battery cage for laying hens, the sow stall ban, the veal crate ban, the end of cosmetics testing on animals and the banning of GMOs and cloned animals. EU retained laws brought in standards and protection for the management of wild animals, stopping the imports of wild caught birds and ending the use of growth promoters in farming. These could all be at risk under this process.

[1] https://public.tableau.com/views/UKGovernment-RetainedEULawDashboard/REULMap?%3AshowVizHome=no

7. The Welsh Government and Senedd have made clear in their LCM that they do not share the policy objectives of the UK Government and that "it is our view that the body of REUL is, in general, functioning well and does not need to be treated collectively in this way."[2] The RSPCA believe that there are four main issues impacting on the Welsh regulatory landscape. Firstly the devolved animal welfare laws that the Senedd will have to carry over if they wish to, which has to be completed by December 31 2023. The time issue will be very pressing to get all the devolved legislation through the Senedd in time. The Bill makes no postponement of that deadline which seems to be penalising the devolved Governments. Secondly, the impact the Welsh Government can have on those animal welfare laws that are reserved to the UK Government so that these are carried over. The date for this could be extended to December 2026 but it is unclear how the Welsh Government will engage in this process. If it is through the Common Frameworks process but there is no agreement on process between the two Governments, it is unclear how this will be resolved. Thirdly the REUL Bill could have large constitutional consequences on devolution itself (LCM note para 83 footnote 2). Many of the powers in the REUL Bill are solely for Ministers of the Crown not Ministers of the Welsh Government. For instance the extension of the sifting deadline from 2023 for a further three years is not a power given to the Welsh Government who have to complete their sifting by December 2023. Finally the REUL has large implications on how products are produced and moved within Great Britain and it is not clear how it works with the Common Frameworks programme[3] and the Internal Markets Act 2020.

- *what role should the Senedd have in the revocation and reform of retained EU law in devolved areas*

8. The Senedd should have a role in the revocation, reform or retention of all devolved EU retained legislation. As the UK Government may agree a different view and position on devolved animal welfare legislation in England it is important for the Senedd to sift all legislation relevant to Wales and within its competence.

- *implications arising from the potential deadlines introduced by the Bill;*

9. Clause 1 of the Bill sets out that the filtering process to assess the legislation will stop on 31 December 2023. Clause 2 allows for it to be postponed no later than 31 December 2026. However this power is only for the UK Government not the Welsh Government which has to complete all its filtering process by 2023. As Defra has over 570 laws to be sifted and it is envisaged that the majority of these are devolved, the Senedd will have to sift all those in under 13 months. 44 of these are animal welfare laws (Table 1). There are only around 170 parliamentary sitting days before the first deadline for the Senedd to consider which works out as a rate of over three pieces of legislation a day to meet that deadline. This is clearly not feasible and could result in relevant legislation being lost due to time constraints and lack of proper scrutiny. However if the Welsh Government intends to restate all EU retained legislation, which seems probable from its LCM[2] , there may be a fast track solution to the time issue. There have been indications at 2nd Reading in Westminster that the Government will consider extending the sunset clause but this would only apply to reserved issues[4]. The RSPCA would support this as an interim measure, as it believes that it is practically impossible to filter and assess all the legislation in the

[2] Para 82 https://senedd.wales/media/wu0fwcny/lcm-ld15434-e.pdf
[3] https://www.gov.uk/government/collections/uk-common-frameworks
[4] https://hansard.parliament.uk/commons/2022-10-25/debates/246DE276-1887-475F-8016-DB81309C6D81/RetainedEULaw(RevocationAndReform)Bill

allocated time frame and this risks good legislation being lost.

- *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;*

10. The RSPCA would recommend the Welsh Government undertook its own assessment of REUL particularly on which of the 2,417 laws that come under the REUL are devolved. Should this not be undertaken the Government risks leaving that decision to the UK Government which may have a different view. There have been instances in the past few years on what animal welfare legislation is devolved and what is reserved so it is important that there is not a land grab by the UK Government on legislation.

- *the Welsh Government's capacity to carry out such an assessment and to use its powers under the Bill;*

11. This will be difficult from a time and financial perspective but if this process is not completed the concerns raised in para 10 could occur.

- *the Welsh Government's role in, and plans for, the UK Government's joint review, announced alongside the Bill;*

12. The Welsh Government should fully participate in the UK's joint review but to do so will need a position on which laws are devolved and which reserved which indicates they will need to form a view on the 2,417 laws and the RSPCA would recommend certainly to undertake on the 570 covered by Defra which include the 44 animal welfare laws. 13 of these are reserved.

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

13. The Minister of the Crown has no limits under this Act in their power to bring in Regulations that are consequential from the Act (Clause 19). The process of tabling secondary legislation is clearly laid out under Schedule 3 but there is no clear process laid out for how each individual Ministry will approach the pieces of reserved legislation that come under it. As Defra has 570 relevant pieces of legislation, 13 of which are relevant to implementing our animal welfare and health standards and are reserved, a clear and transparent process is needed and followed.

14. There are no clear scrutiny processes laid out for Welsh Ministers for devolved legislation but the RSPCA would propose that Welsh Ministers clearly lay out which legislation they believe are devolved and a timetable for considering these laws. Should the Welsh Government wish to simply restate all these laws, which is in their power to do so, this could be completed in a timely manner by December 2023. The Welsh Government could then agree if there is any devolved legislation they wish to amend or reject and fully involve the Senedd in discussion on these laws.

15. The Welsh Government will need to agree a position on those animal welfare laws that are reserved to the UK Government so that these are carried over. The date for this could be extended to December 2026 but it is unclear how the Welsh Government will engage in this process. If it is through the Common Frameworks process but there is no agreement on process between the two Governments, it is unclear how this will be resolved.

16. The REUL Bill could have large constitutional consequences on devolution itself (para 83 footnote 2). Many of the powers in the REUL Bill are solely for Ministers of the

Crown not Ministers of the Welsh Government. For instance the extension of the sifting deadline from 2023 for a further three years is not a power given to the Welsh Government who have to complete their sifting by December 2023. Finally the REUL has large implications on how products are produced and moved within Great Britain and it is not clear how it works with the Common Frameworks programme[5] and the Internal Markets Act 2020.

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

17. The Bill does not have any impact on those devolved areas of animal welfare legislation that the Welsh Government may want to improve post Brexit but where those intervene with the operation of the internal GB market these may interact with the Internal Markets Act 2020 and the Common Frameworks Programme where those products are circulated to other countries in Great Britain.

- *steps that the Committee could take in future, including with regards to powers exercised under the Bill;*

18. Clause 2 of the Bill states the measures do not apply to any law specified in regulations from a national authority but it is not clear from the Bill how the UK Government will undertake this process or for measures that are reserved, such as the import ban on dog and cat fur, how they will ensure that the views of the Welsh Senedd are taken into account as the process of filtering the legislation occurs. The Welsh Government should clarify this process with the UK Government.

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

19. There are large implications for the Welsh legal landscape. Even if the Welsh Government decided to restate all the devolved pieces of legislation huge questions remain for the future Welsh landscape on reserved laws. For instance the Welsh Government has been clear that they have no wish to allow the use of growth promoters or the marketing of products made from them. This legislation (the Animals and Animal Products (Examination for Residues and Maximum Residue Limits) (England and Scotland) Regulations[6] would fall under the Bill. The provisions about allowing in meat treated with growth promoters has become an important issue for the UK in pursuing trade deals with countries that use these promoters such as Canada and Mexico. The UK has always maintained that such meat cannot enter the UK market as there is legislation to stop this happening. The Bill has the powers to revoke this legislation. As this decision is a reserved issue, the Welsh Government could find such products being sold in Wales despite its objections.

[5] https://www.gov.uk/government/collections/uk-common-frameworks
[6] https://www.legislation.gov.uk/uksi/2015/787/contents

Table 1 Summary of the 44 pieces of retained EU animal welfare laws and which are reserved and devolved

	EU Legislation *Directives*	International agreements	Devolved ?	Main goals
Farm Animals				
● General protection	98/58		Yes	Baseline standards on welfare of farm animals
● Laying hens	1999/74		Yes	Prohibits battery cage for laying hens
● Meat chickens	2007/43	OIE Guideline	Yes	Minimum standards on chickens
● Veal calves	2008/199		Yes	Prohibits veal crate and white veal
● Live transport	1/2005	OIE Guideline	Yes	Maximum transport times for farmed animals
● Pigs	*2008/120*		Yes	Prohibits sow stalls
● Slaughter	*2016/336*	OIE Guideline	Yes	Standards on slaughter of farmed animals
● Bans on BST	1099/2009		Yes	Stops use of growth promoting hormones
● Farm subsidies	1305/2013		Yes	Agriculture Act 2020: animal welfare schemes
● Country labelling	1307/2013		Yes	Labels products on country of origin
● Poultry meat	1169/2011		Yes	Sets terms for poultry labelling
● Beef labelling	543/2008		Yes	Sets terms for beef labelling
● Egg labelling	566/2008		Yes	Mandatory labelling of eggs
● Organic Production	1097/90		Yes	Sets standards for organic food production
● Horse identification	5/2001		Yes	Identification of equines
● Feed and food law	834/2007		Yes	Controls on the production of food and feed
Wildlife				
● Trade in endangered species	338/97	CITES	No	Implements CITES to manage and regulate the trade in endangered species and products
		IWC	No	
	812/2004		Yes	
● Whaling	*92/43, 82/72*	Bern Convention	Yes	Bans trade in whale products
● Habitat protection, hunting and trapping	*2009/147*	Bern Convention	No	Sets rules on wild animal protection, humaneness of hunting and trapping animals
			No	
● Wild birds protection	1239/98		Yes	Protects and regulates hunting of wild birds
	2015/1850		Yes	
● Driftnet bans	*1999/22*		No	Bans use of driftnets to protect marine life
● Seal import ban	3254/91		No	Bans seal products due to inhumaneness
● Zoos	139/2013	Bern Convention	Yes	Licensing and management of zoos
● Traps management	1143/2014			Regulates use of traps for wild animals
● Wild bird import ban	1007/2011			Stops imports of wild caught birds
● Invasive alien species				Prevents import & spread of alien species
● Fur labelling				Labels fur products
Animals in science				
● The use of animals in research, testing	2010/63	OIE Guideline	No	Regulates use of animals in laboratories for research, testing and education
● EC party to ETS 123	1999/575	Council of Europe	No	Makes UK member of Council of Europe's Convention on the use of animals in laboratories
	2003/584		No	

● Updates ETS 123 ● REACH ● Plant Protection Products ● Biocidal Products ● Cosmetics ● Novel foods	1907/2006 1107/2009 528/2012 1223/2009 258/1997*		No No No No Yes	Sets rules on testing using animals for chemical production and use Sets rules using animals for biocidal/plants Bans the use of animals in testing for cosmetics and the marketing of such products Regulates the production of GMO animals
Pets ● Non commercial trade dogs, cats, ● Pet Imports ● Commercial trade ● Imports on dog and cat fur	576/2013, 577/2013 2013/31 92/65 1523/2007		Yes Yes Yes No	Manages the cross border movement of pet cats and dogs Limits the commercial trade in cats and dogs Bans the import of dog and cat fur and its sale

FDF Cymru Submission

Legislation, Justice and Constitution Committee

18 November 2022

Introduction

The Food and Drink Federation (FDF) Cymru[1] represents the food and drink manufacturing industry in Wales. We are Wales' largest manufacturing sector, accounting for over 12% of total manufacturing turnover. Our gross value added to the economy is £1.7 billion, representing over 15% of Welsh manufacturing value added. We have 555 food and drink manufacturing businesses, employing 22,500 people, which represents 16% of the Welsh manufacturing workforce. In 2021, manufactured food and drink exports from Wales increased by 20.1% to £558 million from 2020.

Food and drink manufacturers are proud to make a wide variety of great-tasting, safe and nutritious products which are available to, and affordable by everyone. Food and drink are essential for people's lives and brings pleasure and joy to millions. Food and drink are deeply embedded in our history and our culture. Our relationship with food and drink goes way beyond its intrinsic nutritional value; eating and drinking and the occasions that surround them are part of what defines us.

Overview

In relation to the EU Retained Law Bill currently going through parliamentary scrutiny, in principle, the FDF can see the benefit in the domestication and consolidation of all retained EU law to ensure we have a functioning UK statute book, now that we are outside of the EU.

It remains unclear however as to why such an exercise is required to be carried out at such pace with a very concerning sunset date having been set as the end of 2023. With this, it could be easy for legislative mistakes to be made.

This is also compounded by the sheer scale of legislation to review and then for considered decisions to be taken to either keep, amend or lose. Such a process is further complicated by there being no full authoritative list of all EU law in scope.

1 FDF Cymru is a division of FDF representing the food and drink manufacturing industry in Cymru.

The specific Welsh context is yet to be completely understood, particularly in terms of its impact on future law making in areas of already devolved policy. This has the potential to drive through significant divergence if changes are not aligned on a UK basis and this would then put additional burdens on Welsh businesses, particularly smaller enterprises.

The FDF would echo the Food Standards Agency's already aired concerns with this Bill's challenging timeframe and potential to erode consumer protections. We therefore would prefer the creation of a roadmap with more appropriate timeframe to allow due process to be followed. This would allow all UK authorities time to working together, in collaboration with industry stakeholders, to identify areas of suitable reform that would continue to maintain consumer protection, business compliance and trade.

In terms of the specific questions raised by the committee we would respond as follows

- To what extent the Bill might impact Wales' regulatory landscape;

From the UK Governments public dashboard, of the 2,400 pieces of legislation that form the estimated scale of Retained EU Law (REUL) required to be adopted into UK law, 723 items can be initially identified as potentially within the devolved powers of Welsh Government. This assessment combines 570 for Department of Environment and Rural Affairs (Defra), 137 for Department of Health and Social Care (including FSA and 16 for the Department of Education.

For food and drink manufacturers, our focus is on the close to 30% of the overall total that are identified as under the remit of Defra and FSA. At this stage we have not been able to complete a detailed review and impact assessment, however the scale of this impact is potentially of a very significant nature to the food and drink supply chain in Wales.

Unfortunately, for the remaining questions we are unable to take a view, as we are unclear of how the Westminster Bill will impact the regulatory landscape in Wales.

This in itself is a cause of serious concern as an industry we pride ourselves on the integrity and safety of the food and drink we produce in Wales.

Asiantaeth Safonau Bwyd
food.gov.uk
Food Standards Agency

Oddi wrth Yr Athro Susan Jebb
Cadeirydd yr ASB

E-bost [redacted]

SeneddLJC@senedd.wales

18 Tachwedd 2022

Cyfeirnod: MC2022/00298

Annwyl Weinidog / Annwyl Mr Irranca-Davies

Rwy'n ysgrifennu mewn ymateb i'ch cais yn gofyn i randdeiliaid wneud sylwadau ar y darpariaethau ym Mhil Cyfraith yr UE a Ddargedwir (REUL) er mwyn llywio'r gwaith o graffu ar y Bil a memoranda cydsynio deddfwriaethol dilynol Llywodraeth Cymru.

Mae datganoli yn golygu bod cyfrifoldeb dros ddiogelwch a hylendid bwyd a bwyd anifeiliaid wedi trosglwyddo o lywodraeth y DU i Gymru, Gogledd Iwerddon a'r Alban. Mae hyn yn golygu bod yr Asiantaeth Safonau Bwyd (ASB) yn gyfrifol am ddatblygu polisïau a chynghori Gweinidogion Cymru ar y meysydd hyn. Mae ein hymrwymiad i weithio ar draws y pedair gwlad yn sicrhau y gallwn ddiogelu iechyd y cyhoedd a buddiannau defnyddwyr yn effeithiol ledled Cymru, Lloegr a Gogledd Iwerddon, gan weithio gyda Safonau Bwyd yr Alban.

Fel y gwyddoch, mae'r Bil yn bwriadu dirwyn i ben Cyfraith yr UE a Ddargedwir (REUL) yn awtomatig ar ddiwedd 2023, oni bai bod Gweinidogion yn cytuno i'w hymestyn, ei chadw, ei diwygio neu ei hailddatgan. Mae'r Bil hefyd yn cynnwys yr opsiwn i ymestyn REUL i ganiatáu diwygio yn ystod y cyfnod hyd at 2026.

Yn yr Asiantaeth Safonau Bwyd (ASB), rydym yn glir na allwn ddirwyn i ben y deddfau ar ddiogelwch a dilysrwydd bwyd heb beri dirywiad yn safonau bwyd y DU a risg sylweddol i iechyd y cyhoedd. Er fy mod yn siŵr nad dyma yw bwriad y Llywodraeth gyda'r cynlluniau hyn, mae'r amserlen bresennol yn peri peth pryder i mi. Bydd angen i ni weithio drwy fwy na 150 o ddarnau o gyfraith yr UE a ddargedwir, y mae 39 ohonynt yn benodol i Gymru, yn gyflym iawn, a chynghori gweinidogion ar y ffordd orau o ymgorffori rheolau pwysig sy'n diogelu diogelwch bwyd ac iechyd y cyhoedd yn ein deddfwriaeth ddomestig.

Ein prif flaenoriaeth o hyd yw sicrhau bod gan bobl fwyd y gallant ymddiried ynddo. Rydym hefyd yn cydnabod bod hwn yn gyfle i adolygu a diwygio'r cyfreithiau hyn fel bod busnesau'n cael eu rheoleiddio yn y ffordd gywir i'w galluogi i ddarparu bwyd diogel y gellir ymddiried ynddo, i fasnachu'n rhyngwladol, ac i dyfu.

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E-bost: [redacted]

SGÔR HYLENDID BWYD
FOOD HYGIENE RATING

Maes o law, credwn mai Bil Bwyd a Bwyd Anifeiliaid newydd y DU fyddai'r cyfle gorau i ailfeddwl yn gynhwysfawr, wedi'i deilwra i anghenion y DU. Mae ein profiad yn dweud wrthym fod datblygu polisi mewn ffordd agored a thryloyw sydd wedi'i seilio ar dystiolaeth yn well i ddefnyddwyr ac i fusnesau, ond mae hyn yn cymryd amser i'w gael yn iawn.

Mae cyfraith bwyd yn fater datganoledig ac rydym yn cefnogi penderfyniadau datganoledig ar ddiogelwch a safonau bwyd a bwyd anifeiliaid. Byddwn yn parhau i weithio gyda swyddogion Llywodraeth Cymru ar effeithiau biliau yng Nghymru, a byddwn yn ystyried unrhyw ddiwygiadau yn unol ag ymrwymiadau yn y cytundebau fframwaith cyffredin ar gyfer Hylendid a Diogelwch Bwyd a Bwyd Anifeiliaid a Safonau Ynghylch Cyfansoddiad a Labelu.

Yn gywir,

Susan Jebb

Yr Athro Susan Jebb OBE, PhD, FRCP (Anrh), FMedSci

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FOOD HYGIENE RATING
food.gov.uk/ratings

POSITIVE ABOUT DISABLED PEOPLE

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).

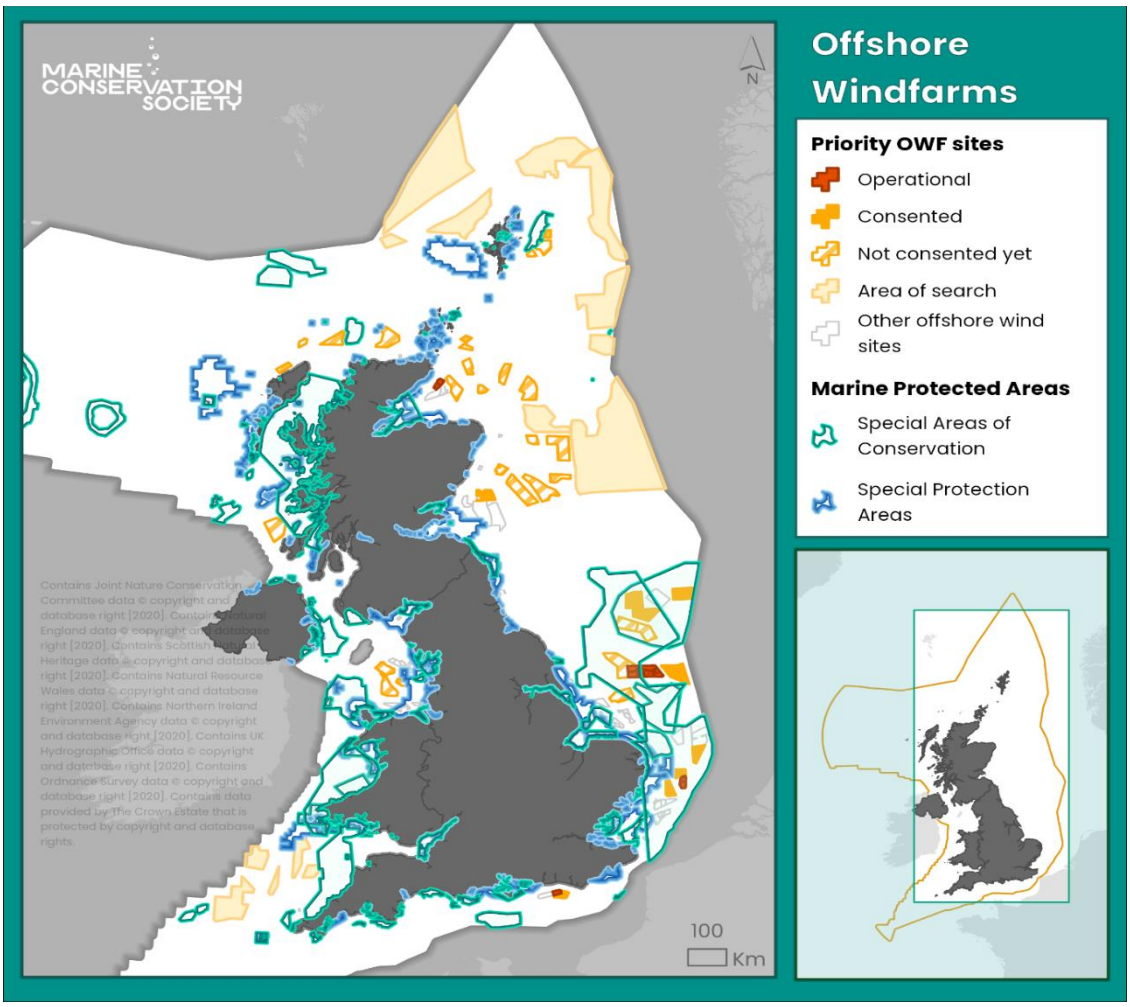
CASE STUDY: OFFSHORE RENEWABLES LICENSING

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).

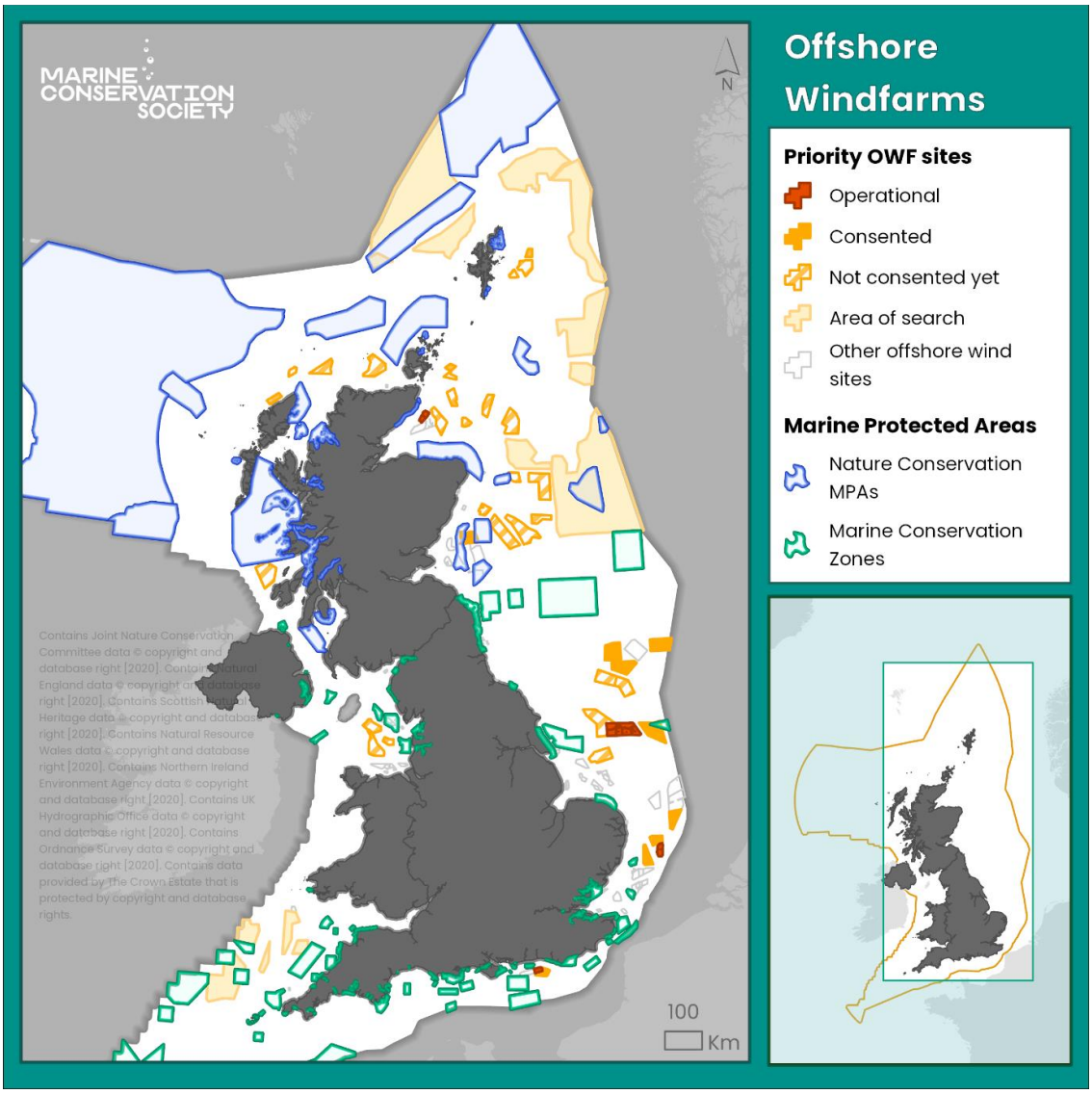
The development of offshore renewables to address climate change is essential, provided such developments *fully take into account the impacts on marine ecosystems and provide appropriate mitigation to eliminate or minimise to a negligible level such damage to these ecosystems.* Current technology enables 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.

Ymateb i Alwad Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad y Senedd am Farnau

Charles Whitmore, Cydymaith Ymchwil, Prifysgol Caerdydd — Canolfan Llywodraethiant Cymru a Chyngor Gweithredu Gwirfoddol Cymru

Tachwedd 2022

Ynghylch y dystiolaeth hon

Ysgrifennwyd y dystiolaeth hon gan Charles Whitmore fel rhan o brosiect Fforwm Cymdeithas Sifil Cymru (y Fforwm). Partneriaeth yw hon rhwng Cyngor Gweithredu Gwirfoddol Cymru (CGGC) a Chanolfan Llywodraethiant Cymru Prifysgol Caerdydd a ariennir gan y Legal Education Foundation. Ei nod yw darparu gofod cymdeithas ddinesig ar gyfer rhannu gwybodaeth, trafodaeth wybodus a chydlynu mewn meysydd sy'n destun newid cyfreithiol, gweinyddol a chyfansoddiadol sy'n deillio o ymadawiad y DU â'r Undeb Ewropeaidd.

CGGC yw'r mudiad aelodaeth cenedlaethol ar gyfer y sector gwirfoddol yng Nghymru.

Mae **Canolfan Llywodraethiant Cymru** yn uned ymchwil a noddir ac a gefnogir yn Ysgol y Gyfraith a Gwleidyddiaeth, Prifysgol Caerdydd.

1. Cyflwyniad

1.1 Diolch yn fawr i'r Pwyllgor am y gwahoddiad i gyflwyno barnau am Fil Cyfraith yr UE a Ddargedwir (Dirymu a Diwygio). Rwy'n gwneud hynny yn rhinwedd fy swydd fel cydlynydd prosiect y Fforwm gan fod sefydliadau cymdeithas sifil yr ydym wedi ymgysylltu â nhw yng Nghymru ac ar lefel y DU wedi mynegi pryderon difrifol am sawl agwedd ar y ddeddfwriaeth. Mae swyddogaeth graidd y Bil – sef diddymu neu ddiwygio'n awtomatig gorff enfawr o gyfreithiau heb graffu seneddol neu gyhoeddus, tra'n trosglwyddo pwerau deddfu enfawr i weinidogion, heb fawr ddim ystyriaeth o'r goblygiadau datganoledig i'w gweld yn y gwaith drafftio – yn peri pryder mawr yn gyfansoddiadol. Bydd y bil:

a. Yn trosglwyddo pwerau deddfwriaethol sylweddol i weinidogion ar lefelau datganoledig a chanolog, fel ei gilydd Bydd hyd yn oed yn mynd cyn belled â chaniatáu i Weinidogion ddefnyddio'r pwerau cyffredinol yng nghymal 15 i ddiwygio darpariaethau cyfraith sylfaenol (yn rhinwedd cymal 12(2)b).

b. Yn creu ansicrwydd cyfreithiol sylweddol.
c. Yn debygol o arwain at wallau a hepgoriadau deddfwriaethol – gyda'r potensial i greu tyllau yn y llyfr statud y bydd angen rhagor o amser deddfwriaethol i'w datrys yn ddiweddarach.
d. Yn tynnu capasiti oddi wrth y Senedd, Llywodraeth Cymru a chymdeithas sifil yng Nghymru — mater sy'n debygol o gael ei deimlo hyd yn oed yn fwy llym ar y lefel ddatganoledig.
e. Yn grymuso'r gweithrediaethau i ddeddfu newid mewn polisi, naill ai'n fwriadol neu drwy hepgor o ganlyniad i ddiffyg gweithredu – mae hyn yn ffordd gwbl amhriodol o ddiwygio corff mor enfawr o gyfraith. Nid yw'n glir sut y byddid yn cyfleu penderfyniad o'r fath, asesu ei effaith, ymgynghori arno na'i herio.
f. Yn peri risg machlud hawliau a safonau allweddol. Mae'r asesiad o'r effaith ar gydraddoldeb[1] a'r memorandwm hawliau dynol[2] ill dau yn nodi, mewn egwyddor, (er gwaethaf sicrwydd Llywodraeth y DU) bod risg y bydd amddiffyniadau gwrth-wahaniaethu a chyfraith yr UE a ddargedwir (REUL) sy'n berthnasol i Hawliau'r Confensiwn yn cael eu dal gan fecanwaith y machlud. Mae'r asesiad o'r effaith ar gydraddoldeb yn egluro bod risgiau i gydraddoldeb yn cael eu creu gan ddarpariaethau'r Bil ar wyro oddi wrth gyfraith achosion yr UE a ddargedwir, ond bod y rhain yn cael eu lliniaru gan ddyletswydd adran 3 y Ddeddf Hawliau Dynol ar y llysoedd i ddehongli deddfwriaeth ddomestig yn unol â'r Confensiwn Ewropeaidd ar Hawliau Dynol (ECHR). **Mae hyn yn anwybyddu'r ffaith bod y Bil Hawliau hefyd yn cael ei ystyried gan Dŷ'r Cyffredin, a fydd yn diddymu'r ddyletswydd hon**.
g. Yn tanseilio gweithdrefnau deddfwriaethol cyffredin, goruchwyliaeth seneddol, a rôl cymdeithas sifil wrth graffu ar newid sylweddol i bolisi trwy ddarparu dim amser na mecanwaith ar gyfer asesu, craffu ar neu ymgynghori ar effaith machlud, cadwraeth, ailddatgan, diweddaru, diddymu neu ddisodli posibl REUL.

1.2 Yn ogystal â'r uchod, mae pryderon pellach sy'n ymwneud yn benodol â diffyg ystyriaeth a chymhlethdod y rhyngweithio â datganoli y byddaf yn canolbwyntio arnynt yn awr.

2. Yr effaith ar dirwedd reoleiddiol Cymru a Rhyngweithiadau â Deddf Marchnad Fewnol y DU (UKIMA)

2.1 Yn amlwg, ychydig iawn o ystyriaeth a chysondeb sydd wedi bod wrth ddrafftio'r Bil ynghylch ei ryngweithiad â sefydliadau datganoli. Ystyrir datganoli yn bennaf ddwywaith yn unig yn nogfennau amrywiol y Bil – llai na hanner tudalen yn y nodiadau esboniadol,[3] a pharagraff 36 yr Asesiad o'r Effaith ar Gydraddoldeb.[4]

a. Mae'r nodiadau esboniadol yn nodi bod dull gweithredu'r Bil yn gyson â deddfwriaeth arall sy'n gysylltiedig â'r UE, yr ymgysylltwyd yn briodol ac yn rhagweithiol â'r 'gweinyddiaethau' datganoledig, bod y Bil yn adlewyrchu ymrwymiad i barchu'r setliadau datganoli a Chonfensiwn Sewel ac **'*na fydd yn creu mwy o ddargyfeirio o fewn y DU*'** (fy mhwyslais i).

b. I'r gwrthwyneb, mae'r Asesiad o'r Effaith ar Gydraddoldeb yn cydnabod bod y Bil yn debygol o arwain at ddargyfeirio rheoleiddiol ond y bydd hyn yn cael ei reoli gan Ddeddf Marchnad

[1] Bil Cyfraith yr UE a Ddargedwir (Dirymu a Diwygio), Asesiad o'r Effaith ar Gydraddoldeb, para. 27.
[2] Bil Cyfraith yr UE a Ddargedwir (Dirymu a Diwygio), Memorandwm ECHR, para. 8.
[3] Bil Cyfraith yr UE a Ddargedwir (Dirymu a Diwygio), Nodiadau Esboniadol, Paragraffau 58-61.
[4] Bil Cyfraith yr UE a Ddargedwir (Dirymu a Diwygio), Asesiad o'r Effaith ar Gydraddoldeb, para. 36.

Fewnol y DU a Fframweithiau Cyffredin. Mae cyfeiriad annelwig at sgyrsiau sydd wedi digwydd yn Whitehall (heb Lywodraeth Cymru, mae'n debyg) i sicrhau nad yw'r Bil yn *'newid effaith Deddf UKIM'*. Mae'r asesiad effaith yn dod â'r ddadl hon i ben gan nodi y bydd egwyddorion mynediad i'r farchnad (MAPs) UKIMA yn berthnasol mewn sawl maes, lle mae dargyfeirio'n digwydd. **Mae'r asesiad hwn yn peri pryder ac mae hyd yn oed yn gamarweiniol mewn sawl ffordd - byddaf yn ystyried pob un yn ei dro.**

Y potensial am ddargyfeirio rheoleiddiol ac effaith hyn

2.2 Fel y gwelir yn yr Asesiad o'r Effaith ar Gydraddoldeb,[5] mae'n hynod gamarweiniol i'r nodiadau esboniadol ddatgan gyda sicrwydd na fydd y Bil yn cynyddu dargyfeirio o fewn y DU. I'r gwrthwyneb, mae'r mecanweithiau yn y Bil yn rhoi cyfle sylweddol i ddargyfeirio, gan gynnwys mewn llawer o feysydd a allai sbarduno'r egwyddorion mynediad i'r farchnad – er enghraifft, o ran cyfansoddiad bwyd, labelu a pholisi amgylcheddol. Mewn egwyddor, mae'n bosibl y gall gwahanol rannau o'r DU ddewis caniatáu i wahanol ddarnau o REUL fachlud a/neu ddefnyddio'r pwerau ailddatgan, diweddaru, diddymu a disodli yng nghymalau 12-16 yn wahanol ar draws corff mawr o gyfraith. Efallai y bydd hyd yn oed ddulliau gwahanol o ailsefydlu egwyddor goruchafiaeth ac egwyddorion cyffredinol Cyfraith yr UE, yn enwedig o ystyried Deddfwriaeth Parhad yr Alban.

2.3 Mae'r esboniad byr a ddarperir ar hyn yn yr asesiad o'r effaith yn hynod gyfyngedig ac unochrog. Mae'n nodi dim ond y bydd UKIMA yn amddiffyn defnyddwyr a busnesau rhag y dargyfeirio sy'n deillio o hynny. Fodd bynnag, mae'n methu cydnabod **y gallai effeithiau polisi alldiriogaethol sylweddol ac annisgwyl godi o'r defnydd gwahanol o'r pwerau dirprwyedig helaeth yn y Bil mewn gwahanol rannau o'r DU yn rhinwedd MAPS UKIMA**. Fel yr archwiliwyd adeg taith UKIMA drwy'r Senedd, mae hyn yn debygol o weithio yn erbyn ymreolaeth polisi Cymru gan y bydd penderfyniadau i fachlud neu ddiwygio REUL/cyfraith wedi'i chymathu yn Lloegr yn cael mwy o effaith anghymesur ar rannau eraill o'r DU oherwydd pwysoliad economaidd Lloegr a'r anghydbwysedd cyfansoddiadol rhwng y lefelau canolog a datganoledig. **O ganlyniad, ni ddylai UKIMA fod yn fecanwaith diofyn ar gyfer rheoli effeithiau unrhyw ddarn o ddeddfwriaeth**. Cydnabyddir natur drechol a phroblemus y MAPs yn y dewis i roi rôl gyfyngedig i Fframweithiau Cyffredin wrth weithredu UKIMA. Mae hyn yn darparu rôl statudol ar gyfer cysylltiadau rhynglywodraethol wrth helpu i reoli dargyfeirio rheoleiddiol posibl a allai arwain at densiynau fel arall.[6]

2.4 Ac eto, yn dibynnu ar y cyfeiriadau polisi y mae'r gwahanol lywodraethau yn eu cymryd wrth ddefnyddio'r pwerau dirprwyedig ym Mil REUL, mae'r ddeddfwriaeth yn peryglu sbarduno'r MAPs ar raddfa ymhell y tu hwnt i'r hyn a luniwyd i ddechrau. **Yn ymarferol, mae hyn yn golygu y bydd angen i lywodraethau a deddfwrfeydd fod yn ymwybodol iawn o'r bwriadau polisi wrth wraidd defnyddio'r pwerau hyn mewn gwahanol rannau o'r DU gan y gallai hyn arwain at gyfyngiadau *de facto* i gymhwysedd**.

[5] Mae cwestiwn arwyddocaol ynghylch pam nad oes gan y Bil hwn asesiad ehangach o'r effaith. Mae'n rhyfedd gweld yr asesiad o'r effaith ar gydraddoldeb yn cael ei ddefnyddio i ystyried effeithiau rheoleiddio ehangach fel rhyngweithiadau posibl ag UKIMA.

[6] Fel y profwyd yn ddiweddar yn sgil ehangu eithriadau i'r MAPs o ran plastigau untro gan ddefnyddio'r weithdrefn yn adran 10 UKIMA, sy'n darparu rôl ar gyfer fframweithiau cyffredin wrth drafod eithriadau pellach.

2.5 Mewn un enghraifft ddamcaniaethol, mae Rheoliad 1169/2011 yr UE ar ddarparu gwybodaeth am fwyd i ddefnyddwyr yn sefydlu gofynion hanfodol o ran gwybodaeth am faeth, alergenau a gwlad wreiddiol ar labeli bwyd. Mae darnau perthnasol o REUL ar lefelau datganoledig a'r DU yn gweithredu'r gofynion hyn (Rheoliadau Gwybodaeth am Fwyd (Cymru) 2014). Gan ddefnyddio cymal 15, gallai Llywodraeth y DU benderfynu lleihau'r gofynion labelu hyn – yn wir, mae'r pwerau hyn wedi'u drafftio'n glir gyda dadreoleiddio mewn golwg. Byddai hefyd o fewn cwmpas y pwerau yn y Bil i Lywodraeth Cymru gadw'r gofynion heb eu diwygio ar y lefel ddatganoledig. Dylid nodi na fyddai'n bosibl cyflwyno unrhyw newidiadau a allai ddod o fewn diffiniad hynod eang y Bil o 'fwy o faich rheoleiddiol'. Fodd bynnag, hyd yn oed os cânt eu cynnal, mae gofynion labelu yn debygol o ddod o fewn egwyddor cydgydnabod UKIMA ac, o ganlyniad, ni fyddai'n ofynnol i gynhyrchion sy'n tarddu o Loegr gydymffurfio â'r safonau 'cadwedig' yng Nghymru. Byddai angen iddynt gydymffurfio â'r safon is ddiwygiedig 'wedi'i chymhathu' yn Lloegr yn unig. Yn anochel, byddai hyn yn rhoi pwysau sylweddol ar lunwyr polisïau yng Nghymru i gyd-fynd â'r safon a gyflwynir gan Lywodraeth y DU i sicrhau chwarae teg i gynhyrchwyr yng Nghymru.

2.6 O ystyried faint o REUL a gadwyd yn ôl a datganoledig y byddai angen ei ystyried mewn cyn lleied o amser, ei ehangder eithriadol, y capasiti cyfyngedig sydd ar gael, a diffyg system effeithiol o gysylltiadau rhynglywodraethol i gefnogi dadansoddiad ar y cyd mor fanwl mewn cymaint o feysydd, **mae'n debygol o fod yn amhosibl ystyried effaith pob dargyfeiriad posibl o'r fath ar dirwedd reoleiddiol Cymru tra na ddarperir unrhyw gyfeiriad polisi ar sut y gellid defnyddio'r pwerau hyn**. Mae hyn yn ansicrwydd cyfreithiol ar raddfa gyfansoddiadol.

Rôl bosibl y Fframweithiau Cyffredin

2.7 Mae'r asesiad o'r effaith ar gydraddoldeb (a chwestiynau a ddarparwyd i mi gan Bwyllgor Bil Cyhoeddus Senedd y DU) yn awgrymu mai barn Llywodraeth y DU yw, pe bai dargyfeirio polisi sylweddol yn deillio o wahanol ddefnydd o bwerau dirprwyedig y Bil, y byddai'r Fframweithiau Cyffredin yn ddigon i reoli'r canlyniad hwn.

2.8 Pe na bai dyddiad machlud, dylai corff sylweddol o waith rhynglywodraethol ddigwydd ynghylch disodli REUL a gadwyd yn ôl a datganoledig oherwydd bod lle i ryngweithio ag UKIMA a bod angen nodi rhyngweithiadau a rhyngddibyniaethau posibl rhwng deddfau'r DU a deddfau datganoledig. Yn sicr, mae hyn yn unol ag ysbryd yr hyn y bwriadwyd i'r Fframweithiau Cyffredin ei ddarparu – sef cydweithrediad rhynglywodraethol yn seiliedig ar ymddiriedaeth a chonsensws mewn gofod a rennir i hwyluso gwahaniaethau polisi ystyrlon. O ganlyniad, maent wedi gweld rhywfaint o lwyddiant,[7] **ond maent yn annhebygol o fod yn fecanwaith digonol i reoli lefel y tarfu a allai ddeillio o Fil REUL**:

a. Fe'u lluniwyd gyda lefel o gydweithrediad mewn golwg sy'n angenrheidiol i hwyluso ailwladoli cymwyseddau o'r UE fel yr archwiliwyd yn y dadansoddiad o fframweithiau.[8]

[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 Gorffennaf 2022. Ar gael yn: 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] Swyddfa'r Cabinet, 'Revised Frameworks Analysis: Breakdown of areas of EU law that intersect with

Byddai maint posibl y dargyfeirio a'r tensiwn a allai ddeillio o wahanol ddefnydd o'r pwerau dirprwyedig yn y Bil a'r mecanwaith machlud, o achosion anghymesur o hepgor a chymryd gwahanol ymagweddau tuag at oruchafiaeth a'r egwyddorion cyffredinol – yn debygol o fod ymhell y tu hwnt i'r hyn y gall y fframweithiau cyffredin ei reoli. Byddai angen ymrwymiad lefel uwch i waith rhynglywodraethol ar sail consensws.

b. Mae bylchau – nid oes gan rai meysydd polisi fframweithiau cyffredin ond mae ganddynt REUL. Yn wir, nododd y dadansoddiad o fframweithiau mai dim ond ar leiafrif o feysydd polisi yr oedd angen fframwaith cyffredin a gadawodd lawer o rai eraill i ddibynnu ar fecanweithiau eraill. Os disgwylir i'r fframweithiau cyffredin ddarparu rôl ffurfiol wrth reoli dargyfeirio sy'n deillio o Fil REUL, nid yw'n glir sut y byddai meysydd polisi heb fframwaith yn cael eu rheoli.

c. Mae'n debygol bod gwahanol dimau yn y gwasanaeth sifil ar y lefelau datganoledig a chanolog yn gweithio ar y fframweithiau cyffredin a REUL. O ystyried yr heriau sylweddol o ran capasiti eisoes, mae'n debygol y bydd ystyriaethau ymarferol pellach o ran sicrhau cyfathrebu rhwng timau perthnasol.

d. Er gwaethaf eu llwyddiannau, nid oes gan y Fframweithiau Cyffredin dryloywder a chysondeb. At hynny, roedd llinell amser ymadawiad y DU â'r UE yn ei gwneud yn ofynnol iddynt ddod i rym er bod llawer ohonynt yn anghyflawn a thros dro.

Nid yw'r Bil yn cyd-fynd â datganoli, ysbryd Confensiwn Sewell na darnau eraill o ddeddfwriaeth sy'n ymwneud ag ymadael â'r UE

2.9 Yn groes i'r honiad yn y nodiadau esboniadol, nid yw'r Bil yn parchu'r setliadau datganoli na Chonfensiwn Sewell. Ni ddigwyddodd digon o ymgysylltu *a priori* fel y dangosir gan gyfathrebiadau gan lywodraethau Cymru (a'r Alban). Hyd yn oed *a posteriori*, mae'n drawiadol na wahoddwyd Llywodraeth Cymru i roi tystiolaeth lafar ochr yn ochr â Llywodraeth yr Alban i'r Pwyllgor Biliau Cyhoeddus. Yn wir, yn ei sesiwn dystiolaeth ar 8 Tachwedd 2022, roedd yn ymddangos bod y Pwyllgor yn gosod Angus Robertson MSP, Ysgrifennydd y Cabinet dros y Cyfansoddiad, Materion Allanol a Diwylliant yn Llywodraeth yr Alban, mewn sefyllfa i gyflwyno barn Llywodraeth Cymru hefyd.[9]

2.10 Mae Llywodraeth Cymru a Llywodraeth yr Alban wedi argymell yn erbyn cydsyniad deddfwriaethol ac, eto, o ystyried arferion diweddar, mae'n ymddangos yn debygol y bydd y ddeddfwriaeth yn cael ei phasio, beth bynnag. At hynny, mae'n rhoi pwerau deddfu i Lywodraeth y DU mewn meysydd cymhwysedd datganoledig i Gymru y gellir eu harfer heb ofyn am gydsyniad y Senedd na Llywodraeth Cymru. Byddai pŵer cymal 16 i ddiweddaru cyfraith wedi'i chymathu, nad yw'n ymddangos ei bod yn gyfyngedig o ran amser hyd at 2026, yn rhoi pŵer amhenodol i Lywodraeth y DU ddiweddaru cyfraith Cymru lle mae 'datblygiad mewn dealltwriaeth wyddonol'. Mae hyn yn gwneud y Bil yn anghymesur o ran sut mae'n mynd i'r

devolved competence in Scotland, Wales and Northern Ireland', Ebrill 2019. Ar gael yn: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792738/20190404-FrameworksAnalysis.pdf

[9]Mae trawsgrifiad ar gael yn: https://www.theyworkforyou.com/pbc/2022-23/Retained_EU_Law_%28Revocation_and_Reform%29_Bill/02-0_2022-11-08a.76.2

afael â datganoli, gan fod Atodlen 2 yn gosod cyfyngiadau ar gymhwysedd datganoledig, gan atal y defnydd o bwerau gan yr awdurdodau datganoledig, ond nid yw'n creu unrhyw gyfyngiad na mecanwaith cydsynio cyfochrog ar arfer pwerau gweinidogol gan Lywodraeth y DU mewn meysydd datganoledig.

2.11 Hefyd, yn groes i'r datganiad yn y nodiadau esboniadol, mae absenoldeb mecanwaith cydsynio yn golygu nad yw'r Bil yn gydnaws â deddfwriaeth arall sy'n gysylltiedig ag Ymadael â'r UE.

e. Er enghraifft, mae adrannau 6(7), 8(9), 10(9) o UKIMA yn ei gwneud yn ofynnol i Lywodraeth y DU ofyn am gydsyniad Gweinidogion Cymru wrth arfer pwerau dirprwyedig perthnasol.

f. Mae'r Ddeddf Ymadael a'i chytundeb rhynglywodraethol cysylltiedig yn darparu enghraifft gadarnach yn gyfansoddiadol o fecanwaith cydsynio. Pe bai Llywodraeth y DU yn arfer y pwerau i rewi cymhwysedd datganoledig, roedd y system yn mynnu bod y Llywydd yn cael ei hysbysu a bod y rheoliadau perthnasol yn cael eu darparu i Lywodraeth Cymru. Yna, byddai'r Senedd yn cael cyfle i gydsynio. Os oedd Llywodraeth y DU yn dymuno bwrw ymlaen heb gydsyniad, byddai llywodraethau datganoledig a chanolog yn darparu datganiad ysgrifenedig i Senedd y DU yn esbonio pam y gwrthodwyd cydsyniad. Yna, gallai Senedd y DU benderfynu a ddylid cymeradwyo'r rheoliadau ai peidio. **Mae'n gyfansoddiadol hynod na roddir unrhyw ystyriaeth ar wyneb Bil REUL i geisio cydsyniad awdurdodau datganoledig wrth arfer pwerau cydredol sydd, yn achos y Bil hwn, yn enfawr**.

2.12 Yn yr un modd, mae sawl problem â'r pŵer i ymestyn y machlud gan nad yw'n glir pam y caiff hyn ei roi i Lywodraeth y DU yn unig. Er bod y llywodraeth wedi nodi mai 'methu-diogel' yw bwriad hyn, mae'n debygol o fod yn hanfodol o ystyried pa mor dynn yw'r dyddiad cyflawni. Mae'r un mor bryderus y bydd hawliau uniongyrchol effeithiol sy'n deillio o gyfraith achosion yr UE, cytuniadau'r UE a chyfarwyddebau'r UE yn machlud yn 2023 yn rhinwedd cymal 3 heb y posibilrwydd o'u hymestyn, pan fydd yn gwbl ansicr beth fydd effeithiau hyn yn y pen draw.

2.13 Mae'r mecanwaith yng nghymal 1(2) i gadw rhag machlud yn darparu opsiwn sy'n agored i Lywodraeth Cymru, ond mae hefyd yn mynnu bod pob REUL datganoledig yn cael ei nodi cyn y dyddiad cyflawni. Mae hefyd ymhell o fod yn ddelfrydol ei fod yn ddarostyngedig i'r weithdrefn negyddol. Nid yw'r mynegiant a'r gwahaniaethau rhwng mecanweithiau cymal 1(2) a chymal 2 yn gwbl glir, er ei bod yn ymddangos y gallai mecanwaith cymal 2 gael ei ddefnyddio mewn perthynas â chategorïau o ddeddfwriaeth, gan ei gwneud yn ehangach o bosibl. Yn y naill achos neu'r llall, mae'n bosibl y bydd dyddiad terfynol y machlud yn arwain at ruthr i ymestyn neu ddiogelu REUL datganoledig o'r machlud a bydd hyn yn agored i hepgoriadau a chamgymeriadau deddfwriaethol, gyda goblygiadau difrifol posibl i'r llyfr statud ac i sicrwydd cyfreithiol.

2.14 At hynny, mae'r broses yn gwbl amhriodol o safbwynt craffu seneddol, gan na fydd gan y Senedd unrhyw benderfyniad ystyrlon i'w wneud os cyflwynir corff o REUL datganoledig iddo mewn *un swmp* i'w ddiogelu. Byddai'r penderfyniad i beidio â diogelu wir yn rhy broblemus. **Dylai fod gan y Senedd rôl ddeddfwriaethol gyffredin o ran craffu ar y newidiadau i REUL dros gyfnod llawer mwy hirfaith, lle y gall rhinweddau diwygiadau deddfwriaethol penodol fod yn destun trafodaeth, asesiad effaith ac ymgynghoriad ystyriol. Dylid dileu neu newid y mecanwaith machlud fel bod yn rhaid nodi bod offerynnau i'w cynnwys o fewn ei gwmpas, fel y gellir craffu ar y penderfyniad i wneud hynny. Dylid hefyd ystyried mecanwaith sy'n debyg i'r un yn y**

Ddeddf Ymadael fel bod gan y Senedd rôl graffu lle y mae Llywodraeth y DU yn arfer pwerau cydredol mewn meysydd cymhwysedd datganoledig.

3 Pryderon capasiti

3.1 Bydd y dyddiad terfyn a grëwyd gan y machlud yng nghymal 1 yn rhoi pwysau enfawr ar Lywodraeth Cymru a'r Senedd gan fod y llinell amser ar gyfer nodi pob REUL datganoledig yn amhosib o dynn. **Mae hyn gyfystyr â Llywodraeth y DU yn gofyn bod blaenoriaethau deddfwriaethol a gweithredol Cymru yn cael eu hatal am gyfnod tra bydd ymarfer cwbl ddiangen yn digwydd na all ond arwain at ansicrwydd cyfreithiol sylweddol a thensiwn rhwng awdurdodau canolog a datganoledig**. Mae'r pryderon hyn o ran capasiti yn ymestyn i fudiadau trydydd sector Cymru, a fydd yn ei chael hi'n anodd i gyflawni unrhyw graffu ystyrlon gan gymdeithas ddinesig ar ddefnyddio'r pwerau machlud a gweinidogol. Mae'n rhyfeddol y dylai ailgyfeirio capasiti mor fawr a diangen ddigwydd tra bod y wlad yn mynd i'r afael â'r argyfwng costau byw, argyfwng ynni a sgîl-effeithiau'r rhyfel yn Wcráin.

3.2 Mae Llywodraeth Cymru wedi datgan na ddylai mapio REUL datganoledig at ddiben y Bil hwn gael ei osod yn faich ar awdurdodau datganoledig. Er ei bod yn ddealladwy ar lefel wleidyddol, yn ymarferol, os bydd y Bil yn pasio heb ei ddiwygio i raddau helaeth, bydd yn hanfodol bod REUL datganoledig yn cael eu nodi mor gynhwysfawr â phosibl, gan fod canlyniadau cael eu dal gan y machlud yn rhai difrifol.

3.3 Fodd bynnag, nid yw'r pwysau o ran capasiti y bydd y Bil yn eu creu wedi'i gyfyngu i nodi REUL datganoledig. Mae angen cydlynu rhynglywodraethol sylweddol i sicrhau bod goblygiadau polisi trawsffiniol yn cael eu nodi a'u hystyried ar y cyd cyn unrhyw benderfyniadau i fachlud, ailddatgan, diwygio neu ddiddymu offerynnau penodol. Hefyd, dylid cynnal deialog lle byddai newidiadau i feysydd polisi a gedwir yn ôl gan ddefnyddio'r pwerau hyn yn arwain at oblygiadau sylweddol yng Nghymru (er enghraifft o ran newidiadau posibl i hawliau llafur).

3.4 Nid yw'n ddefnyddiol nad yw'r dangosfwrdd yn nodi REUL datganoledig perthnasol, gan fod hyn yn golygu bod awdurdodau datganoledig yn ôl pob tebyg ymhellach ar ei hôl hi yn y broses hon na Llywodraeth y DU. Maent yn debygol hefyd o fod yn ddarostyngedig i gyfyngiadau hyd yn oed yn fwy llym ar gapasiti. Fodd bynnag, hyd yn oed pe bai'r Dangosfwrdd yn gwahaniaethu rhwng REUL datganoledig a REUL a gadwyd yn ôl, ni fyddai hyn yn arbennig o ddefnyddiol gan nad yw'n mynd i'r manylder angenrheidiol i gefnogi ymarfer polisi o'r natur a'r raddfa hon. Yn wir, mae gwaith diweddar gan yr Archifau Gwladol wedi amlygu pa mor anghyflawn ydyw fel cronfa ddata – gan nodi eu bod wedi nodi 1,400 darn pellach o REUL.[10] Yn y cyfamser, ychydig neu ddim ystyriaeth a roddwyd mewn trafodaethau yn Senedd y DU i absenoldeb REUL datganoledig o'r gronfa ddata.

4 Cwmpas y pwerau newydd i wneud rheoliadau a chraffu arnynt

[10] Gweler adroddiad y Financial Times ar 7 Tachwedd 2022. Ar gael yma: https://www.ft.com/content/0c0593a3-19f1-45fe-aad1-2ed25e30b5f8

4.1 Bydd y bil yn trosglwyddo llawer iawn o bwerau deddfu o'r deddfwrfeydd i'r gweithrediaethau heb unrhyw broses graffu, ymgynghori nac asesu effaith ystyrlon – **mae hyn yn gyfansoddiadol amhriodol ni waeth ar ba lefel llywodraethu y mae'n digwydd**. Mae'n tanseilio rôl y Senedd a'r rôl graffu ddemocrataidd a ddarperir gan gymdeithas ddinesig ehangach. Byddai cymal 12 (2) (b) hyd yn oed yn caniatáu i Weinidogion ddiwygio darpariaethau deddfwriaeth sylfaenol gan ddefnyddio'r pwerau sydd eisoes yn eithafol yng nghymal 15. At hynny**, bydd yn galluogi Gweinidogion, naill ai drwy fwriad neu anwaith, i ddeddfu diwygiadau i bolisi drwy ddiffyg gweithredu**. Nid yw'n glir sut, neu hyd yn oed p'un a, fyddai'r bwriad i ganiatáu i ddarn o REUL fachlud yn cael ei gyfleu, heb sôn am ei herio, o ystyried y dyddiad terfyn tynn.

4.2 Mae cymal 15 yn arbennig o hynod mewn dwy ffordd. Yn gyntaf, mae'n drawiadol o ran ehangder y pwerau a roddir i weinidogion, a fyddai'n gallu dirymu a disodli REUL gydag unrhyw ddewis arall sy'n 'briodol' yn eu barn nhw. Yn ail, er gwaethaf sicrwydd gwleidyddol, mae tôn a mecanweithiau cymalau 15(5) a 15(10) yn amlwg yn ddadreoleiddiol.

a. Byddai cymal 15(5) yn gosod cyfyngiad ar allu Llywodraeth Cymru i ddefnyddio'r pwerau dirprwyedig yng Nghymal 15 i wneud unrhyw newidiadau y gellid dehongli eu bod yn cynyddu'r 'baich rheoleiddiol'.

b. Yn y cyfamser, mae cymal 15(10) yn sefydlu diffiniad anhygoel o eang (a phenagored) o'r hyn a all fod yn faich rheoleiddiol. Mae hyn yn cynnwys, er enghraifft, 'rhwystrau rhag effeithlonrwydd, cynhyrchiant, neu broffidioldeb, 'cost ariannol' neu hyd yn oed '**anghyfleustra** gweinyddol'. Nid yw'n glir sut y gellid trafod a mynd i'r afael â gwahaniaethau mewn dehongli o ran y diffiniadau hyn. Mae'r hyn y mae un awdurdod yn ei ystyried yn faich yn safon reoleiddio uwch i awdurdod arall. I bob pwrpas, byddai hyn yn atal safonau rheoleiddiol rhag cael eu codi gan ddefnyddio'r pwerau hyn sydd, mae'n bwysig cofio, yn bwerau y gall Llywodraeth y DU eu harfer yn unochrog mewn meysydd cymhwysedd datganoledig. Gellid defnyddio prosesau deddfwriaethol cyffredin i ailsefydlu neu godi safonau, fodd bynnag, mae pryderon ynghylch amser deddfwriaethol, capasiti, a risg bosibl y gallai unrhyw newidiadau a gyflwynir gan ddefnyddio'r pwerau gweinidogol hyn ymwreiddio.

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.