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Constitution, Europe, External Affairs and Culture Committee

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



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Contents

Introduction	1
The sunset, revocation schedule and preservation powers	2
Engagement with UK Government	3
Powers to Restate, Revoke, Replace and Update REUL	5
Reporting Requirements	7
Conclusion	9
Bibliography	10

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.



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Introduction

1. On 10 May 2023, the UK Government tabled a number of amendments to the Retained EU Law (Revocation and Reform) Bill ('the Bill') in the House of Lords and these were agreed to by the House on 15 May 2023. Rule 9B.3 of the Scottish Parliament's Standing Orders requires the Scottish Government to lodge an LCM in respect of any amendments which make relevant provision for the first time.
2. The UK Government wrote to the Scottish Government on 19 May 2023 seeking consent to the amendments which the Government tabled on 10 May 2023. This request covers the new powers which are conferred on the Scottish Ministers by those amendments.
3. The Scottish Government lodged a Supplementary Legislative Consent Memorandum (sLCM) on 24 May. It states that it "disagrees with [the UK Government's] assessment of which amendments require legislative consent."¹ This is on the basis that the UK Government has not sought consent for the legislation which is listed in Schedule 1 to the Bill and makes provision within the legislative competence of the Scottish Parliament.
4. The sLCM recommends the Scottish Parliament withhold consent for all UK Government amendments tabled on 10 May 2023 and the Scottish Ministers "remain fundamentally opposed to the Bill."¹
5. As lead Committee, we are required under Rule 9B.3.5 of the Standing Orders to report on the sLCM. We took evidence from the Cabinet Secretary for the Constitution, External Affairs and Culture ('the Cabinet Secretary') on 1 June 2023. We also considered the Delegated Powers and Law Reform Committee (DPLRC) [report](#) on the sLCM.
6. The Committee [reported](#) on the initial LCM for the Bill on 15 February 2023. The Parliament agreed, by division, to withhold consent for the Bill on 23 February 2023.²
7. This report focuses on the amendments to the Bill covered in the sLCM and their potential impact on devolved areas, and should be read in conjunction with the Committee's report on the LCM for the Bill which was published on 15 February 2023.

The sunset, revocation schedule and preservation powers

8. The automatic sunset of retained EU law (REUL) on 31 December 2023 is removed. Instead, only the REUL specified in Schedule 1 attached to the Bill will be revoked at the end of the year. Schedule 1 provides that 587 specific instruments are revoked. The date of the revocation remains “the end of 2023”.
9. The [UK Government published information on the REUL contained in Schedule 1](#). Of the 587 instruments listed on the Schedule the Scottish Government assesses 148 as making some devolved provision. The sLCM states that “to date the SG considers that 9 cannot yet be said to be obsolete; and therefore opposes their sunset.”¹
10. Environmental Standards Scotland (ESS) have written to the Committee raising concerns about 2 of these 9 instruments, in relation to National Emissions Ceilings Regulations (NECR) (Regulations 9 and 10) (S.I. 2018/129). ESS state that they “are not aware of any legislation that supports Defra’s view that these regulations are duplicative in the case of Scotland” and are concerned “about the proposal to revoke” the regulations. This “is based on some of our current analytical work on air quality standards and targets in Scotland.”³
11. The sLCM also notes that in “the limited time available it has not been possible to comprehensively review all aspects of the Schedule” and that therefore this is a “cautious assessment.” The Scottish Government is content that the other 139 instruments listed on Schedule 1 which contain some devolved provision can be revoked at the end of the year.
12. The Committee notes that REUL not specified in Schedule 1 will remain on the statute book. In other words, the default position that all REUL would be revoked except pieces which were expressly saved has changed to a default position that all REUL remains on the statute book unless it is on the specified list of REUL (Schedule 1) that will be revoked.
13. The Committee also notes that the power to preserve REUL has changed and is now a power to remove legislation listed in the Schedule. The power allows for Ministers to specify that an instrument listed in Schedule 1 is not revoked at the end of 2023. This power can be exercised within Scottish devolved competence by both Scottish Ministers and UK Ministers, concurrently or jointly, and is not subject to a consent or consultation requirement when exercised by UK Ministers within devolved competence.ⁱ
14. The power is subject to the affirmative procedure and cannot be exercised after 31 October 2023. The UK Government has stated that the “power is only intended to be used subsequent to Royal Assent in the case of technical errors where REUL may have been wrongly included on the revocation schedule.”⁴

ⁱ ‘Concurrently’ means that the power can be used either by a UK Minister or a devolved administration independently of each other. ‘Jointly’ means a UK Minister and a devolved administration acting together.

15. The Cabinet Secretary provided further details on the potential challenge for Scottish Ministers in exercising this power in a letter to the Committee dated 31 May 2023. He stated that there “is uncertainty and complexity in how we could remove an instrument from the Schedule where the instrument is not entirely within devolved competence.” This is partly because “the eventuality may arise whereby the UK Government is of a different opinion to a Devolved Government in relation to what should be done in respect of a particular law.” ⁵
 16. The DPLRC, while noting that the new power provides “a useful safeguard”, reiterates its view that the Scottish Parliament “should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.” ⁶
 17. The Cabinet Secretary indicates that he is “open to discuss what might be the appropriate role for the Scottish Parliament on considering whether any instruments should be removed from the Schedule, to the extent that they are within devolved competence.”
18. **The Committee notes that the removal of the automatic sunset of REUL addresses a number of the significant concerns we identified in our report on the LCM regarding the “cliff-edge” of the sunset provision.**
 19. **The Committee has written to relevant subject committees highlighting the timescales for the possible removal of instruments from the Schedule and suggesting that if they wish to take a view this would realistically need to be done before Summer recess.**
 20. **The Committee notes the concerns of ESS and has shared the relevant correspondence with the Net Zero, Energy and Transport Committee.**

Engagement with UK Government

21. The sLCM states the view of the Scottish Government that, in relation to the instruments in the Schedule to the extent that they are within devolved competence the Scottish Government and the Scottish Parliament were “not consulted”, had no “advance sight” and “were not asked for consent” on the items of REUL to be included. The sLCM also states that the UK Government has not given “any indication of their assessment of the impact of the Schedule on devolved law.” ¹
22. In a subsequent letter to the UK Government published on 25 May 2023, the Cabinet Secretary noted that he received a letter seeking consent for UK Government amendments to the Bill on Friday 19 May 2023. He also noted that a UK Minister subsequently told the House of Lords on Monday 22 May 2023 that the UK Government intends to proceed with the Bill without devolved consent. ⁷
23. The Cabinet Secretary questioned how the Scottish Government or Scottish Parliament are “supposed to have time to consider a proposal about legislative consent from the UK Government over a weekend when no notice was given that it would carry on regardless on the Monday?” His view is that he “cannot see how that sequence of events can be reconciled with UK Government’s claims to respect

devolution.” He added that it “seems to me to be clear that the UK Government had no intention of respecting the Sewel Convention or the views of the Scottish Parliament.”⁸

24. The Committee asked the Cabinet Secretary “how much engagement you received from Lord Callanan in advance of the statement that he made to the House of Lords, and whether he has offered time to engage with you as a Scottish minister to hear the Scottish Government’s concerns?” He responded that he has “not had a single meeting with the UK minister in the House of Lords.” He added that as “with many other matters on which the UK Government is proceeding with legislation or policy that relates directly to devolved competence, unfortunately, there is a gulf between the rhetoric and the reality when it comes to co-operation and close working relations, which are illusory.”⁸
25. The UK Government’s position as stated by Lord Callanan in the House of Lords on 22 May 2023 is that “it was never our intention to proceed with the Bill without consent in place” and that the “Government have sought to engage proactively with the devolved Administrations on the REUL Bill since March last year.” He added that the UK Government have “listened to their concerns and sought to make meaningful changes to the Bill in response.”

26. **The Committee notes that the UK Government does not appear to have consulted with the Scottish Government on the amendments it tabled on 10 May 2023 to the extent that they impact on devolved competence. We will write to the UK Government seeking clarification as to why this appears to be the case, and in particular, in relation to the instruments in Schedule 1 which fall, at least in part, within devolved competence.**
27. **The Committee notes that the complexity of how devolution now works outside of the EU means that there is a fundamental requirement for all of the governments across the UK to work together to provide clarity and certainty in delivering an effective regulatory environment while respecting the devolution settlement. At the same time there needs to be transparency and accountability around the operation of common frameworks, including effective parliamentary scrutiny.**
28. **The Committee has stated previously that the Sewel Convention is “under strain” following the UK’s departure from the EU. The Committee has written to both the Cabinet Secretary and the UK Minister for Inter-Governmental Relations seeking their views on whether they respectively agree that the Sewel Convention is under strain and whether, and how, it could be strengthened in law and be subject to judicial review or whether, and how, it could be strengthened on a non-statutory basis.**

Powers to Restate, Revoke, Replace and Update REUL

29. The Scottish Government's position is that none of the UK Government amendments tabled on 10 May 2023 "address the danger the Bill poses to the devolution settlement." This is because UK Ministers will still be able to revoke, replace or restate devolved REUL with no requirement to obtain the consent of the devolved governments or legislatures.
30. Both the Scottish Government and the Welsh Government "have made it clear that there must be a statutory consent requirement for the use of concurrent powers." ¹⁹
31. The UK Government's position is that it is—
 - ” “committed to ensuring that the provisions in the Bill, including its powers, are consistent with the devolution settlements and work for all parts of the UK...It is not necessary to limit the use of the powers within areas of devolved legislative competence by requiring UK Ministers to obtain legislative consent. Rest assured, the concurrent nature of the powers is not intended to affect the devolution settlements, nor to influence decision-making in devolved Governments. Rather, it is intended to reduce additional resource pressure on the devolved Governments by enabling the UK Government to legislate on behalf of a devolved Government where they do not intend to take a different position.” ¹⁰
32. The UK Government's *smarter regulation to grow the economy* document (published 10 May 2023) states that Common Frameworks are designed to manage regulatory divergence including that which may result from future provisions made under the REUL Bill once it receives Royal Assent—
 - ” “Both the UK government and devolved governments agree that where Common Frameworks are operating they are the right mechanism for discussing REUL reform in the areas they cover. When using the powers in the bill, we will use Common Frameworks to engage with the devolved governments on decision-making across the UK.” ¹¹
33. The sLCM states, however, that the UK Government “has not been able to explain how the Bill would do anything other than radically undermine common frameworks. Were UKG Ministers to use concurrent powers to legislate in devolved areas for the whole of the UK/GB, common frameworks would be bypassed entirely.” ¹
34. The Cabinet Secretary also highlighted that “not only do common frameworks play a role in intergovernmental relations in the UK but there is also the United Kingdom Internal Market Act 2020, which was legislated subsequently and is, in many respects, trumping the common frameworks approach to things.” ⁸

35. **The Committee reiterates our view that it is a fundamental constitutional principle that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.**
36. **The Committee notes that in relation to the concurrent powers to amend retained EU law in the European Union (Withdrawal) Act 2018, the then UK Government gave a non-statutory commitment that it would not normally use those powers in areas of devolved competence without the agreement of the relevant devolved administration.¹² The Committee will write to the UK Government seeking clarification as to why a similar commitment has not been given in relation to this Bill.**
37. **The Committee notes that there is a real lack of clarity in how common frameworks are operating both generally and, in the context of this report, in relation to REUL. The Committee reiterates our previous view of the need for much greater transparency and accountability with regards to the operation of common frameworks.**
38. **The Committee invites the Cabinet Secretary to provide a detailed response on the effectiveness of Common Frameworks including how they are being used in relation to REUL. We will also invite the UK Government to do likewise.**

Reporting Requirements

39. The Committee notes that subsequent to this sLCM being lodged a new clause was inserted into the Bill to require UK Ministers to update the retained EU law “dashboard” and lay a report every 6 months on the progress that is being made in revoking and reforming retained EU law. The DPLRC understands that the dashboard at present does not contain any legislation that is wholly devolved, but that it does contain legislation dealing with matters of mixed reserved/devolved competence. The obligation to report continues until the powers expire in June 2026.
40. These reports must also cover the UK Government’s forward-looking plans to revoke and reform REUL in the subsequent 6 month periods. This includes providing a list of such legislation as the UK Government intends to revoke or reform.
41. The Delegated Powers and Law Reform Committee suggested that we may wish to explore the implications for the Scottish Parliament’s scrutiny, for example:
- whether this obligation covers devolved REUL (as currently drafted the amendment could cover both);
 - whether there should be an equivalent obligation on Scottish Ministers to report on their use of powers, and, in particular, their future plans for the use of the powers (as currently drafted the obligation is only on UK Ministers); and
 - how the Scottish Government and Scottish Parliament would engage with this process in relation to devolved legislation.⁶
42. The Cabinet Secretary states that while the reporting provisions, at the time of writing to Committee on 31 May 2023 “are not yet settled” he is “happy to consider what reporting may be appropriate by the Scottish Government where our new approach to the annual reporting on EU Alignment will be relevant.”⁵
43. As noted above, the Bill confers very significant new powers on Ministers. Whether these powers are used in a way that results in alignment with EU law is just one of a number of issues that the Scottish Parliament will want to scrutinise going forward.
44. Separately, in relation to alignment, the Committee notes that preserving REUL now does not in itself amount to alignment with EU law: for example divergence will already have occurred where REUL hasn’t been updated since 31 December 2020 but EU law has moved on, and vice versa.
45. **The Committee recommends that the reporting requirements for the Scottish Ministers should, as a minimum, be equivalent to the requirements on the UK Ministers. Once those requirements are “settled”, the Committee invites Scottish Parliament officials to work with Scottish Government officials in developing proposals for how this will work in practice, while noting that scrutiny of the use of the powers to restate, revoke, replace and update REUL should not be conflated with scrutiny of the policy**

commitment to align with EU law.

Conclusion

46. The Committee notes that the Scottish Government has committed to providing further updates as required to the Scottish Parliament once the Bill print is settled, with any required recommendation on legislative consent. The Committee will consider any such updates.

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- [3] Letter from Environmental Standards Scotland to the Convener of the Constitution, Europe and External Affairs Committee. (2023, June 5). Retrieved from <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-constitution-europe-external-affairs-and-culture-committee/correspondence/2023/environmental-standards-scotland-retained-eu-law-revocation-and-reform-bill>
- [4] House of Lords Delegated Powers and Regulatory Reform Committee. (2023, May 11). 33rd Report of Session 2022-23 - Retained EU Law (Revocation and Reform) Bill: Government Response. Retrieved from <https://committees.parliament.uk/publications/39923/documents/194578/default/>
- [5] Letter from the Cabinet Secretary for the Constitution, External Affairs and Culture to the Convener of the Constitution, Europe, External Affairs and Culture Committee in advance of giving evidence to the Committee on 1 June 2023. (2023, May 31). Retrieved from <https://www.parliament.scot/-/media/files/committees/local-gov/correspondence/2023/mrrobertsonretainedeu-law-revocation-and-reform-bill.pdf>
- [6] Scottish Parliament Delegated Powers and Law Reform Committee. (2023, May 30). Supplementary Legislative Consent Memorandum: delegated powers relevant to Scotland in the Retained EU Law (Revocation and Reform) Bill. Retrieved from <https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2023/5/30/cf015c9e-bc60-446e-be04-7996f9b213a5/DPLRS062023R36.pdf>
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- [8] Scottish Parliament. (2023, June 1). Official Report of the Constitution, Europe, External Affairs and Culture Committee. Retrieved from <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/CEEAC-01-06-2023?meeting=15348>
- [9] Supplementary legislative consent memorandum (no. 5) lodged by the Welsh Government for the Retained EU Law (Revocation and Reform) Bill. (2023, May 26). Retrieved from <https://senedd.wales/media/mlida4s1/sbcm-ld15855-e.pdf>
- [10] UK Parliament. (2023, May 15). House of Lords Hansard volume 830: Retained EU Law (Revocation and Reform) Bill. Retrieved from [https://hansard.parliament.uk/Lords/2023-05-15/debates/506802E6-81AF-46C9-9D36-2ADF6CB75A7B/RetainedEULaw\(RevocationAndReform\)Bill](https://hansard.parliament.uk/Lords/2023-05-15/debates/506802E6-81AF-46C9-9D36-2ADF6CB75A7B/RetainedEULaw(RevocationAndReform)Bill)

- [11] UK Government Department for Business and Trade. (2023, May 10). Smarter regulation to grow the economy. Retrieved from <https://www.gov.uk/government/publications/smarter-regulation-to-grow-the-economy/smarter-regulation-to-grow-the-economy#reforming-regulations-to-reduce-burdens>

- [12] Explanatory notes for the European Union (Withdrawal) Act 2018: Chapter 16. (2018). Retrieved from https://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf

