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The Scottish Parliament
Pàrlamaid na h-Alba

Constitution, Europe, External Affairs and Culture Committee

Legislative Consent Memorandum for the Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation)

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Constitution, Europe, External Affairs and Culture Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) the Scottish Government's EU and external affairs policy;

(b) policy in relation to the UK's exit from the EU;

(c) the international activities of the Scottish Administration, including international development; and

(d) any other matter falling within the responsibility of the Cabinet Secretary for the Constitution, External Affairs and Culture and any matter relating to inter-governmental relations within the responsibility of the Deputy First Minister.


ceeac.committee@parliament.scot


0131 348 5215

Committee Membership

Convener
Clare Adamson
Scottish National Party

Deputy Convener
Donald Cameron
Scottish Conservative and Unionist Party

Alasdair Allan
Scottish National Party

Sarah Boyack
Scottish Labour

Maurice Golden
Scottish Conservative and Unionist Party

Jenni Minto
Scottish National Party

Mark Ruskell
Scottish Green Party

Introduction

1. As lead committee, the Constitution, Europe, External Affairs and Culture Committee ('the Committee') is required under the Standing Orders[i] to consider and report on the Legislative Consent Memorandum (LCM) for the Retained EU Law (Revocation and Reform) Bill ('the Bill').

2. At our meeting on 6 October 2022, the Committee agreed to examine the potential impact of the Bill in devolved areas, with a particular focus on the issues identified in our report on *The Impact of Brexit on Devolution* .

3. The Scottish Government lodged the LCM on 8 November 2022. We took evidence on the LCM and the Bill at our meetings on 10 November, 24 November, 1 December, and 8 December 2022.

4. On 29 November 2022, while the Committee's deliberations were ongoing, the Cabinet Secretary for the Constitution, External Affairs and Culture ('the Cabinet Secretary') led a plenary debate on the Bill, the outcome being an amended motion that was passed by 84 votes to 29.[ii] The Presiding Officer, in response to a point of order from Martin Whitfield MSP, Convener of the Standards, Procedures and Public Appointments Committee, immediately before that debate, said—

> "There have been instances when the Parliament has debated matters that are the subject of committee scrutiny prior to committee reports being published, and I can confirm that there are no procedural limitations on the Parliament debating this topic today. This afternoon's business was agreed by the Parliamentary Bureau and then voted on by the Parliament last week.
>
> The member may be interested to know that the Scottish Government has confirmed its intention to bring forward a debate following the conclusion of the committee's consideration." [1]

5. The Committee also considered the findings of the Delegated Powers and Law Reform Committee ('DPLR Committee'), which examined the relevant delegated powers in the Bill and, in line with the Standing Orders[iii], reported to us as the lead Committee for the LCM. The DPLR Committee published its Legislative Consent Memorandum: delegated powers relevant to Scotland in the Retained EU Law (Revocation and Reform) Bill report on 16 January 2023.

6. Evidence taken by the Committee has been set out under the following themes—

   - Sunsetting retained EU law;
   - Impact of the Bill on the regulatory environment;
   - Sewel Convention;
   - Delegated powers; and

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i Rule 9B.3.5
ii See paragraph 16 of this report for the text of that amended motion.
iii Rule 6.11.1(b) and (c) and 9B.3.6

- Interpretative provisions

7. The Committee wishes to thank all those who gave evidence and provided written submissions.

8. Donald Cameron MSP and Maurice Golden MSP dissented from the conclusions in this report (with the exception of those paragraphs relating to the conclusions in earlier reports agreed by this Committee, or where the text in bold is simply noting the facts or evidence that the Committee has heard during this inquiry).

Bill overview, LCM, and Scottish Government debate

9. Retained EU law ('REUL') is a category of UK domestic law that was created to retain the EU law and rights which applied in the UK before the UK left the EU. Its purpose was to provide legal continuity and certainty following the UK's withdrawal.

10. REUL was created by the European Union (Withdrawal) Act 2018 ('EUWA'). In essence, REUL is a 'snapshot' of the EU laws that previously applied, which was copied and pasted into domestic law on 31 December 2020, since when it may have been amended by domestic legislation.

11. The UK Government explains that "REUL consists of a combination of EU regulations, decisions and tertiary legislation, domestic legislation passed to implement EU directives, general principles of EU law, directly effective rights and obligations developed in relevant case law of the Court of Justice of the European Union (CJEU), and other principles developed in that case law." [2]

12. The Retained EU Law (Revocation and Reform) Bill was introduced by the UK Government on 22 September 2022. The stated purpose of the Bill is to "provide the Government with all the required provisions that allow for the amendment of retained EU law (REUL) and remove the special features it has in the UK legal system". [2]

13. It will have the following main effects—

    - To provide a "sunset" on REUL, meaning that REUL which is not specifically retained by Ministers will be automatically repealed at the end of 2023;[iv]
    - To delegate powers to UK Ministers and Ministers of devolved administrations to enable them to amend, revoke or retain pieces of REUL;
    - To change the rules on how REUL is to be interpreted, by removing the principle of supremacy of EU law and other retained general principles of EU law by the end of 2023, allowing UK courts to depart from retained case law, and requiring retained direct EU legislation to be interpreted and applied consistently with domestic legislation;
    - To rename REUL which remains on the statute book after 31 December 2023 as "assimilated law".

14. The Scottish Government's LCM for the Bill sets out that "the Bill applies to Scotland in its entirety" and that legislative consent is required from the Scottish Parliament with respect to 20 clauses and schedules of the Bill. [3] This differs from the UK Government's position as set out in Annex A of Explanatory Notes to the Bill, in which it states that it is seeking the Scottish Parliament's consent for 10 of

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iv The key exceptions are financial services legislation (clause 22(5)), and primary legislation (e.g. Acts of Parliament and Acts of the Scottish Parliament), all of which are excluded from the sunset.

the Bill's clauses. [2] The Bill makes provision applying to Scotland for purposes within the legislative competence of the Scottish Parliament, and it makes provision which alters the legislative competence of the Scottish Parliament and the executive competence of the Scottish Ministers.

15. The LCM recommends that the Parliament should *not* give consent to the Bill for three reasons—

- Its deregulatory implications;
- Its undermining of devolution; and
- The risk posed by the sunsetting provision to automatically repeal REUL unless Ministers take legislative action and the date of sunsetting (31 December 2023) which will disrupt Scottish Government work, including the legislative programme. [3]

16. On 29 November 2022, following a plenary debate led by the Cabinet Secretary, the Parliament agreed the following motion (S6M-06984) on REUL, as amended, by division (For 84, Against 29, Abstentions 0)—

> "That the Parliament agrees that the Retained EU Law (Revocation and Reform) Bill threatens vital environmental and health standards and protections built up over 47 years of EU membership, creates enormous uncertainty for workers and businesses, and undermines devolution, and should, therefore, be scrapped by the UK Government." [1]

17. **The Committee notes the outcome of the debate that took place on 29 November 2022. We address the matter of the timing of that debate and when a legislative consent motion is required or not required under the Standing Orders later in this report (see paragraphs 195-197).**

Sunsetting retained EU law

18. The Bill puts a 'sunset' (expiry date) on most REUL for the end of 2023, at which point, laws that have not been preserved or restated by Ministers will be revoked automatically. It also allows for an extension of the sunset for specified instruments (or classes of instrument) no later than 23 June 2026 at the discretion of UK Ministers (not a power exercisable by Scottish Ministers).

19. The sunset applies to almost all EU-derived law in the UK: it applies to "EU-derived subordinate legislation"[v] and "retained direct EU legislation" (RDEUL).[vi] It does not apply to financial services legislation[vii] and UK primary legislation (such as Acts of Parliament and Acts of the Scottish Parliament) which implemented EU law.

20. The UK Government outlined that the sunset provision has been included in the Bill "to ensure REUL comes to an end in the near future". It said the sunset would "accelerate reform and planning for future regulatory changes, benefiting both UK business and consumers sooner" and would "increase business certainty by setting the date by which a new domestic statute book, tailored to the UK's needs and regulatory regimes will come into effect". [2]

21. The UK Government Minister for Industry and Investment Security, Nusrat Ghani MP, said in the third reading of the Bill that the "territorial scope of the Bill is UK-wide, and it is therefore constitutionally appropriate that the sunset applies across all four sovereign nations of the UK…Providing a carve-out for legislation that is within a devolved competence would severely impact the coherence of the UK statute book and legal certainty for our public and businesses". [4]

22. However, the Scottish Government's view is that "the sunsetting approach brings significant risk to the coherence of the statute book, and that the proposed 2023 date for sunsetting is impractical and unachievable, imposing unrealistic burdens on both government and Parliamentary resources to complete the necessary work to preserve REUL in the available time". [3]

23. The House of Lords' Delegated Powers and Regulatory Reform Committee ('DPRR Committee') has stated: "The normal way of changing the law to deliver significant policy change is by Act of Parliament, following consultation, debate, amendments and (if at all) with targeted and proportionate delegated powers. This Bill takes a radically different approach. Under clause 1, considerable swathes of REUL will automatically expire at the end of 2023 unless Ministers decide otherwise. The Bill gives the widest powers to Ministers to amend or replace it. It is a blank cheque placed in the hands of Ministers". [5]

24. This aspect of the Bill was central to the evidence the Committee received in its

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v i.e., secondary legislation made in the UK which implements or related to EU obligations.

vi i.e., EU legislation which was directly applicable in the UK and then converted into domestic law by EUWA. RDEUL is a subset of REUL.

vii Clause 22(5)

consideration of the LCM.

Practical challenges posed by a "legal cliff-edge"

25. The Committee heard from several witnesses of the considerable practical challenges associated with the sunset provision setting a time restriction on—

- Identifying all REUL subject to the sunset clause, including identifying where the boundary lies in pieces of REUL which have both reserved and devolved aspects;
- Reviewing the REUL which is identified and deciding what to preserve, and therefore exempt from the sunset provision, or otherwise; and
- Subsequently, the potential risks these challenges could present to legal certainty, standards, and protections.

26. The Committee also heard evidence on alternative approaches to reviewing REUL.

Identifying REUL

27. The Committee heard concerns that there is a lack of certainty regarding the identification of all REUL which is subject to the sunset. The Law Society of Scotland outlined that the Bill does not include a “list of those items of legislation so that people would know exactly what was going to be revoked” – instead the sunset clause takes a “blanket nature”. [6]

28. Professor Alison Young explained that while “in some senses it might be easy to identify retained EU law enacted under section 2 of the European Communities Act 1972…it is much harder to recognise every single piece of secondary legislation that was intended to implement an EU obligation, but which was enacted through another piece of parent legislation.” [6]

29. The UK Government described its Retained EU Law dashboard, published in June 2022, as “an authoritative catalogue of REUL”. It later stated that “the Government will continue developing this authoritative record of where EU-derived legislation remains and will work to identify more legislation which can be amended, repealed or replaced”. Wording on the dashboard notes that it will be updated quarterly as more REUL is "repealed or replaced or more REUL is identified". [7]

30. Scottish Environment LINK highlighted that “the Cabinet Office’s attempt to identify REUL has not been comprehensive, and as recently as early November it was admitted that 1,400 relevant pieces of legislation had been absent from the official dashboard.” [8] Professor Young said this “highlights how difficult it can be to spot everything” [6] , and Charles Livingstone – a partner at Brodies LLP Solicitors – considered that “you cannot know with absolute certainty what is within the category of things [to be revoked]”. [6]

31. Regarding REUL in devolved areas, an explanation on the dashboard states that it “is not intended to provide an authoritative account of REUL that sits with the competence of the devolved governments. However, it may contain individual pieces of REUL that do sit in devolved areas and it does identify the territorial

application of each piece of REUL." [7] The Cabinet Secretary has said he remains "unsatisfied that the UK Government has a coherent understanding of what REUL sits within devolved or reserved competence". [9]

32. Charles Livingstone suggested a "greater use of sunset clauses in legislation might be a good idea, as that would encourage more post-legislative scrutiny" but "doing it in the way that the bill does is difficult because…you cannot know with absolute certainty what is within the category of things that is being repealed" and "from a practitioner's perspective" that the Scottish Government's request for the UK Government to exclude legislation that is within devolved competence from the sunset clause "would be an enormous headache". He said: "It would be difficult to have to start by identifying whether something is within the category of law to which the sunset provision applies and to then ask whether it is in the sub-category of things that are within devolved competence, which is, similarly, not always an easy question. From a legal certainty perspective, that would create quite a lot of doubt about whether a given piece of legislation was still in effect". [6]

33. Professor Young described a "huge task that will be difficult to do in a short period of time" and "if you have not discovered something…it will just disappear" leading "to huge problems in terms of legal certainty". [6] Dr Kirsty Hood KC said this would mean "to put it plainly—we would end up with gaps in the law" leading to "uncertainty, extra cost and—at worst—injustice for people who might be affected by something dropping off the statute book because people were in a rush to deal with such a massive project." [6]

34. The UK Environmental Law Association (UKELA) highlighted a further complicating factor to the Committee that, as UK Ministers could previously make regulations within devolved areas under the European Communities Act 1972, there "did not have to be a rigid separation between devolved and reserved provisions where a measure straddled the boundary". Accordingly, "some instruments that do contain matters within devolved competence may also contain some that are reserved". [10]

35. UKELA therefore considered that "it will likely to be impossible to identify which provisions (some predating the existence of devolution) were made via 'reserved' provisions but where Scotland will wish to nevertheless retain that law." [10] The Scottish Government echoed that "due to the way that REUL has been embedded in our legal system since 1972, we consider that it will be very difficult to ensure that we have identified all devolved REUL". [11]

36. Dr Viviane Gravey and Professor Colin Reid outlined in an academic blog that "it is difficult, if not impossible, to fully gauge what the impact of the Bill will be on devolved competences." [12] The Soil Association agreed that "given the length of time and resources it would take to analyse the volume of legislation already listed, this admission that the dashboard is not fully representative of all the individual pieces of law affected makes it very difficult to provide a fully informed assessment of the implications of this Bill on devolved competences." [13]

37. Ultimately, as suggested by the Society of Chief Officers of Trading Standards in Scotland (SCOTSS), due to the lack of a comprehensive list of REUL in devolved areas, "there is a danger of some pieces of legislation falling to the sunset clause by

accident". [14] This could conflict with the Scottish Government's aim "that devolved REUL should be preserved, as appropriate, so that it does not sunset at the end of 2023". [11]

38. RSPB Scotland also concluded there was a "real danger that important laws will fall automatically at the end of 2023, simply because they have not been identified and/ or restated or amended in time" [15] and "giving devolved ministers the powers to extend the sunset provision will be absolutely critical to ensure that there are not immediate significant capacity and resourcing implications in Scotland". [16]

39. The Law Society of Scotland considered that devolved Ministers not having the power to extend the sunset for specified pieces of REUL "creates additional uncertainty because we are not sure that the minister of the Crown would have the same sensitivities to devolved retained EU law…as they would have to all the other pieces of legislation that Whitehall departments will deal with" [6] and Scottish Environment LINK feared a "much harsher cliff-edge in devolved areas than in reserved". [8]

40. The Scottish Government's view was that as "the UK Government is imposing the REUL Bill on the Scottish Government and the Parliament which provides for all devolved REUL to automatically sunset", it is therefore "incumbent on the UK Government to take responsibility to identify all REUL at risk of the sunset and to provide the Scottish Government with that information". [11]

41. Furthermore, it did "not consider it appropriate that only UK Ministers have the power to extend the sunset for devolved REUL" and had "already requested that the extension power be conferred on devolved Ministers". Otherwise, while Scottish Ministers "could make a further formal request of the UK Government to extend the sunset in relation to devolved REUL, it would be up to UK Ministers to make the decision about extension." The Cabinet Secretary said this "could have consequences for the workload of this Parliament" and was "wholly unacceptable". [11]

42. The Cabinet Secretary also noted that the Scottish Government "plan to do our own assessment…to ensure accuracy, but the UK Government doing that exercise is important in reaching a shared, centralised understanding of what the devolved governments should have full responsibility for." [9] The Welsh Government has also said that it is working to identify devolved REUL in place in Wales. [17] [18]

43. The UK Government outlined in a letter to the House of Lords Common Frameworks Scrutiny Committee dated 29 November 2022 that "the UK Government is committed to working with the devolved governments to reach a shared understanding on the devolution status of REUL", adding that the Department for Levelling Up, Housing and Communities and Cabinet Office have "formed a fortnightly working group with the devolved governments to share analysis and to identify REUL that falls within devolved competence." [19]

44. In a letter to the DPLR Committee dated 12 December 2022, the Scottish Government said that "as a responsible Government we are beginning the work of identifying devolved REUL". [11]

45. In a letter of 30 November 2022, the DPLR Committee asked the UK Government what the procedure would be for Scottish Ministers to request that UK Ministers exercises the power to extend the sunset in relation to specified devolved legislation. [20]

46. The UK Government's Secretary of State for Business, Energy and Industrial Strategy replied on 15 December 2022 that "UK Ministers will be able to legislate to extend pieces or descriptions of retained EU law in areas of devolved competence on behalf of Scottish Ministers" and "we remain committed to working collaboratively with devolved government counterparts as we develop this process". [21]

47. The DPLR Committee's report on the LCM, in relation to the power to extend the sunset, expressed concern "at the short time frame" and "a need for the power to extend to be used" suggesting an increased "potential for uncertainty". With "no equivalent power for Scottish Ministers", it said it was "inappropriate" that there was "no formal mechanism" for them to "request that the UK Government…extend the sunset in relation to specified devolved legislation". [22]

48. The DPRR Committee of the House of Lords stated in its report on the Bill that: "There is no certainty about the sunset provision itself because Ministers can extend it under the delegated power in clause 2. There is no certainty about which policy areas will be affected. And there is no certainty about what will replace revoked REUL". [5]

Reviewing REUL

Stakeholder engagement

49. Repeatedly we heard the view that the timescale set by the sunset clause would not enable an appropriate level of stakeholder engagement in reviewing individual pieces of REUL and informing subsequent Ministerial decisions.

50. The British Veterinary Association ('BVA'), for example, said that "to achieve improved or at least equivalent regulatory outcomes, every single piece of regulation that is due to be discarded under the Bill should be properly reviewed including a stakeholder consultation to establish whether it should be retained, amended or completely replaced." However, in its view, "it is not feasible to carry out such a process within the proposed timeframe". [23]

51. The National Farmers' Union of Scotland (NFUS) agreed there was "considerable doubt that this process can be undertaken with due care and attention, while properly involving stakeholders, in such a small timeframe". [24]

52. The Law Society of Scotland said that the Bill "does not appear to allow sufficient time to enable the review to be completed properly after due consultation with the devolved authorities and relevant stakeholders including UK Parliamentary and Devolved Legislature Committees". [25]

53. The Committee heard the timescale would also have resource implications for

stakeholders. Seafood Scotland said that the "legal 'cliff-edge'" would "force businesses and representatives to divert considerable resource to understanding and responding to proposed changes", while for the BVA, "vital capacity will be diverted from other necessary business". [16]

54. RSPB found it "deeply frustrating to be talking about fighting to keep some of our existing effective protections when we should be looking to build on them" at a "critical juncture for nature", while SCOTSS agreed that "the REUL Bill is a distraction". [16]

Government and parliamentary resources

55. Further concerns were raised with regards to whether governments would have the time and resources necessary to identify, review, and then introduce legislation to preserve or restate REUL before the end of 2023, as well as the burden that the latter may place on parliaments in providing scrutiny.

56. At the UK Government level, Seafood Scotland told the Committee that the Department for the Environment, Food and Rural Affairs (DEFRA), which is responsible for 570 of the 2,400 currently identified pieces of legislation subject to the sunset – more than any other department – "does not have the resourcing to deal with" that volume of legislation. [26] Scottish Environment LINK compared this "significantly bigger challenge" of REUL with the "comparatively modest EU Exit Statutory Instrument programme, which itself required significant civil service resource within DEFRA to implement". [8]

57. In UKELA's view, there was a "paucity of policy direction from the UK Government as to how a review of all affected retained EU law would be carried out within the narrow window before the end of 2023 and the policy aims and objectives that would underpin and guide that exercise". [10]

58. Food Standards Scotland, a non-ministerial department of the Scottish Government, stressed that "it is not a straightforward keep-or-bin exercise. It is much more line by line. What pieces are no longer relevant? What pieces would you want to get rid of? What pieces would you change? What pieces would you keep? It is a huge task". [26] Even if Scottish Ministers sought to preserve all retained EU food law, it would still require "the use of significant resource" [27] and "even if we put our whole team on to this single Bill it probably would not touch the edges of what we would need to do". [26]

59. Scottish Environment LINK expressed concerns that "the resource pressures on the Government, the Parliament and stakeholders will be immense" but that there was also a "risk of trying to do something simple and missing something". [16]

60. Dr Hood KC referred to the "danger that the civil service and the various parliamentary committees and chambers might not be able to cope with the amount of work that is involved as well as dealing with the other workstreams that are important." [6]

61. The Cabinet Secretary told us that the Scottish Government has "initiated a programme to co-ordinate management of the secondary legislation that will be necessary to stop essential devolved laws being lost" but that it was "still operating largely in the dark on what the UK Government proposed to do with retained EU law and, therefore, what powers Scottish ministers might need to use." [28]

62. The Cabinet Secretary further highlighted the "extremely serious impact on the ability of the Scottish Government and the Scottish Parliament to scrutinise legislation that would need to go through our process to ensure that legislation does not fall over the sunsetting cliff-edge." [29]

63. No preservation or other instruments can be made under the Bill unless and until it has received Royal Assent and is in force, which is "expected to be around May 2023". Thereafter, it is the Scottish Government's intention to lay secondary legislation to "seek to ensure that laws are not lost at the end of 2023". [11]

64. The Welsh Government in its LCM expressed "very significant concerns" about the "arbitrary sunsetting deadline of the end of 2023" resulting in all the governments in the UK being forced "to revisit this large body of law in a very compressed timescale that will likely lead to errors and inoperability issues". It said the outcome of "such a needlessly short period in which to consider all the complex interdependencies in the law could be a dysfunctional statute book". The sunsetting provision would also, in its view, leave "parliament and the devolved legislatures" with no scrutiny role regarding REUL that will "sunset automatically" and not enough time "for effective consultation on proposed modifications to REUL" risking an outcome of "unidentified issues and potential negative impacts." [30]

65. The House of Lords' DPRR Committee stated that: "The Bill gives to Ministers (rather than Parliament) the power to decide, in relation to a considerable amount of REUL, what is to be: (a) revoked and not replaced, (b) revoked and replaced with something broadly similar, (c) revoked and replaced with something very different, or (d) retained". [5]

Risks to standards and protections

66. The LCM states that the sunset clause "creates an unacceptably high risk that vital standards and protections are not properly considered and may, through oversight, disappear overnight at the end of the period." [3]

67. The Faculty of Advocates warned that there is "an obvious danger that new legislation drafted to replace the existing rules in a particular area of the law is rushed" and "the existence or importance of a provision is overlooked in the haste…thus creating a gap in the law." [31]

68. Witnesses highlighted the potential practical consequences on matters such as the environment, trade, and consumer protection. UKELA assessed that the Bill had the effect of creating a "cliff-edge" situation for EU-derived law, warning that the effect of the Bill would mean that "unless specific action is taken to the contrary, whole areas of environmental law such as waste, water and air quality, nature conservation, and the regulation of chemicals will be removed from the statute book automatically,

simultaneously and without any safeguards or replacement." [10]

69. RSPB Scotland agreed that the Bill "creates a legislative cliff-edge for some of the most important and powerful legislation we have to protect the environment and nature" and considered that "this 'cliff-edge' constitutes irresponsible law making: a legislative sledgehammer instead of an evidence-driven, targeted and cost-effective process". [15]

70. NFUS described an "unacceptably high risk that vital law, on which the smooth functioning of food production and the economy depends, simply drops off the UK statute book". [24] Food Standards Scotland viewed that "food and feed safety and standards legislation should not be subject to…the risks of inadvertent or unintended harms that could arise for both consumers and businesses", concerned that the sunsetting of retained EU food law could "return us to a time where little in the way of any standards applied". [27]

71. Agricultural Industries Confederation (AIC) Scotland warned against any "failure to ensure minimum standards for food and feed safety, that would have major business and trade implications" [26] while SCOTSS shared concerns that the sunset provision "risks causing the loss of a wide range of crucial Trading Standards legislation which protects people, businesses, animals and the environment from both physical and financial harm". [14]

72. SCOTSS told the Committee that "the problem is that something that falls victim to the sunset clause will be replaced by nothing" and "businesses will rightly think, 'maybe I can get a competitive advantage by slightly changing what I do'". [16]

73. Scottish Environment LINK questioned what enforcement bodies would do if they did not know what REUL was being preserved. It explained that "the level of uncertainty about which laws will and which will not exist, come January 2024, will have a real chilling effect on those bodies…a situation in which they are nervous about whether they should undertake enforcement action." [16]

74. Discussing the interconnection of regulations, the Soil Association told us that "all sorts of horizontal regulations cross-cut and are referred to in the organic regulations", that these "cover a range of areas, including water quality, animal welfare and payments for sustainable systems" and if we were going to be "pulling individual threads, it is important to think about all the other areas that are interconnected". [16]

75. "Food law is a system" according to Food Standards Scotland rather than "neat little bits of legislation that we can just put in a bucket to keep or save", and "all of these things are deeply interlinked and intertwined…they go back many years." [26]

76. The UK Government stated in a letter to DPLR Committee that a sunset "will accelerate reform and regulatory change by a specific date" and "incentivise genuine reform of retained EU laws in a way that works best for the UK". It also pointed to the extension mechanism which: "Should it be required…will provide additional time [until 2026] where necessary to implement more complex reforms to specific pieces of retained EU law". [21]

77. The DPLR Committee identified a "significant uncertainty and risk inherent in this ["cliff-edge"] approach"; was concerned that although there was provision for "scrutiny…in relation to which pieces of REUL will be preserved" the same did not apply for "which pieces of REUL will be revoked at the sunset"; and invited this Committee to call on the Scottish Government "to facilitate a role for the Scottish Parliament in any decisions not to exercise…the preservation power". [22]

78. Asked by the DPLR Committee what action it was taking to mitigate against the risk of unintended or undesirable regulatory gaps emerging due to the blanket application of the sunset provision, the Scottish Government said it was "working at pace to identify devolved REUL and seek to ensure that law is not lost" and that "the Parliament will be kept updated on this work, given that it will have a role to play in these legislative processes". [11]

Alternative approaches to reviewing REUL

79. Many witnesses told us that they would welcome REUL being reviewed on a sectoral and ongoing basis. However, we heard consistent concerns regarding the approach to review and reform, in particular the timescales imposed on this exercise by the sunset clause.

80. Seafood Scotland said that businesses tended to want a "stable, predictable regulatory framework" [32] and AIC Scotland told us that "in general, regulatory uncertainty is not welcomed". [26]

81. The Faculty of Advocates outlined that in relation to the approach being taken to REUL by the Bill "such wide-ranging change may prove disruptive for the legal system" and that "re-opening the issue of retention so quickly" could leave citizens businesses "unsure as to the legal framework in which they operate". [31]

82. The Institute of Directors commented that the "intention to review many thousands of pieces of EU-derived legislation by the end of 2023" could "create a huge amount of uncertainty around the regulatory framework" and is "the last thing that business needs in such a fragile economic environment". [33]

83. Food Standards Scotland's view was that while powers to amend REUL "would not necessarily be a bad thing", the sunsetting approach is "hugely problematic" as it "carries huge risk and unintended consequences for consumers and trade". [26] It saw "no advantage in applying an arbitrary guillotine to food and feed law", regardless of the date. [26]

84. Seafood Scotland said it could "feasibly support the idea of reforming and/or replacing REUL" but this should not be driven by "arbitrary cut-off dates". [32] Quality Meat Scotland saw a need for regulatory reform but not with "an arbitrary timescale". Instead "we could take a much more phased approach that would lessen the impact on business". [26]

85. Similarly, AIC Scotland suggested "a fundamental review of all EU legislation is welcome". However, given its "complexity", this should be carried out within a

"realistic timeframe". It wanted to see more of an "ad hoc process" to reviewing REUL, one "prioritising what needs to be looked at first by industry". [26]

86. RSPB Scotland recognised that "there may be a need to review and strengthen these laws, to drive improvements to both the law itself and how it works in practice". However, it was clear that "change needs to be managed well…and with enough time and resource to ensure maximum benefit in strengthening environmental protections and to avoid unintended consequences". [15]

87. The Soil Association had "no objection to a sensible process of examining, updating or improving existing law" but "we do not think that the bill as drafted delivers that." [16]

88. Professor Young told us the "main alternative" to the approach taken by this Bill to reviewing and amending retained EU law would be "a sector-by-sector approach", whereby "different legislatures and Governments…approach those who are influenced by the existing rules and ask them which they want to keep, and which should change." She said that providing "more time to go away and investigate and scrutinise through primary legislation, not just secondary legislation" would have "the advantages of preserving legal certainty and of enhancing democratic scrutiny". [6]

89. Food Standards Scotland asked: "why not start with the premise that you retain everything rather than sweep everything away?" [26] In the Law Society of Scotland's view, this would be "the obvious alternative" which "fits with the plan". It highlighted that the "plan" as outlined by the then Prime Minister Theresa May MP – and then delivered through EUWA[viii] – was "to convert the 'acquis'...into UK law at the moment we repeal the European Communities Act", which would provide "maximum certainty" as "the same rules and laws will apply on the day after exit as on the day before". Thereafter, it was intended "for democratically elected representatives in the UK to decide on any changes to that law, after full scrutiny and proper debate". [34]

90. The Law Society of Scotland had told us that "it was never intended to be a permanent state of affairs to have retained EU law in all its manifestations" [35] and Dr Emily Hancox had also previously said at our roundtable on REUL in June 2022 that "retained EU law was never intended to be permanent. The idea—this was always the intention—was to provide a springboard for introducing new policy choices. That has been done in Scotland and by the UK Parliament". She said it was "important to think about the issue in those two ways. One is a way of ensuring continuity and legal certainty; the other is allowing for change." [35]

91. The Faculty of Advocates had noted that the approach of retaining EU law through EUWA would "allow the various Parliaments, depending on their powers in the areas, to decide, at leisure, whether to retain, amend and make that law fit better perhaps with a new situation, or to revoke it altogether." [35]

92. UKELA considered that this Bill "stands in stark contrast to" and is a "radical

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viii The European Union (Withdrawal) Act 2018 ('EUWA')

departure from" the approach taken in EUWA [10] while the Law Society of Scotland commented that the Bill would not permit the "full scrutiny" or "debate" on changing REUL that was envisioned by EUWA. [6]

93. Scottish Environment LINK pointed out that "although the phrase 'retained EU law' has "EU" in it, it would be UK and/or devolved law…and change would be done through the normal process of engagement and consultation". It called for the Bill to be "dropped and the review to be done the other way round so that, as and when a Government wishes to do so in individual areas, it has a sensible process to carry out the review and make proposals on change", highlighting that this is "the way that reviews have been done in the past and which was the intent in the European Union (Withdrawal) Act 2018". [16]

94. The Scottish Government considered that "any case for reforming devolved REUL is best progressed through the ordinary Scottish Parliament legislative processes, which build in time for consultation with stakeholders and consideration of impact assessments, and which enhance parliamentary scrutiny". [11]

95. **The clear and repeated message from a broad range of stakeholders was that, while it is accepted that there is a need to review and reform REUL on an ongoing basis, the "cliff-edge" approach taken by the Bill through the sunset provision is "problematic", "arbitrary", and even "irresponsible". Several of them raised concerns regarding the impact on their own resources, as well as on Government and Parliament, from the need to identify, review and then introduce legislation to preserve, restate or amend REUL before the end of 2023. They told us such an approach could present significant risks to, and have unintended consequences for, standards in policy areas as wide ranging as food standards, animal health, safeguarding the environment, consumer protection, employment, and business practice.**

96. **The Committee is concerned that the timetable, with a sunset date of the end of 2023, does not allow sufficient time for the identification of REUL and decisions to be taken on what to preserve. A further and significant concern is that any extension of the sunset for specified instruments or classes of instruments is at the discretion of UK Ministers only and not a power exercisable by Scottish Ministers. We would encourage the Scottish Government and UK Government to work together to identify what REUL should be considered for retention. It is difficult, however, to see how the timeline allows for appropriate levels of parliamentary scrutiny and debate, and stakeholder consultation and engagement on the future of REUL.**

97. **We also share the concern of stakeholders and the DPLR Committee at the short timeframes within which officials are expected to identify and decide which REUL to retain and which should fall away. The Committee agrees there is significant uncertainty and risk inherent in this approach. We note the DPLR Committee's particular concern that while there is provision for parliamentary scrutiny (under clause 1) in relation to which pieces of REUL will be preserved, there is no such provision for scrutiny in relation to which pieces of REUL will be revoked at the sunset.**

98. **Accordingly, we accept the DPLR Committee's invitation (see paragraph 77) for us to call on the Scottish Government to facilitate a role for the Scottish Parliament in any decisions not to exercise this power (the consequences of which will be to allow particular pieces of devolved REUL to sunset). The Committee duly makes that request to the Cabinet Secretary. We also welcome his commitment to the DPLR Committee to keep the Parliament updated on work to identify all devolved REUL and his acknowledgment of Parliament's role in these processes.** [11]

99. **The Committee notes that the scrutiny of legislation laid by Scottish Ministers to preserve or restate REUL before the end of 2023 is likely to present considerable challenges to the capacity of Scottish Government officials and to parliamentary time and resources in the second half of 2023. It is unclear how the Scottish Government intends to approach this legislation, whether for example by a handful of instruments covering a whole range of policy areas, or with a more tailored approach. Either way, the scale and difficultly of the task ahead – in terms of the additional administrative burden and the challenge of conducting scrutiny within the time constraints and even knowing what to scrutinise – should not be underestimated. We will therefore be writing to the Conveners' Group to highlight, and recommend their consideration of, the potential implications for the workload of subject committees and the DPLR Committee.**

Impact of the Bill on the regulatory environment

100. As the Bill allows for a significant body of law to be sunsetted, revoked or replaced, amended, preserved, or restated, it is inevitable that the Bill will lead to further changes in the regulatory environment. However, the extent of these potential changes remains unknown. We consider the evidence heard in relation to the potential impact of the Bill on the regulatory environment below.

Regulatory trajectory

101. The Committee received evidence regarding the direction of travel of the regulatory environment that could be instigated by the Bill. The LCM sets out the Scottish Government's view that the Bill "could usher in a deregulated race to the bottom". [3]

102. The Prime Minister, in response to questioning on the Bill in the UK Parliament, stated that "taking advantage of our freedoms is going to drive growth, jobs and prosperity in the UK… that is why we are going to get on and deregulate post Brexit". He added that the UK Government is "seizing the economic opportunities, deregulating, and signing trade deals around the world." [36]

103. In the third reading of the Bill, UK Minister for Industry and Investment Security said the Bill was "crucial" and "constitutes a process". She said that "considerable work" had been taking place with officials "across Whitehall and with the devolved authorities" and "I cannot stress enough the importance of achieving the 2023 deadline". REUL was "never intended to sit on the statute book indefinitely" and the "continued existence on our statute book of the principle of supremacy of EU law is just not right, as we are a sovereign nation with a sovereign Parliament". [4]

104. Dr Hancox told us "there is a deregulatory element to the Bill" [6] with regards to the restriction imposed on the exercise of the power to revoke REUL (up until 31 December 2023) or assimilated law (from 1 January 2024) and replace it, in that no provision may be made under this power unless the overall effect of changes "do not increase the regulatory burden" on that particular subject area. [2 6]

105. "Burden" is defined in the Bill as including "amongst other things"—

- A financial cost;
- An administrative inconvenience;
- An obstacle to trade or innovation;
- An obstacle to efficiency, productivity, or profitability;
- A sanction (criminal or otherwise) which affects the carrying on of any lawful activity.[ix]

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ix Clause 15(10)

106. Dr Hood KC suggested that this definition "could mean that protections that businesses and individuals have enjoyed could be downgraded" and "conversely, there could be difficulties in enhancing protections". [6]

107. RSPB Scotland considered that "the direction of travel that this Bill promotes is therefore abundantly clear – deregulatory" and highlighted that "if Scottish Ministers wanted to use this process to strengthen environmental standards, they may be unable to do so". [15] UKELA thought the Bill would introduce a "deregulatory ceiling" for environmental standards. [10]

108. Dr Gravey and Professor Reid were of the view that "it is very unlikely that any instrument reformed to increase environmental ambition would escape this burdensome definition of burden", meaning that devolved administrations would not "be able to use REUL powers to deliver on their environmental priorities – such as keeping pace with EU development in Scotland." [12]

109. Moreover, NFUS did not believe that that the potential for the Bill to lead to improved regulations in these areas "could ever be realised if we are looking at a sunset clause"—or "guillotine"—of the end of 2023. [26]

110. The Cabinet Secretary outlined that "the provisions have been drafted in such a way so that safeguards can be weakened, which is not the Scottish Government's intention but is obviously part of the ideological drive of the UK Government", and therefore "it is important to put on the record again that all we can do is retain safeguards." [28]

111. The UK Secretary of State for Business, Energy and Industrial Strategy stated in a letter to the DPLR Committee that the "intention is for these powers [under clause 15] to be used to revoke any retained EU law that is not fit for purpose and to replace it with laws that are more tailored to the UK and reflect our new regulatory freedoms". [21]

112. RSPB Scotland raised broader concerns regarding the power to replace REUL or assimilated law either with "such provision as the relevant national authority considers to be appropriate to achieve the same or similar objectives" or with "such alternative provision as the relevant national authority considers appropriate". Its view was that "this subjective judgement of appropriateness, accompanied by such a limited link to the objectives of the original legislation, leaves clear potential for sensible, longstanding protections to be replaced by regulations with entirely divergent aims and outcomes". [15]

113. Scottish Environment LINK felt the Bill was "deregulatory by design" though "not in a thought-out manner…in an indiscriminate manner" [16] and posed "significant risks to our natural environment" [8] while the Soil Association saw the Bill as "part of a wider drive towards deregulation". It warned that the loss of protections could "not only put our basic animal welfare standards at risk, but it would also risk these substances causing pollution by entering water and soils and ultimately ending up in the food that we eat". [8]

114. Food Standards Scotland suggested "high regulatory standards" were needed "to provide assurance to Scottish and UK trading partners". It cited the World Trade

Organisation (WTO) sanitary and phytosanitary (SPS) agreement as being "critical in underpinning the UK and EU food safety regimes to facilitate trade" and warned "the wholesale sunsetting of food law would both undermine our ability to meet these international obligations and send the entirely wrong signal to our international trading partners on our commitment to them." [27]

115. Regarding trading relationships beyond the EU, the BVA set out that "it will be vital for the conclusion of future trade deals to build confidence in our regulatory regime and structures as these will be evaluated by foreign authorities when deciding if the UK is able to export its goods into their territories." [23]

116. NFUS told us that "it is absolutely clear that regulation is required to underpin the integrity of what we all do in life" and "none of us particularly wants regulation but we all need regulation". [26] Food Standards Scotland was also clear that "regulation should restrict poor and unsafe practices because the purpose of it is to provide public protection". In its view, "deregulation that removes consumer protection is not an improvement, and this bill offers a huge opportunity for deregulation in a way that could undermine consumer safety". [26]

Regulatory divergence

117. Below we consider the potential impacts of the Bill, and its interplay with other constitutional arrangements, on future regulatory divergence and/or alignment between—

- The UK and the EU;
- Scotland and the EU; and
- Scotland and the rest of the UK ('rUK').

UK-EU

118. The UK Government has stated that "Parliament has already voted for and enacted a form of Brexit that allowed for significant regulatory divergence", outlining that the power to revoke or replace REUL or assimilated law "builds upon that decision to allow for departure from the EU acquired acquis where it is in the UK's best interests to do so and therefore capitalise on the benefits of Brexit." [37] This would suggest that at least some regulatory divergence with the EU is likely to result from the provisions of this Bill.

119. A number of witnesses raised concerns that changes to REUL, or assimilated law, made through this Bill – and leading to greater active regulatory divergence with the EU – could have significant implications for trade. Food Standards Scotland outlined that "the EU remains, and is likely to continue to remain for some time, the UK's biggest export market and therefore exporting businesses will need to continue with close regulatory alignment if they want to retain access to the EU market." [27]

120. Quality Meat Scotland stated that "the Scottish red meat sector cannot risk any

further obstacles in accessing the EU trade market" [38] and "any friction from divergence either with the EU or within the UK could provide barriers to trade and, crucially at the moment, barriers to confidence in the supply chain". [26]

121. Seafood Scotland said there is "a real fear that deregulation and any standards that are lowered from our side would interrupt the trade [with the EU]", explaining that "if we cannot guarantee that we are at the same standards, we could see more and more checks, which would mean more and more delays." [26]

122. AIC Scotland considered that if standards were lowered in the UK, it was likely "that the supply chain itself, through our various assurance schemes, would have to implement our own standards to essentially replicate EU legislation to ensure continuity of trade". [26] For Quality Meat Scotland, "the priority should be ensuring that our producers, processors and the rest of the supply chain remain on a level, legislative playing field with their counterparts in the EU". [38]

123. The Committee has previously heard warnings that UK divergence from EU standards would have "consequences for market access and integration". The European Policy Centre explained that, in some areas, if goods and services were "no longer compatible with EU provisions", UK divergence "simply leads to non-access to EU markets". [39]

124. As Professor Catherine Barnard had remarked, while "from the UK Government's point of view, it is free to do what it likes and does not need to co-operate with the EU", tensions arise as "supply chains are still closely interconnected with those of the EU". [39]

125. The Scottish Fishermen's Federation (SFF) outlined that "where there is a need for and a sensible rationale for divergence, we can have that divergence" but stressed that "there is a need to take the time to do this right" and highlighted "the concerns about the Bill are that there will be a rush in the timescale". [26]

126. Similarly, NFUS told the Committee that ultimately "the overriding objectives [high-quality food production, climate, biodiversity and wider rural development issues] are not diverging from Europe's objectives." [26]

UK-EU Trade and Cooperation Agreement

127. There are some restrictions on divergence under the terms of the TCA which governs the relationship between the UK and the EU post-Brexit. However, the Committee has previously noted "there is a real lack of clarity regarding the extent to which the TCA non-regression principle and level playing field provisions may limit the level of regulatory divergence between the EU and the UK. It is also unclear whether access to the EU single market for businesses in Scotland and the rest of the UK may be impacted if divergence engages the terms of the level playing field provisions". [40]

128. The level playing field provisions aim to ensure that the standards which applied at the end of the transition period in certain areas cannot be lowered (so-called 'non-regression') by either the UK – including by the devolved governments – or the EU in a way which impacts on trade and investment between the UK and the EU.

129. In addition, the level playing field provisions mean that if either side seeks to reduce or increase standards unilaterally, the other party could seek to impose trade restrictions such as tariffs to ensure that no competitive trading advantage can be gained. [41] Professor Barnard has previously highlighted to us that divergence in some areas would engage the level playing field provisions. [39]

130. UKELA pointed out that the UK has made commitments under the TCA "as to non-regression on levels of environmental and climate protection and to respect recognised international principles of environmental policy" and therefore "there are specific obligations under the TCA on the UK to maintain specific features of the law which are currently retained EU law, but which will disappear with sunsetting". [10]

131. On environmental law, the Soil Association commented that if a "significant proportion" of the REUL is revoked, "that could be interpreted as working against the spirit, if not the letter, of the TCA". [16] Scottish Environment LINK further expressed concerns that "it will potentially be quite difficult to come to an agreement on equivalence with the EU if the UK has diverged". [16]

Scotland-EU

132. While the UK Government may seek greater divergence from the EU, the Scottish Government has indicated that it intends to preserve REUL, as appropriate, so that it is not sunsetted, and has a commitment to align with EU law, where appropriate, with the "Scottish Ministers' default position" stated as being "to align with EU law". It added: "There will however be occasions, such as technical provisions only relevant to EU member states, where such alignment would not assist the intended outcome. There will also be occasions where the UK Internal Market Act and the constraints it places on devolved powers raises significant challenges in respect of achieving the desired policy effect". [42]

133. The Scottish Government has set out that alignment with EU law "will be achieved in a range of different ways, legislative and non-legislative". [42] This could include through primary legislation, secondary legislation using powers from a relevant primary act, or through the use of the power conferred by Section 1(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the Continuity Act') which enables Scottish Ministers to make regulations to keep Scots law aligned with EU law where appropriate.

134. This 'keeping pace power' can be exercised in relation to any areas of EU law that are within devolved competence in Scotland.

135. The Committee's adviser, Professor Tobias Lock, noted that the 'keeping pace power' will apply in parallel with the powers conferred on the Scottish Government by the REUL Bill. The Scottish Ministers retain their power to make regulations corresponding to EU legislation beyond 31 December 2023 (the date on which the power to restate retained EU law ends). Professor Lock stated that this means that Scottish Ministers could, so far as is within devolved competence, restate sunsetted retained EU law on the basis of the Continuity Act and restate assimilated law beyond 23 June 2026. [43]

136. The Law Society of Scotland explained that, due to these parallel powers, "the Scottish Government could enact legislation that would keep pace with EU law, even though it may have been sunsetted or otherwise dealt with [under REUL]". [26] In Charles Livingstone's view, between the powers in this Bill and the "very broad secondary legislation powers" in the Continuity Act, "the Scottish Government would have very wide powers to preserve…retained EU law". [6]

137. However, the Cabinet Secretary asked: "Can the Scottish Parliament and the Scottish Government do what they can to ensure that different pieces of retained EU law remain on the Scottish statute book? We can in significant areas, but we cannot necessarily do that in all areas." [28]

138. The Cabinet Secretary further outlined that "we are currently aligned with the European Union and we wish to remain aligned with it. We do not need to go through this unnecessary process for the next year—and longer—to do that", adding that "legislation is being forced on us as a Government and as a Parliament that will make us go through an entire process to remain aligned". [28]

139. As the Committee noted in a letter to the Cabinet Secretary on the draft annual report laid in connection with the Continuity Act, retained EU law only preserves alignment with EU law as it stood at the end of December 2020, and it is important to recognise that EU law evolves continuously over time primarily through secondary legislation (regulations, directives, and decisions) and tertiary legislation (implementing acts and delegated acts). REUL in its frozen form at the end of December 2020 will invariably diverge from EU law as it develops unless the UK and/or Scottish Government brings forward legislation to align. Therefore, preserving REUL so that it is not sunsetted will not in itself provide for alignment with EU law. [44]

140. Given the Scottish Government's emphasis on retaining EU law, the Committee has invited the Cabinet Secretary in that letter to clarify whether this also includes a commitment to align with implementing legislation which impacts on Scotland. [44]

Scotland-rUK

141. The Committee has previously noted "there are substantive differences between the views of the UK Government and the Scottish and Welsh Governments regarding future alignment/divergence with EU law." We concluded that this difference of views raised several "fundamental constitutional questions"—

- To what extent the UK can potentially accommodate four different regulatory environments within a cohesive internal market and while complying with international agreements;
- Whether the existing institutional mechanisms are sufficient to resolve differences between the four governments within the UK where there are fundamental disagreements regarding alignment with EU law and while respecting the devolution settlement; and
- How devolution needs to evolve to address these fundamental questions." [40]

142. Professor Kenneth Armstrong said at the Committee's roundtable on REUL in June 2022 that "we can begin to see divergences between the position being taken by the UK Government and its a desire to diverge and move away from that European model of the regulatory state and the Scottish Government's keeping pace power and desire to remain closer to and aligned with that model of the regulatory state". [35]

143. With powers for both UK and Scottish Ministers to preserve, revoke, restate, amend, and replace REUL, and differing views regarding the end to which these powers should be used, the Committee considered the potential impact of the Bill on the dynamic divergence between Scotland and the rest of the UK. This included consideration regarding the impact of the UK Internal Market Act 2020 and the common frameworks programme.

144. AIC Scotland told us that "the UK frameworks and the common frameworks approach only really works if there is the political commitment, which I understand was contained in the common frameworks, to work in consensus and to reach compromise where possible in order to have a degree of commonality across the UK. [26]

145. In the Explanatory Notes, the UK Government outlined that the Bill "will not create greater intra-UK divergence". [2]

146. However, Dr Christopher McCorkindale, the Committee's adviser, highlighted that "while the Bill itself will not create intra-UK divergence, there is no doubt that the broad and ambiguous way in which many of these powers are drafted, and their allocation across UK and devolved administrations…enables the possibility—cutting across a range of significant policy areas—of divergence in terms of what legislation is to be made exempt from the sunsetting provision, what retained EU law is to be restated, revoked, replaced or updated and what secondary assimilated law is to be restated."

147. Dr McCorkindale considered therefore that "given the Scottish Government's commitment to keep pace with EU law, and its fundamental opposition to the Bill, at least some divergence seems likely." [43] The Law Society of Scotland also viewed the Scottish Government's keeping pace commitment as "likely to result in considerable divergence between what domestic provisions replace REUL in Scotland and the rest of the UK". [25]

148. Concerns were raised by Quality Meat Scotland that any regulatory divergence between Scotland and the rest of the UK resulting from the commitment to align with EU law would create "an increasingly complicated operating environment for businesses" [38] while UKELA considered that the Bill would likely "herald a divergence in environmental law" which would lead to a "patchwork and fragmented approach". [10]

149. The BVA considered there was potential that the Bill "could allow for considerable policy differentiation within the UK in areas where EU law has previously provided a common legal framework." It warned that "allowing different standards could lead to confusion for farmers, transporters, businesses and vets which could potentially compromise animal welfare". [23]

150. In principle, the Scottish Parliament has legislative competence in all areas of devolved REUL. Therefore, Professor Lock has stated if the Scottish Government wanted to keep pace with EU law that it could amend any devolved legislation to do so, including retained EU law and then assimilated law. However, there may, in practice, be other factors which would influence decisions regarding the future of REUL, including:

- What has been agreed in common frameworks;
- The market access principles (mutual recognition and non-discrimination) in the UK Internal Market Act 2020;
- The intergovernmental agreement on seeking exclusions to the market access principles in UKIMA where divergence is agreed in a framework;
- The EU-UK Trade and Cooperation Agreement, which may influence decisions made in devolved policy areas (fisheries, for example) because this agreement, and future decisions made under it, are legally binding. [45]

151. The UK Minister for Industry and Investment Security said at the third reading of the Bill that "we accept that some retained EU law in scope of the sunset is required to continue to operate our international obligations, including the trade and co-operation agreement, the withdrawal agreement and the Northern Ireland protocol" and "I am happy to make a commitment here today that the Government will, as a priority, take the action required to ensure that the necessary legislation is in place to uphold the UK's international obligations. In the near future, we will set out where retained EU law is required". [4]

Impact of the UK Internal Market Act on the future of REUL

152. In deciding whether to preserve REUL, and in using the powers in the Bill to amend REUL, Ministers will need to consider how preservation, amendment or restatement may affect how the UK Internal Market Act 2020 (UKIMA) applies to that legislation.

153. UKIMA establishes two market access principles to protect the flow of goods and services in the UK's internal market post-Brexit—

- The principle of mutual recognition, which means that goods and services which can be sold lawfully in one nation of the UK can be sold in any other nation of the UK; and
- The principle of non-discrimination, which means authorities across the UK cannot discriminate against goods and service providers from another part of the UK.

154. UKIMA operates by disapplying legislation in one part of the UK which would prevent market access to goods and service providers which comply with the law in another part of the UK. Any changes to REUL which do not comply with the market access principles of UKIMA will be disapplied to incoming goods/service providers in the same way as if the changes were to any other type of legislation.

155. Committee advisers Dr McCorkindale and Professor Lock concluded that the main effect of UKIMA will be felt where a devolved authority decides to deviate from legislation elsewhere in the UK. The potentially likely scenarios which may be

affected by UKIMA are set out below—

- Devolved authority assimilates pieces of REUL that other devolved authorities and/or the UK Parliament do not assimilate;
- Devolved authority restates retained EU law but other devolved authorities and/or the UK Parliament do not;
- Devolved authority otherwise replaces sunsetted REUL, and other devolved authorities and/or the UK Parliament either do not replace it or choose a less burdensome replacement. [43]

156. Broadly speaking, UKIMA contains exemptions for legislation which was in place before the Act took effect. [43] [x] Charles Livingstone suggested that this "grandfathering provision", so-called, in UKIMA "and its relationship with [this Bill] will be key"—"if provisions are prevented from sunsetting and are saved under the bill, the grandfathering will unquestionably still apply to them". [6] That being said, in some cases, a restatement of the legislation can bring it within the scope of UKIMA. For example, the market access principles for goods do not apply to re-enactment of pre-existing provisions without substantive change but do apply if there is substantive change. [43] Charles Livingstone explained that "if provisions are only restated, the grandfathering will probably still apply to them", however, "if they are modified, you get into more difficult territory." [6]

157. Dr Hancox considered that powers for UK and devolved Ministers to restate or replace REUL "might lead to differing restatements or replacements across all four nations of the UK in a way that it is hard to see interacting with what has already been agreed or proposed in terms of common frameworks and the United Kingdom Internal Market Act 2020". [6]

158. UKELA suggested that due to UKIMA, decisions for England will in practice have a major impact on the practical effect of regulatory decisions in devolved nations. [10] Food Standards Scotland said its concerns regarding the Bill were "compounded" by the fact that decisions by UK Ministers "to amend the regulatory landscape in England has consequences elsewhere in GB on account of the Internal Market Act 2020". [27]

159. The Cabinet Secretary outlined that "the UK Government might choose…to introduce another set of laws at UK level in important areas that are devolved, which may well have an impact on the law in Scotland in ways that are not in accordance with the views of the Government or the Parliament here." He elaborated: "That is another dimension to all this. It is not simply saying that law A requires replacement by law B in the Scottish Parliament; it is that the UK Government is beginning a process in which it will potentially seek to identify law A and replace it with law B, which may have an impact on devolved competence." [28]

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x In relation to goods, legislative requirements are only exempt from the mutual recognition principle if they were already *different* in one part of the UK before the Act took effect (UKIMA s. 4(2)(b)).

160. RSPB Scotland stated that "it is not clear in practical terms how the Scottish Government might be able to retain regulations in effect for Scotland if the UK Government's position is to revoke or amend UK-wide regulations." [16]

161. NFUS explained that "if measures are retained in Scotland and not in other parts of the UK, UKIMA would result in goods being sold across the UK despite differing regulations". In its view, "this could result in competitive disadvantages for businesses that could significantly impact business feasibility going forward". [24]

162. Similarly, the BVA suggested that "you could get a situation in which transport regulations on one side of the border are different from those on the other, which could have implications for how we move animals around, and that will have direct implications on trade." As such, it considered that "the internal market is hugely important, and divergence is a big issue". [26]

163. NFUS asked "how do we respect devolved divergence of regulatory approach and policy needs to reflect the needs of food production and agriculture here in Scotland, for example, while maintaining a relatively level playing field within the UK and the internal market?" [26]

Managing divergence

164. Several witnesses were supportive of there being co-operation between the UK and devolved Governments to manage regulatory alignment and divergence across the UK. NFUS said it was "supportive of common frameworks and encourages their use to retain some form of commonality across the UK to avoid such issues." [24]

165. The UK and devolved Governments agreed to develop common frameworks, in policy areas formerly governed by EU law which intersect with devolved competences, and in which an agreed approach to divergence was considered desirable.

166. Common frameworks provide a mechanism for agreeing and managing divergence; however, in subject areas covered by UKIMA, the powers ultimately lie with UK Ministers to make exclusions from the market access principles. Under section 10 of UKIMA, UK Ministers have powers to make exclusions from the market access principles where divergence is agreed through a Common Framework. There is an agreed intergovernmental process for considering such exclusions (and there is one already in place on single-use plastics). [46]

167. The Cabinet Secretary considered that, in light of the UK Government having a "different agenda" than the Scottish Government regarding alignment with the EU, "it would be entirely possible to reconcile the difference in approaches through agreed common frameworks". However, his view was that "the United Kingdom Internal Market 2020 and now this Bill make that near impossible", adding that UKIMA is "having an insidious and erosive effect on devolution" while "in contrast, this Bill is a direct assault on devolution." [29]

168. The Soil Association's view was that there was no system or process in place for managing regulatory divergence under the Bill as it is currently drafted. [13] Dr

Gravey and Professor Reid suggested in a recent academic blog that the Bill has a "casual disregard for divergence", raising "concerns about how well [the Bill] fits with the rest of the post-Brexit legislative architecture." [12]

169. The UK Government said that it would "not seek to make changes to retained EU law within common frameworks without following the ministerially agreed processes in each Common Framework". [47] It has since elaborated that, while "the Government has not committed to retain all REUL covered by common frameworks", it "has however publicly committed to follow the processes set out in common frameworks when approaching reforming REUL covered by a common framework". [19]

170. The UK Government's stated "ambition is that the UK and devolved governments agree their approaches to individual pieces of REUL and then the delegated powers could be used to preserve, amend or repeal REUL as required. In some cases, this will mean [devolved governments] make their own Statutory Instruments and in others there may be agreement for the UK Government to make these on a UK-wide basis." [19]

171. The Cabinet Secretary told the Committee that the UK Government had "not told" the Scottish Government what REUL "it wants to preserve or its approach to the areas that we have already agreed to work together on, including the common frameworks." [28]

172. UKELA highlighted that "tight timescales between the enactment of the Bill and the sunsetting deadline mean that there is likely to be no realistic prospect that the UK government and devolved administrations could agree where an agreed common framework with respect to a matter of retained EU environmental law would be desirable, let alone work up and implement an agreed common framework." [10]

173. AIC Scotland agreed that that the Bill "runs the risk of exacerbating divergences because of the timescales that are put in place" and noted that "the common frameworks approach only really works if there is the political commitment…to work in consensus and to reach compromise where possible in order to have a degree of commonality across the UK". [26]

174. Food Standards Scotland thought that "any arbitrary sunset date, and a default "deregulatory" policy setting will undermine the collaborative approach to policy development which had been provisionally agreed by each administration under the Common Framework programme." [27]

175. Scottish Government officials told the Committee that while "the expectation is that the common frameworks will do a lot of the heavy lifting where divergence in regulations occurs," Common Frameworks "have not been designed to deal with the scale or the pace that would be required to meet the 2023 sunset date and, particularly with regard to divergence, the unintended consequences that are likely to arise during the course of next year plus any operational issues that arise." [28]

176. **The Committee considers that the sunsetting provision and the delegated**

powers conferred on Ministers through the Bill could accelerate regulatory divergence between the UK and the EU, and within the UK internal market.

177. **We note the concerns raised by stakeholders that insufficient time is provided by the Bill, as currently drafted, for subsequent intra-UK divergence to be managed through common frameworks and the UKIMA exclusions process. It is our view that this could present uncertainty regarding the impact of decisions taken by Scottish Ministers to preserve REUL before the sunset, including the extent to which devolved assimilated law – i.e., REUL which remains on the statute book after 31 December 2023 – could be affected and disapplied by the UKIMA market access principles.**

178. **The Committee also notes the recent letter to the Scottish Government on our scrutiny of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 Annual Report, and the evidence of the Cabinet Secretary on the challenge that the REUL Bill presents in terms of the Scottish Government's alignment policy. [44]**

Sewel Convention

179. In the Explanatory Notes for the REUL Bill, the UK Government outlined that legislative consent is being sought from all devolved legislatures and that it has "proactively engaged with the Devolved Administrations in order to ensure the Bill works for all four nations". The UK Government states that it "remains committed to respecting the devolution settlements and the Sewel Convention, and has ensured that the Bill will not alter the devolution settlements". [2]

180. Both the Scottish and Welsh Governments have recommended that the Scottish Parliament and Senedd, respectively, should not give consent to the Bill. [30] [3] Both have also expressed broader concerns regarding a lack of engagement by the UK Government prior to the Bill's introduction on its policy intentions, and as the Bill progresses through the UK Parliament.

181. Three months prior to the Bill's introduction, the Cabinet Secretary told the Scottish Parliament that "the UK Government has declined to share" the Bill instructions with the Scottish Government", or "provide any settled certainty of its policy intentions." [48]

182. On the date that the Bill was introduced in the UK Parliament, the Cabinet Secretary stated that the Scottish Government had "no advance sight of the most controversial clauses of the Bill up until a few hours before today's introduction, mirroring the disappointing UK Government approach to engagement ahead of the introduction of the Northern Ireland Protocol Bill and much of the Brexit related legislation", and regarded this as "unacceptable". [49]

183. The Welsh Government Counsel General and Minister for the Constitution, Mick Antoniw MS, shared similar concerns: "We are disappointed the Bill has reached this stage with such little engagement with the Welsh Government about its most important aspects". [50] As a result, "given the Bill contained previously unseen content and because of serious concerns about the effect of provisions in the Bill", the Welsh Government stated that "it would not be possible to lay a Legislative Consent Memorandum within the timescales normally assigned to the process." [51] The Scottish Government also lodged its LCM later than otherwise would have been expected.[xi]

184. The Cabinet Secretary has written to the UK Government on a number of occasions regarding the Bill, including on 15 November 2022 [52] with a copy of a range of proposed amendments to be taken at Committee Stage in the House of Commons. The Cabinet Secretary told the Committee on 8 December 2022 that he had "received no reply whatsoever" to these letters, and that all of the proposed amendments had been "blocked" at Committee stage in the House of Commons. [28] He later updated the Parliament in Portfolio Questions on 11 January that he had

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xi The LCM was lodged on 8 November 2022, four weeks later than would have been expected (the Standing Orders stating "normally no later than 2 weeks after introduction [of the Bill]" in line with Rule 9B.3.1).

received a response from the Secretary of State for Business, Energy and Industrial Strategy to his letters on 21 December.[xii]

185. Professor Aileen McHarg had previously said that "prior to the Brexit referendum, there was never any suggestion, as far as I am aware, that the obligation imposed by the convention was merely to seek consent. Rather, the obligation was to obtain consent i.e., it was understood as conferring a right on the devolved legislatures to veto UK legislation affecting devolved matters. This might mean amendment of a Bill so as to enable consent to be given, or if it could not be secured, removal of the provisions affecting devolved competence from the Bill altogether" and "While it has always been clear that there might be exceptional cases in which legislation might be enacted despite a refusal of devolved consent, there has never been any official attempt to clarify when those exceptional cases might arise". [54]

186. The Committee's adviser, Dr McCorkindale, suggested that pre-Brexit the legislative consent process had been "respected on both sides as a constitutional rule that protected devolved autonomy and facilitated shared governance; in which the decision to withhold consent was the exception rather than the rule, but where a decision to withhold consent generated a constructive response from the UK Government by creating space for amendment in response to concerns from the Scottish Parliament and/or devolved legislation in the relevant areas; and, (reflecting this) against which UK legislation in devolved areas would only be made where that legislation was necessary on the part of the UK Government or where it was invited or welcomed by the Scottish Government." [55]

187. The Cabinet Secretary's view in evidence to the Committee on 8 December 2022 was that "the UK Government has reinterpreted what the Sewel convention is." He outlined that "To the UK Government, the Sewel convention would appear to mean only that it must have consulted the Scottish Government on the principles of a legislative proposal, not that it recognises that it has been given a red card and that the legislative proposal must go—it must be withdrawn and must not apply in Scotland. Instead, what it seems to say is, 'We have consulted, we hear what the Scottish Government says on the matter, and we are going to carry on regardless.'" [28]

188. An example of where the convention had worked as intended in the post-Brexit context was shared with us by the SFF, who highlighted that the Scottish Parliament consented to Fisheries Bill (now Fisheries Act 2020). The SFF noted that "it gives quite significant wide-ranging powers and responsibilities to the Scottish Government and to Scottish ministers to make legislation in Scotland". In relation to the present Bill, the SFF continued: "As a principle, it would seem that if UK

[xii] "On 21 December, I received a response from Grant Shapps to my two letters. Although I am happy to have finally received his response, I am disappointed that our concerns continue not to be addressed and that our amendments—which were drafted to limit the damaging impact of the bill on Scotland—continue to be ignored. Scottish Government officials continue to work with their UK Government counterparts as part of the programme to identify devolved retained European Union law, yet we are still operating largely in the dark in terms of what the UK Government proposes to do with retained EU law, and therefore in terms of what powers Scottish ministers might need to use to prevent deregulation and to uphold high standards for the people of Scotland." [53]

ministers are making changes in devolved areas that should be with the consent of Scottish ministers who are closest to those areas". [26]

189. The view of the Trade and Animal Welfare Coalition was that because of the tight timescale for reviewing REUL before the sunset date, "the UK Government… will act for the Scottish Government, which is a dangerous precedent not just for animal welfare legislation but for devolution itself" and the UK Government was said to be "trampling all over the Sewel convention". [16]

190. **In an earlier report, on the Impact of Brexit on Devolution, the Committee found the Sewel Convention to be under strain and some of our witnesses suggested that without reform there was a risk of it collapsing altogether. Professor Nicola McEwen had described it as "an intergovernmental process" and told us that if the process is not working then "you have a problem—and I think that we have a problem". [40]**

191. **The concerns that have emerged from our overall work examining the operation of the Sewel Convention following Brexit are two-fold—**

- **the extent of the UK Government consultation with devolved governments on legislative proposals affecting devolved matters prior to the introduction of Bills at Westminster; and**
- **the number of Bills at Westminster which are proceeding without the consent of the devolved legislatures.**

192. **The Committee's view that the Convention is under strain was further reinforced by our recent consideration of the Legislative Consent Memorandum for the Northern Ireland Protocol Bill. [56]**

193. **We are therefore concerned that there appears to have been limited engagement by the UK Government with the Scottish and Welsh Governments regarding devolved consent for the REUL Bill. This would seem to be another example of the intergovernmental process, which is integral to the proper functioning of the Sewel Convention, not working as intended.**

194. **As the Committee has previously concluded, there is a need for a much wider public debate to address fundamental questions about where power lies within the devolution settlement following the UK's departure from the EU.**

195. **We also note the timing of the debate on REUL[xiii] that took place on 29 November 2022. [1] It is regrettable that a motion on the Bill was debated when both this Committee (the lead committee) and the DPLR Committee were still in the process of undertaking scrutiny of the evidence and yet to complete our reports on the LCM (the lead committee being required to report under the Standing Orders).[xiv]**

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xiii **Motion (S6M-06984)**

196. **A legislative consent motion seeks the Parliament's consent, not its refusal of consent. As the Scottish Government recommended in its LCM that the Parliament not give its consent to the Bill, there was no requirement to lodge a legislative consent motion. The Standing Orders (which set out that a legislative consent motion shall not normally be lodged until after the lead committee has reported on the LCM)[xv] did not apply in relation to this Bill and they are silent regarding the scenario of consent not being sought.**

197. **The Committee will therefore be writing to the Standards, Procedures and Public Appointments Committee to recommend that it considers undertaking a review of the relevant provisions of Standing Orders.**

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xiv **Rule 9B.3.5**

xv **Rule 9B.2 of the Standing Orders sets out that "a legislative consent motion shall not normally be lodged until after the publication of the lead committee's report" and "the Parliament shall not normally take such a motion earlier than the fifth sitting day after the day on which the lead committee's report…is published."**

Delegated powers

198. A key theme in our report on the Impact of Brexit on Devolution was the post-EU step change in the approach to the use of delegated powers, in terms of scale and frequency, with the Committee concluding that "the extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change". [40]

199. Prior to the UK leaving the EU, UK Ministers did not generally have powers to make secondary legislation in devolved areas and did not often do so. The principal area in which UK Ministers did so was to implement EU obligations, with Scottish Ministers' agreement. The Committee highlighted that "there is a considerable difference between delegated powers being conferred on Ministers to deliver a legal obligation to comply with EU law and delegated powers in the same policy area without this constraint". [40]

200. We identified two significant areas of concern regarding delegated powers in our report on the Impact of Brexit on Devolution—

- The scope of delegated powers being conferred on UK Ministers in devolved areas and on Scottish Ministers where these powers are concurrent; and
- Consent to the use of powers by UK Ministers in devolved areas. [40]

201. In our recent report on the LCM for the Northern Ireland Protocol Bill, the Committee concluded that the scope of the delegated powers in that Bill – some of which may be sub-delegated to Scottish Ministers – viewed within the wider context of the scope of delegated powers in other Bills related to the UK leaving the EU, presents a significant risk to the balance of power between the executive and the legislature both at a UK and devolved level. [56] This was something also highlighted in the Impact of Brexit on Devolution report. [40]

202. These findings provide the framework for the Committee's consideration of the delegated powers within the Retained EU Law (Revocation and Reform) Bill.

Scope

203. The Bill gives significant new delegated powers to Ministers. Most of these powers are conferred on both UK Ministers and devolved Ministers.

204. The following six powers are conferred on both UK and devolved Ministers. They are conferred both 'concurrently' and 'jointly' (meaning that the powers can be used by UK and Scottish Ministers either independently of each other or together)—

- The power to preserve REUL, by exempting specific pieces of legislation from the Bill's sunset provision (clause 1);
- The power to restate secondary REUL in domestic legislation (which is then not subject to the sunset (clause 12);
- The power to restate secondary assimilated law (clause 13);

- The power to revoke or replace REUL or assimilated law (clause 15);[xvi]
- The power to update secondary REUL and restated/replaced REUL 'to take account of changes in technology or in developments in scientific understanding' (clause 16);
- The power to the legislative hierarchy between REUL and other domestic law (clause 8).[xvii]

205. The following power is conferred on UK Ministers alone—

- The power to postpone the sunset date (clause 2).

206. The powers to restate REUL, restate assimilated law and to postpone the sunset are "Henry VIII" powers.[xviii]

207. A key issue as regards the scope of the delegated powers was considered to be the power to revoke or replace REUL (clause 15). The DPLR Committee report suggested the concern "lies in the breadth of the power" which permits Ministers (UK and devolved) not only to replace REUL with provisions considered "to achieve the same or similar objectives", but also to make different provision: to "make such alternative provisions" as considered appropriate. DPLR Committee noted that, when replacing a piece of REUL under this power, Ministers are not subject to the same oversight provisions (e.g., consultation requirements) that were required when that piece of law was originally put in place. [22]

208. In a letter to this Committee, the UK Minister for Industry and Investment Security, outlined that the Bill "will create powers which will enable departments and the devolved governments to amend, revoke and replace outdated REUL and ensure our regulations are modern and agile and tailored to UK specific priorities", with there being currently "no mechanism in law for the efficient reform of REUL". [57]

209. The UK Government further argues in its Delegated Powers Memorandum that the power to revoke or replace REUL or assimilated law is "required" as "there are approximately 2000 pieces of secondary retained EU law, including RDEUL, that

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xvi Replacement provisions can implement different policy objectives. However, there is a restriction on the exercise of the power that it must not increase the 'regulatory burden'. This power expires on 23 June 2026.

xvii This is a power to override the hierarchy established by the Bill that domestic law takes precedence over incompatible RDEUL retained direct EU legislation. The power is therefore to restore, for specified pieces of legislation, the pre-Bill hierarchy under which RDEUL took precedence.

xviii Henry VIII powers are those which enable secondary legislation to repeal or amend primary legislation. The usual constitutional principle is that primary legislation, passed by parliament, should be repealed or amended only by other primary legislation passed by parliament, not by secondary legislation made by the executive. Key to this principle is that where the executive wants to amend or repeal primary legislation which has been put in place by Parliament, it should do a way of a bill, which will receive full parliamentary scrutiny, and which Parliament has the opportunity to amend. Secondary legislation receives a far lower level of scrutiny and Parliament cannot amend it, only approve or reject it as a whole.

the Government may wish to replace with legislation more suited to the UK's needs." But that "doing so purely through sector specific primary legislation would take a significant amount of Parliamentary time." [37]

210. The Public Law Project's assessment was that the Bill was "constitutionally inappropriate, practically unfeasible, and potentially deeply harmful" and "contains a suite of broad delegated powers" which would "confer on Ministers a blank cheque to rewrite or repeal valued rights and protections". [58]

211. The Scottish Human Rights Commission saw "a considerable risk to the enjoyment of human rights in Scotland, in particular, economic, social, cultural and environmental rights". Given what was described as "very little protection" of such rights in either UK or Scots law, the "protection afforded [by REUL]" was "of great importance" and complete or partial revocation "would represent an important retrogression of rights". [59]

212. The Hansard Society similarly described the powers delegated to Ministers as "a series of broad 'blank cheque' powers to amend or replace REUL – including to make 'alternative provision' that they 'consider appropriate' – across policy areas as diverse as animal welfare, consumer rights, data protection, employment, environmental protection, health and safety, and VAT, and all subject to only limited parliamentary oversight." It judged that "the broad, ambiguous wording of powers will confer excessive discretion on Ministers." [60]

213. The Committee had previously been told by the Hansard Society that delegated powers for UK and/or Scottish Ministers to change "potentially quite significant and long-standing aspects of the domestic legal framework" in REUL would present "clear constitutional democratic risks". In its view, this mechanism would not provide "the democratic oversight that we think is commensurate with changes such as might be made". It added that "whether or not a policy area was previously an EU competence may be relevant to determining how law in that area should be made in the future…but it ought not be decisive on the matter." [35]

214. Dr Emily Hancox had also previously cautioned that, if the Bill introduced "a broad delegated law-making power to amend all types of retained EU law", this would present a "real risk that such power would delegate important policy choices to the UK Government and contribute to the general shift of power away from the UK Parliament to the UK Government", highlighting that "parliamentary oversight of secondary legislation remains weak". [35]

215. There was concern from the Scottish Human Rights Commission "over the potential retrogression on current enjoyment and protection of economic, social, cultural and environmental rights, without sufficient democratic and participatory scrutiny". [59]

216. The BVA expressed concerns that the "transfer of considerable legislative powers to Ministers to modify or revoke regulations" has the potential "to result in new policies that have not undergone a sufficient level of both parliamentary scrutiny and stakeholder consultation". [23]

217. The Committee's adviser, Dr McCorkindale, suggested there would be "minimal opportunities for the Scottish Parliament to scrutinise and impact upon the

exercise…of powers (by UK and by Scottish Ministers) in devolved areas". He said it was the Parliament's "opportunity now to understand fully, to scrutinise and, where appropriate, to comment on those areas of the Bill that might impact most upon the exercise of its legislative and scrutiny functions".[xix]

218. The Cabinet Secretary's view was that the Bill "sidelines proper and appropriate parliamentary scrutiny" by granting Ministers – "including Scottish Ministers" – "powers to amend or abandon legislation with minimum democratic scrutiny". [29]

219. The House of Lords' DPRR Committee suggested that clause 15 of the Bill "contravenes the commitment given at the time of the 2018 Act [EUWA], a commitment that was enshrined in section 8 of the 2018 Act, that substantial policy changes to REUL should be for Parliament in primary legislation rather than for Ministers in secondary legislation." [5]

220. There were also concerns from the DPLR Committee over the powers to restate REUL, and assimilated law (clauses 12 and 13), particularly the width of what could qualify as a restatement given that it "may use words or concepts that are different" from those used in the law that is being restated.[xx]

221. **In our report on the LCM for the Northern Ireland Protocol Bill, the Committee highlighted a post-EU 'step change' in the use of delegated powers in devolved areas, something that we view as a significant constitutional change. We identified that this posed a significant risk to the balance of power between executive and legislature, both at the UK and devolved level.**

222. **The REUL Bill confers nine new powers on UK Ministers, of which six are also conferred on Ministers of devolved administrations. We were told of "blank cheque powers" being handed to Ministers in terms of their discretion to amend or replace REUL, with limited parliamentary oversight, in various policy areas, including animal welfare, consumer rights, data protection, employment, environmental protection, and health and safety.**

223. **The Hansard Society described "clear constitutional democratic risks" in terms of the degree of oversight available from this use of delegated powers. The Committee's adviser, Dr McCorkindale, warned of "minimal opportunities" for the Parliament to scrutinise these powers in devolved areas, whether exercised by UK or Scottish Ministers.**

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xix "Affirmative – this procedure is attached to instruments relating to significant matters and provides for a greater level of scrutiny than the other two main procedures. Before an instrument which is subject to the affirmative procedure can be made and brought into force, it must be approved by the Parliament. Negative – this is the most common procedure attached to instruments laid before the Parliament. It is generally attached to instruments relating to matters of less significance than those subject to affirmative procedure. While the Parliament does not need to approve negative instruments before they can come into force, the Parliament can annul a negative instrument." [61]

xx Clause 14(2)

Consent to the use of powers by UK Ministers in devolved areas

224. The UK Government stated that as "the majority of the powers within the Bill are conferred concurrently on the devolved governments", this "will enable Scotland to make active decisions regarding REUL within its devolved competence, for the benefit of citizens and business in Scotland". [57]

225. However, as outlined by Dr McCorkindale, the Committee's adviser, the Bill confers "broad powers upon UK Ministers to act in devolved areas—for example, to preserve REUL, to extend the sunset on specified instruments or categories of instrument, to restate REUL, to restate assimilated law—without the need to seek consent from, or consultation with, the Scottish Government or the Scottish Parliament". [43]

226. The LCM states the Scottish Government's view that the Bill is "another example of a UK Bill that gives UK Ministers powers to act in devolved areas without a formal legal requirement for consent from Scottish Ministers, accountable to the Scottish Parliament for the exercise of that consent." [3]

227. The Cabinet Secretary considered that the concurrent conferral of powers on UK Ministers without a requirement to seek consent from Scottish Ministers when they are exercised by UK Ministers in devolved areas would "allow the UK Government to make broad changes in retained EU law in devolved areas, including revoking and entirely replacing standards", and thereby, the Bill would "introduce a massive democratic disconnect". [29]

228. As noted above, the SFF agreed that "as a principle, it would seem that if UK Ministers are making changes in devolved areas that should be with the consent of Scottish Ministers who are closest to those areas". [26]

229. Dr Gravey and Professor Reid had also considered that "at a time where UK intergovernmental relations are not good, and when devolved regulatory agendas, especially in Wales and Scotland, are sharply at odds with those in England, this absence of consent can only fuel discontent." [12]

230. Dr Hood KC said there were "two key parts to the issue": "the extent to which…the bill allows UK ministers to move into the devolved space" and "the mechanism involved allows that in a way that does not necessarily require consent from the Scottish Parliament". On which basis she told us "I can understand why the committee would want to consider whether the bill involves an incursion into devolved competence." [6]

231. Charles Livingstone questioned the need for UK Ministers to have delegated powers to change REUL and described conferring powers on UK Ministers as "a habit" in the post EU era, adding "if the Scottish Government does not care enough to use its own powers to restate or save legislation that is in a devolved area, why would the UK Government want to step in?" [6]

232. In the Scottish Government's view, "there are no practical or legislative bars to a

formal consent requirement which would allow the flexibility to make GB or UK-wide instruments where that is agreed to be best, while recognising and respecting devolution." It requested (without success at committee stage at Westminster) that the Bill be amended to include a statutory consent requirement for UK Ministers' use of the powers in relation to devolved matters in or as regards Scotland. [3]

233. It was the view of the DPLR Committee with regard to clause 15 of the Bill that "the conferral of delegated powers to replace REUL should be considered in the policy context of a particular subject area…rather than conferred without distinction across all subject areas"; and that the "consequence of permitting provision that would normally be contained in a Bill to be made instead by secondary legislation…is that where this is done by UK Ministers (acting alone), the legislative consent process will not apply and therefore the Scottish Parliament's consent will not be sought". [22]

234. The DPLR Committee wrote to the UK Government asking for further explanation as to why the powers in the Bill are exercisable by UK Ministers within devolved areas, and why there is no requirement for Scottish Ministers' consent. [20]

235. The Secretary of State said in his reply of 15 December 2022 that the "majority of the powers have been conferred concurrently on the devolved governments" as this was "in line with previous EU Exit related legislation" and would allow "greater flexibility" for devolved administrations "to decide how they regulate those areas currently governed by retained EU law in the future". [21]

236. He added that "The concurrent nature of the powers is not intended to influence decision-making on devolved legislation" and "would serve to reduce the additional resource pressure that the devolved governments may experience, by enabling the UK Government to act on a devolved government's behalf where they have confirmed they do not intend to take a different position". In his view this could "ensure that the most efficient and appropriate approach to REUL reform can be taken in every situation as well as providing greater legal certainty UK-wide." [21]

237. In a recent report on the LCMs for the Procurement Bill and Trade (Australia and New Zealand) Bill, the Economy and Fair Work Committee identified that "in almost all recent cases", the Scottish Government has not recommended consent to UK Parliament legislation due to "provisions that allow UK Ministers to make regulations in areas of devolved competence without the consent of the relevant devolved administrations". As such, it recommended that "there should be a means for the Scottish Parliament to scrutinise regulations laid by the UK Government that fall within devolved competence". [62] [xxi]

[xxi] SPICe have identified some limitations with regards to the operation of Statutory Instrument Protocol 2 (SIP2). First, it applies only to powers in policy areas that were formerly governed by the EU. This is because Protocol 2 was agreed at a time when the new powers that were being created were only in former EU areas. Increasingly, however, new powers for UK Government Ministers are now being conferred in devolved areas that were not formerly EU areas. Second, the Protocol is only effective if the Scottish Government has a legal entitlement to withhold its consent for a UK SI to be made, that is, where a requirement for such consent is written into the power. Such a statutory consent requirement is not always provided. [40]

238. The DPLR Committee called for "both the Scottish and UK Governments, in their discussions on the potential use of the delegated powers within devolved competence, to be mindful of the importance of the Scottish Parliament having an effective scrutiny role in relation to the exercise of these powers, and to facilitate that role". [22]

239. Aside from "how UK Ministers might exercise specific powers in devolved areas", Dr McCorkindale has suggested that there is a "more fundamental constitutional issue at stake." In his view, "the more that secondary legislation in devolved areas is made and (minimally) scrutinised at the UK level—and the more that enabling legislation is made without seeking, or by overriding, legislative consent from the Devolved Administrations—the more that the reserved powers model of devolution is undermined, not by adjusting the boundaries of devolved powers but by occupying the space within devolved boundaries and thereby limiting devolved autonomy and the effective exercise of devolved powers." [43]

240. During the third reading of the Bill in the House of Commons, the UK Government's Minister for Industry and Investment Security said that the "majority of the powers in the Bill are conferred on the devolved Governments" and that they would "have the ability to decide which retained EU law they wish to preserve and assimilate, and which they wish to let sunset within their devolved competences". [4]

241. **We reiterate our view – as expressed in the Impact of Brexit on Devolution and Northern Ireland Protocol LCM reports – that the extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change. Prior to the UK leaving the EU, UK Ministers would principally make secondary legislation in devolved areas in order to implement EU obligations and with the consent of Scottish Ministers. The UK Government did not generally have powers to make secondary legislation in devolved areas and did not often do so.**

242. **The questions we asked in our Impact of Brexit on Devolution report remain relevant, for this Bill and beyond, namely—**

- **Whether it is appropriate for UK Ministers to have considerable new delegated powers in devolved areas without any overarching consideration of the impact on how devolution works;**
- **To what extent there is a risk to the Scottish Parliament's legislative and scrutiny function from the post-EU increase in the size and use of delegated powers both at a UK level in devolved areas and by Scottish Ministers; and**
- **How the post-EU limitations of the Sewel Convention discussed above need to be addressed in considering the effectiveness of legislative consent mechanisms for secondary legislation.**

243. **As also stated in our previous reports, the Committee considers there is an urgent need to address the ad hoc and inconsistent approach to consent mechanisms for the exercise of delegated powers by UK Ministers in devolved areas. Different approaches have been adopted across EU-exit**

related legislation and it is of significant concern to us that there is no consent requirement in the REUL Bill.

244. **We note the views of the Economy and Fair Work Committee from its report on the LCMs for the Procurement Bill and Trade (Australia and New Zealand) Bill that there should be a means for the Scottish Parliament to scrutinise regulations laid by the UK Government that fall within devolved competence (see paragraph 237). We also note that the DPLR Committee in its own report on the REUL LCM called on both governments to be mindful of the importance of the Scottish Parliament having an effective scrutiny role in relation to the exercise of delegated powers within devolved competence (see paragraph 238).**

245. **The Committee believes it to be a fundamental constitutional principle that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.**

Interpretative provisions

246. As noted earlier, the Bill will have the effect of changing the rules on how REUL is to be interpreted by—

- Removing the principle of supremacy of REUL and other retained general principles of EU law by the end of 2023;
- Allowing UK courts to depart from retained case law; and
- Requiring retained direct EU legislation to be interpreted and applied consistently with domestic legislation.

Removal of supremacy and general principles of EU law

247. Within the EU regime a key principle of EU law is that it is supreme, taking precedence over conflicting domestic law of Member States. EUWA preserved the principle of supremacy of RDEUL over other domestic legislation but only in relation to pre-exit UK domestic enactments, meaning they continue to be read subject to RDEUL and disapplied to the extent that they are inconsistent. This Bill abolishes the principle of supremacy in UK law at the end of 2023 so that it no longer applies to any domestic legislation.

248. Dr Hancox explained that "the key impact of this provision is that domestic law will no longer be disapplied where incompatible with retained direct EU law." However, the UK Government and Ministers of the devolved governments have the power to reverse the abolition of the supremacy principle in relation to specified provisions of domestic and retained direct EU law, and therefore, "the consequences of the removal of the supremacy principle are…hard to predict because of the specific power to reinstate the existing legal position". [63]

249. The Faculty of Advocates also pointed out that "although the point of abolition is to be at the end of 2023, it is said that the abolition would be in respect of any enactment or rule of law whenever passed or made. In effect, then, the abolition will be retrospective". It highlighted concerns that "this has the potential impact that when a court is considering a legal case, it might not assess parties' actings in line with their understanding of the law at the time." [31]

250. Furthermore, the general principles of EU law – developed by the Court of Justice of the European Union (CJEU) in its case law and incorporated into UK law by EUWA – are abolished by the end of 2023 by this Bill and would therefore no longer influence the interpretation of legislation on the UK statute book. [43]

251. UKELA outlined that the assimilated law,[xxii] once preserved, "will be denuded of the interpretative provisions of EU law, such as supremacy and the general principles (e.g., proportionality) which apply to the interpretation of retained EU law at present". [10] In UKELA's view, "this is not a technical change but a fundamental change in domestic law as, stripped of these interpretive provisions, assimilated law

may be interpreted differently in future" and "creates further uncertainty and the risk that environmental protections may be lowered in the future through altered interpretative norms." [10]

252. Dr Hood KC highlighted that "in terms of EU law, when the courts consider how pieces of legislation work… to a great extent, they are being asked to interpret what the law was at some point in the past, prior to withdrawal". She suggested it would be "difficult to ask courts to go back and interpret and apply what the law was at a given time without using the tools that they would have expected to use at that time". [6]

253. Moreover, she told the Committee that "EU legislation in its widest sense", including "statements of principle" had "throughout the whole period of our EU membership…become woven into so much of our law". [6]

254. Dr Hancox considered that the sunsetting of the general principles and supremacy of EU law would require the UK and devolved governments to "identify where domestic law has been interpreted in a particular way and where certain conflicts have been resolved in a certain way." [6]

Role of UK Courts

255. EUWA provided that most UK domestic courts should remain bound by relevant CJEU judgments made on or before 31 December 2020 (the point at which EU law ceased to apply in the UK).[xxiii] The UK Government outlined that "this provided legal certainty upon the UK's exit from the EU and prevented the risk of considerable uncertainty for business over how EU law would operate" and "contributed to establishing legal provisions with different rules of interpretation, meaning that EU case law has continued to influence the interpretation and application of REUL in the UK after the UK's exit from the EU." [2]

256. The UK Government "considers that the UK courts should have greater freedom to develop case law on REUL that remains in force in ways that are not unduly constrained by the continuing influence of previous EU case law" and the Bill "addresses this by facilitating domestic courts departing from retained EU case law". [2]

257. Professor Reid considered that "the decisions of the European courts are so important in making certain framework laws work, so even if the text of the

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xxii The Bill provides that REUL which remains on the statute book after 31 December 2023 is renamed 'assimilated law'.

xxiii Certain courts are already able to depart from retained EU case law. For example, the UK Supreme Court is not bound by any retained EU case law and the High Court of Justiciary in Scotland is not bound in certain circumstances. The same is true for the Inner House of the Court of Session, and the Court of Appeal for England and Wales and the Court of Appeal for Northern Ireland. They may therefore depart from retained EU case law, but 'must apply the same test as [they] would apply in deciding whether to depart from [their] own case law'.

legislation stays the same, the fact that the interpretations could—not necessarily would—change adds an extra layer of uncertainty." [16] [xxiv]

258. Scottish Environment LINK added that "the implementation and interpretation of a lot of EU law is very reliant on past EU cases" with "many cases having influenced the way in which public authorities in all member states implement various domestic interpretations" of EU Directives. [16]

The proper development of domestic law

259. The Bill establishes a new test to be applied by higher courts when considering whether to depart from retained EU case law. The higher court must (among other things) have regard to—

- The fact that decisions of a foreign court are not usually binding;
- Any changes of circumstances which are relevant to the retained EU case law; and
- The extent to which the retained EU case law otherwise restricts the proper development of domestic law.

260. We focused in particular on the latter factor regarding the proper development of domestic law.

261. Professor Reid considered that "it is very hard to see what 'the proper development of domestic law' means or whether it has any particular meaning", [16] while Professor Young was "very suspicious of the idea of 'proper development' in its context" and did "not understand what it can mean, other than policy choices." [6]

262. RSPB Scotland thought that the confusion around what is meant by 'proper development of domestic case law' "further highlights the huge uncertainty and complexity around the issue and the interplay between the different pieces of regulation, legislation and case law". [16]

263. Dr Hood KC told the Committee that "it is unusual to ask a court to try to work out what 'the proper development of law' is" and that this is "potentially a very difficult factor". She added that "the courts are there to apply the law" and "to interpret the law". However, "asking the court to work out how domestic law should properly develop, and whether something is restricting that, perhaps involves a phrase or a device that the courts would not have a lot of experience of or familiarity with." [6]

264. Charles Livingstone pointed out that "when we are dealing with a principle as vague as 'the proper development of domestic law', the courts will often take the view that it is vague enough that they do not need to do anything with it, because they cannot clearly be accused of failing to take account of it." [6]

[xxiv] Decisions of the CJEU made *after* IP Completion Day are not binding on domestic courts, but domestic courts may have regard to such a decision so far as it is relevant to the case before them.

265. **We note the concerns expressed to us regarding the interpretative provisions of the Bill and in particular: the legal consequences that may arise from removal of the supremacy principle; the uncertainty that could come about with changing interpretations of, and the complexity of interplay between, different pieces of regulation, legislation, and case law; and the difficulty in interpreting the meaning of "the proper development of domestic law".**

Conclusion

266. **The Committee notes that the Parliament debated a Scottish Government motion on the REUL Bill on 29 November 2022 and, further to a vote,[xxv] came to the view that the legislation "threatens vital environmental and health standards and protections built up over 47 years of EU membership, creates enormous uncertainty for workers and businesses, and undermines devolution, and should, therefore, be scrapped by the UK Government".**

267. **We also note that there will be a further debate in the Chamber, one informed by the findings of this report. It is crucial that the Parliament has an opportunity to fully debate all the issues set out above. Where an LCM does not recommend consent – as with this LCM – Standing Orders are silent on the requirement for a legislative consent motion. This means that the Parliament is unable to guarantee a debate on LCMs where consent is not recommended; a matter of ongoing concern, particularly given the number and significance of LCMs since 2018 which have not recommended consent.[xxvi] Therefore, in the interests of future parliamentary scrutiny, we will be writing to the Standards, Procedures and Public Appointments Committee to recommend that it considers undertaking a review of the relevant provisions of Standing Orders.**

268. **The Committee's concerns about the Bill are deep and wide-ranging, some being recurring issues that we have consistently sought to highlight in other reports, namely—**

- **an urgent need to address the ad hoc and inconsistent approach to consent mechanisms for the exercise of delegated powers by UK Ministers in devolved areas; and**
- **the significant risk that this may bring to the balance of power between executive and legislature, both at the UK and devolved level.**

269. **The many and significant concerns particular to this Bill include—**

- **the "cliff-edge" of the sunset provision for what REUL will be retained and what will fall away, variously described as "problematic", "arbitrary", even "irresponsible" and "the last thing that business needs in such a fragile economic environment";**

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xxv **For 84, Against 29, Abstentions 0**

xxvi **As the Committee noted in its Impact of Brexit on Devolution report: The IfG note that before 2018, consent had been withheld by one or other of the devolved legislatures on just nine occasions: The Welsh Senedd (7); Scottish Parliament (1); and Northern Ireland Assembly (1). Furthermore, before 2018 "the UK parliament had never passed legislation without consent in a situation where the UK government considered the relevant provisions of a bill to fall within the scope of the Sewel convention." Since 2018, there have been six Brexit-related Bills passed at Westminster without the consent of the Scottish Parliament**

- **the "blank cheque powers" for Ministers in terms of discretion to amend or replace REUL and to do so with limited parliamentary oversight – either at Westminster or Holyrood – and across multiple policy areas;**
- **the extent of the impact on parliamentary and Scottish Government time and resources in the second half of 2023 likely to arise from scrutiny of legislation to preserve or restate REUL before the sunset date at the end of 2023;**
- **any extension of the sunset date for specified instruments (or classes of instruments) being a power at the sole discretion of UK Ministers;**
- **the sunset date allowing insufficient time to manage intra-UK divergence through common frameworks and the UKIMA exclusions process;**
- **the potential impact of the UKIMA market access principles on devolved REUL and assimilated law in Scotland as a result of changes under the Bill to the law in another part of the UK;**
- **the possibility of acceleration of regulatory divergence between the UK and the EU;**
- **the seriousness of the challenge that the Bill presents for the Scottish Government's alignment policy; and**
- **uncertainty that could arise from the changing interpretation of legal principles and conventions applying to REUL and its interaction with other domestic law.**

270. **The Committee wishes to highlight the DPLR Committee's finding that "a consequence of provision that would normally be contained in a Bill being made in secondary legislation is that where this is done by UK Ministers (acting alone) the legislative consent process will not apply and the Scottish Parliament's consent will not be sought". [22] We note that the DPLR Committee called on both the UK and Scottish Governments to be mindful of the importance of the Scottish Parliament having an effective scrutiny role in relation to the exercise of delegated powers within devolved competence. We also share the concern of the DPLR Committee about the significant uncertainty and risk likely to arise from the short timeframes within which officials are expected to identify and decide which REUL to retain and which should fall away; and that there is no provision for scrutiny in relation to which pieces of REUL will be revoked at the sunset.**

271. **The Committee believes – as a point of constitutional principle and simple democratic imperative – that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence. The Bill in its current form neither protects nor promotes that principle; nor does it encourage confidence when it**

comes to the potential impacts on policy areas as crucial and wide ranging as food standards, animal health, safeguarding the environment, consumer protection, business practice, and employment.

272. **We note that the Bill is currently being considered in the House of Lords and hope the concerns set out above will be heeded by parliamentarians in both houses at Westminster and by the UK Government. We will be writing to bring our findings to the attention of the House of Lords' Constitution Committee and the House of Commons' Public Administration and Constitutional Affairs Committee and Scottish Affairs Committee. Whatever the final form of the Bill, it is critical that the UK Government works with the Scottish Government to address these considerable shortfalls and that it respects the devolution settlement.**

Annexe A - Delegated powers: DPLR Committee's findings and correspondence

Key aspects from the DPLR Committee's Legislative Consent Memorandum: delegated powers relevant to Scotland in the Retained EU Law (Revocation and Reform) Bill reportnot already outlined in the body of this report include—

Sunset of REUL

The DPLR Committee's recommendations in relation to the sunset clause included that it—

- considers that the power to preserve contained in clause 1 is necessary in consequence of the Bill imposing a sunset by which time most REUL will fall unless explicitly saved;
- expresses concern, however, at the "cliff-edge" created by the Bill, the short timeframes within which officials have to identify and decide which REUL to retain and which should fall away, and the significant uncertainty and risk inherent in this approach;
- expresses its concern that while there is provision for parliamentary scrutiny under clause 1 in relation to which pieces of REUL will be preserved, there is no provision for parliamentary scrutiny in relation to which pieces of REUL will be revoked at the sunset; and
- invites the lead committee to consider calling on the Scottish Government to facilitate a role for the Scottish Parliament in any decisions not to exercise this power (i.e., the preservation power), the consequences of which will be to allow pieces of devolved REUL to sunset. [22]

Powers to restate REUL and assimilated law

The findings on clauses 12 and 13 were that the DPLR Committee—

- considers that the delegation of the power is acceptable in principle, but has concerns that even minor changes can have a significant policy impact;
- notes the UK Government's position that these powers "cannot substantively change the policy effect of legislation" and considers that, in line with the intention, the limits of what constitutes a "restatement" should be further circumscribed on the face of the Bill, by an express requirement that the policy effect must be the same, rather than substantially the same, as the policy effect of the law being restated; and
- notes that Scottish Ministers have a choice of the negative or affirmative procedure for instruments made under this power which do not amend primary legislation. The Committee expects Ministers to exercise this discretion in each case with care. The Committee will monitor how this discretion is exercised to ensure that the appropriate level of parliamentary scrutiny is provided. [22]

Power to revoke and/or replace REUL and assimilated law

The findings on clause 15 (summarised at paragraph 233, above) were included that the DPLR Committee —

- considers that the power in clause 15 is an inappropriate delegation of power in that it permits far-reaching policy changes of a significance that would normally be appropriate for primary legislation to be made instead by Ministers. The Committee considers that changes of this nature should be contained in a Bill, considered in the context of a specific policy area and subject to full parliamentary scrutiny (enabling Parliament to amend the proposal);

- considers that the conferral of delegated powers to replace REUL should be considered in the policy context of a particular subject area, which would enable Parliament to scrutinise how it is anticipated that they will be used in the relevant context, rather than conferred without distinction across all subject areas; and

- notes that a consequence of permitting provision that would normally be contained in a Bill to be made instead in secondary legislation is that where this is done by UK Ministers (acting alone), the legislative consent process will not apply and therefore the Scottish Parliament's consent will not be sought. [22]

Parliamentary scrutiny processes - "sift"

In relation to the process for parliamentary scrutiny of secondary legislation that could be made under the powers in clauses 12, 13 and 15 of this Bill, the DPLR Committee heard evidence on the proposed sifting mechanism in the UK Parliament and the Welsh Senedd, a means for additional parliamentary scrutiny of Ministers' decisions to lay an instrument under the negative rather than affirmative procedure in those legislatures.

Such a mechanism does not exist for regulations which come before the Scottish Parliament. Such decisions "may be less significant in the Scottish Parliament than they might be in other UK legislatures" as "each instrument laid subject to the negative procedure is considered by a subject committee of the Parliament, and there is an opportunity to take evidence on negative instruments, in the same way that there is for affirmative instruments".

Furthermore, while there had been a "non-statutory sifting mechanism for deficiency-correcting instruments under the SSI Protocol", this was discontinued after the DPLR Committee, this Committee and the Conveners' Group decided that "it no longer facilitated proportionate or effective scrutiny". Lead committees were thereby "freed up to target their scrutiny effort on the policy changes proposed in an instrument". It was the view of the DPLR Committee that the "same principles apply in respect of instruments under the current Bill to restate, revoke or replace retained EU law" and it recommended that "a sifting mechanism is not appropriate here". [22]

Powers for UK Ministers within devolved competence / devolved consent

The DPLR Committee's findings (summarised earlier in the report) included the following:

In correspondence with the UK Government in a letter of 30 November 2022, the DPLR Committee set out its position that—

(a) The Scottish Parliament should have the opportunity to effectively scrutinise the

exercise of all legislative powers within devolved competence.

(b) Where such powers are exercised by the Secretary of State in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.

If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

(c) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.

(d) As a minimum, powers when exercised by the Secretary of State in devolved areas should be subject to the process set out in the SI Protocol 2 where the power is within the scope of that protocol. [22]

In that letter, the DPLR Committee asked for an explanation for each relevant power in the Bill regarding—

- why the UK Government considers it appropriate that the power is exercisable by UK Ministers in relation to devolved matters;
- why the UK Government considers it appropriate that when the power is exercised by UK Ministers in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers; and
- whether the UK Government intends to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to Scotland, or to require UK Ministers, when exercising the power in relation to devolved matters, to obtain the consent of the Scottish Ministers. [20]

The Secretary of State said in his reply of 15 December 2022 that the UK Government took "into account a variety of factors when seeking delegated powers in devolved areas" with each Bill drafted "according to its specific policy intent and the most appropriate way to affect those policy changes". He added that the "majority of the powers have been conferred concurrently on the devolved governments" as this was "in line with previous EU Exit related legislation" and would allow "greater flexibility" for devolved administrations "to decide how they regulate those areas currently governed by retained EU law in the future". [21]

He added that: "The concurrent nature of the powers is not intended to influence decision-making on devolved legislation" and "would serve to reduce the additional resource pressure that the devolved governments may experience, by enabling the UK Government to act on a devolved government's behalf where they have confirmed they do not intend to take a different position". In his view this could "ensure that the most efficient and appropriate approach to REUL reform can be taken in every situation as well as providing greater legal certainty UK-wide." [21]

Also noting the DPLR Committee's "position in relation to the requirement for Scottish Ministers' consent for the use of delegated powers when exercised by UK Ministers in areas of devolved competence", he expressed ongoing commitment "to continuing discussions with the devolved governments throughout Bill passage over the use of concurrent powers in the Bill to ensure they work for all parts of the UK". [21]

Conclusions

Among its conclusions on the LCM, the DPLR Committee—

- calls on both the Scottish and UK Governments, in their discussions on the potential use of the delegated powers within devolved competence, to be mindful of the importance of the Scottish Parliament having an effective scrutiny role in relation to the exercise of these powers, and to facilitate that role;

- considers that, as a minimum, there should be a statutory requirement for the Scottish Ministers' consent when the powers are exercised within devolved competence by the Secretary of State. This recommendation applies to the power conferred solely on the Secretary of State in clause 2, and to the concurrent powers in clauses 1, 8, 12, 13, 15 and 16;

- recommends that consideration be given to use of the joint procedure for any proposed statutory instrument which contains devolved provision; and

- expects that where a concurrent power is exercised to make provision wholly within devolved competence, that power will be exercised in a Scottish statutory instrument made by the Scottish Ministers. [22]

Annexe B - Minutes

Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 25th Meeting, 2022 - Thursday 10 November 2022

2. Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation): The Committee took evidence from—

- Michael Clancy OBE, Director of Law Reform, Law Society of Scotland;
- Dr Emily Hancox, Lecturer in Law, University of Bristol;
- Charles Livingstone, Partner, Brodies LLP Solicitors;
- Professor Alison Young, Professor of Public Law, University of Cambridge;
- Dr Kirsty Hood KC, Faculty of Advocates.

Donald Cameron referred to his register of interests as a non-practising member of the Faculty of Advocates.

Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 27th Meeting, 2022 - Thursday 24 November 2022

2. Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation): The Committee took evidence in a roundtable format from—

- Jonnie Hall, Director of Policy, National Farmers Union Scotland;
- Dr Gareth Hateley, Junior Vice President Scottish Branch, British Veterinary Association;
- Donna Fordyce, Chief Executive, Seafood Scotland;
- Julie Hesketh-Laird, Deputy Chief Executive & Director of Strategy and Corporate Affairs, Food Standards Scotland;
- Elspeth Macdonald, Chief Executive, Scottish Fishermen’s Federation;
- Sarah Millar, Chief Executive , Quality Meat Scotland;
- Ian Muirhead, Policy Manager, Agricultural Industries Confederation Scotland.

Donald Cameron referred to his register of interests.

Mark Ruskell referred to his register of interests.

Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 28th Meeting, 2022 - Thursday 1 December 2022

2. Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation): The Committee took evidence from—

- Isobel Mercer, Senior Policy Officer, RSPB Scotland;

- David McKay, Head of Policy, Scotland, Soil Association;
- Professor Colin Reid, UK Environmental Law Association;
- Lloyd Austin, Convener, Governance Group, Scottish Environment LINK;
- David Bowles, Chair, Trade and Animal Welfare Coalition;
- David MacKenzie, Chair, Society of Chief Officers of Trading Standards in Scotland.

Donald Cameron referred to his register of interests as a non-practising member of the Faculty of Advocates.

3. Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation): The Committee considered the evidence heard under item 2.

Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 29th Meeting, 2022 - Thursday 8 December 2022

2. Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation): The Committee took evidence from—

- Angus Robertson, Cabinet Secretary for the Constitution, External Affairs and Culture;
- Chris Nicholson, Solicitor and Head of Branch, Constitutional Reform and External Affairs, Scottish Government;
- Elliot Robertson, Head of EU Secretariat, Scottish Government.

Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 4th Meeting, 2023 - Thursday 2 February 2022

3. Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation) (in private): The Committee considered a draft report on the legislative consent memorandum lodged by Angus Robertson, the Cabinet Secretary for Constitution, External Affairs and Culture, on 22 September 2022 (LCM (S6-29)

Constitution, Europe, External Affairs and Culture Committee - Meeting Minutes - 5th Meeting, 2023 - Thursday 9 February 2022

4. Retained EU Law (Revocation and Reform) Bill (UK Parliament legislation) (in private): The Committee considered a revised draft report on the legislative consent memorandum lodged by Angus Robertson, the Cabinet Secretary for Constitution, External Affairs and Culture, on 22 September 2022 (LCM (S6-29).

Annexe C - Evidence

Oral evidence

- 10 November 2022
- 24 November 2022
- 1 December 2022
- 8 December 2022

Written evidence

- Agricultural Industries Confederation Scotland
- British Veterinary Association
- Faculty of Advocates
- Food Standards Scotland
- Dr Emily Hancox
- Law Society of Scotland
- National Farmers' Union Scotland
- Quality Meat Scotland
- RSPB Scotland
- Scottish Environment LINK
- Scottish Human Rights Commission
- Seafood Scotland
- Society of Chief Officers of Trading Standards in Scotland
- Soil Association Scotland
- Trade and Animal Welfare Coalition
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