RESPONSE
by
FACULTY OF ADVOCATES
To
the Call for Evidence issued by the House of Lords Constitution Committee concerning the European Union (Withdrawal) Bill

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The Faculty of Advocates is the Scottish Bar. It has prepared this response to the Call for Evidence issued by the House of Lords Constitution Committee concerning the European Union (Withdrawal) Bill. At the outset, the Faculty would record that it shares the concerns expressed by the Committee in its interim report on the Bill (7 September 2017). Its comments on the specific aspects investigated by the Committee are set out below.

A. Delegated Powers & Scrutiny

The Bill will confer wide powers on United Kingdom and devolved authority ministers to correct 'retained EU law'. Broadly framed powers are needed, because of the range and volume of material to be addressed. The key issues of concern are how the powers then come to be exercised and that exercise scrutinised.

Powers

1. Clause 7(1), which contains the principal corrective power, is formulated to enable an exercise of power which is 'appropriate' rather than 'necessary'. As a matter of standard legal interpretation, the latter term would be understood as containing an objective test, whereas the word 'appropriate' is subjective, being in essence a matter of the Minister's opinion – albeit she would require to act reasonably and rationally when deciding whether it was 'appropriate' to make a particular provision. There is also concern about whether more policy-driven changes might be made under the head of appropriateness. Necessity might be thought to require a more clearly evidenced justification from the Minister. Arguably, it is more difficult to change the direction of a legal instrument on the basis of 'necessity' than 'appropriateness'. The UK Parliament and the devolved administrations might reasonably expect Ministers to have a proper evidence base for all delegated legislation, but necessity is easier to measure against evidence provided. It would also provide reassurance that the exercise of the power is more obviously litigable, 'necessity' being a test that judges can more readily adjudicate than 'appropriateness'.

2. The Faculty notes that Clause 7(6)(f) protects the Northern Ireland Act 1998 from amendment or repeal by regulations made under section 7. It is not apparent why the Scotland Act 1998 and the Government of Wales Act 2006 are not similarly protected.

3. Schedule 7 of the Bill provides a choice of three legislative routes to exercising the powers of correction: regulations that are made by the UK ministers, regulations that are made by the

devolved authorities, and regulations that are made jointly by the UK ministers and the devolved authorities. It is not clear why and when it is envisaged that the exercise of joint powers might be required. The Scotland Act 1998 makes provision for the exercise of powers in that way in certain circumstances, which are clear and relatively limited. Despite the existence of powers thus framed, it is not at all clear how joint exercising of the powers would operate in practice.

Scrutiny

4. Under Schedule 2, when exercising their powers, devolved authorities may not modify retained direct EU legislation, or make provision that is inconsistent with a modification of retained direct EU legislation that is made by UK ministers. That is a policy choice, rather than a structural legal inevitability. In its wake come questions about the level of scrutiny and engagement, and how the various devolved authorities might have a place in that.

5. At present, the Bill does not provide any mechanism for scrutiny by devolved authorities of the regulations proposed to be made by UK ministers acting alone, irrespective of whether those regulations are a matter of significance for Scotland, Wales or Northern Ireland, or would otherwise have engaged the Sewel Convention had the matter been included in primary legislation.

6. This is a matter which would benefit from structured cooperation between UK departments and the devolved authorities. It seems likely that there will need to be intergovernmental working, first, at the stage of deciding what needs to be done in terms of legislation, and then in having a realistic conversation about who is going to take responsibility for dealing with particular issues. Co-ordination is key for two reasons: first, to make it work as a matter of practicality, and, secondly, to work out how the scrutiny can best be exercised. In evidence to the Scottish Parliament Delegated Powers and Law Reform Committee, Professor Alan Page suggested a form of coordinating committee for this purpose.[1] The Faculty considers that that suggestion has much to commend it.

7. There is currently no formal role for consultation with, let alone consent from, the devolved authorities to the exercise of powers by UK ministers in otherwise devolved matters. It might be questioned whether such functions should extend to UK ministers' exercise of powers that relate to matters within the devolved legislature's competence or, perhaps, cover the exercise of powers in areas that are of interest and importance to an individual devolved nation, for example hill farming in Scotland and Wales, or fishing in Scotland.[2]

8. There is an urgent need for some form of mechanism for consultation to be agreed and adopted, and we suggest there is no reason in principle why design of that process should not begin now, even before the Bill is enacted. The Article 50 notice period expires in March 2019, and the most cautious approach (against the possibility of a 'no deal' exit) would require all instruments which were to be made under the Bill's powers to have been laid before then. That is a significant amount of work, and even if there were a transition period of several years, the task will be substantial. It seems only reasonable to construct a triage system to sift the urgent orders and prioritise work on them, and to finalise the details of the process of consultation.

9. In relation to parliamentary scrutiny, whether by devolved legislatures or by the UK Parliament, the scale of the task cannot be overstated. The White Paper which preceded the Bill estimates that between 800 and 1,000 legislative instruments will be required (see paragraph 3.19). It seems

[1] Scottish Parliament *Official Report* Delegated Powers and Law Reform Committee 26 September 2017, cols 9-10. http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11115&mode=pdf

[2] The problems identified by the Committee in its report 'Inter-governmental relations in the United Kingdom' (27 March 2015) will rapidly become more acute without early progress on this issue.

plausible that that may prove to be an underestimate. Whatever the correct number, it will be in addition to the normal volume of UK Statutory Instruments, recorded in the White Paper as exceeding 1,000 per year. Such a volume of material makes it inevitable that some areas will receive less scrutiny. It also necessitates prompt notification of draft measures, and timely involvement of agencies and other stakeholders.

10. Schedule 7, paragraph 1(2) of the Bill lists a number of purposes for which legislation will require the affirmative procedure. We consider those are appropriately identified, but there may well be further cases where that procedure is appropriate because of the importance of the subject-matter. That leads back to the issue of co-ordination and the need to identify the issues and whose responsibility it is to deal with them; the need to take legislation forward; and the process for identifying what procedure should be adopted in any given case.

11. There is also a case for a uniform approach to be developed for the presentation of information produced by Ministers to accompany proposed secondary legislation laid before Parliament or devolved legislatures under authority of the Bill. Prioritisation and scrutiny are likely to be practicable only where there is a clear indication of whether an instrument simply deals with what the policy of the Bill is supposed to address—namely, moving the legal basis from the EU to domestic law—or whether a more substantive change is being made to the domestic legal order. It should be incumbent on the Minister, whether a UK minister or a Scottish minister, to identify that. Many instruments will be purely technical; a smaller number will be of great significance, and may involve a policy change. Those are the ones on which Parliament is likely to want to focus attention. They will include instances where the affirmative procedure is invoked under Schedule 7.

B. Rule of law and Legal Certainty

12. By way of general comment, the Faculty endorses the observation of Professor John Bell, made in his written evidence already available on the Committee's page of the Parliament website, concerning the static nature of the mass of law incorporated *en bloc*. Direct EU legislation thus incorporated might then be significantly amended by the EU, or even superseded but, unless and until modified, it will continue to govern in the UK.

13. Moreover, definition of key legal or constitutional concepts is lacking, and the policy underlying the government's approach to incorporating EU law into the domestic juridical realm is unexplained.

Lack of legal certainty

14. The senior judiciary has repeatedly asked the government to clarify how the case law on EU matters, including in particular judgments of the CJEU, are to be used after Exit Day.

15. Clause 6 offers only vague advice: a court or tribunal may have regard to anything done or after exit day by the CJEU, another EU entity or the EU, 'if it considers it appropriate to do so'. In the absence of any explanation of underlying policy, the assessment of appropriateness is effectively rendered arbitrary. It allows for a differentiated approach between the UK's own jurisdictions, meaning that Scottish courts could take a different view from English courts of 'appropriateness', as has occurred in the past (e.g. *Kaur v Lord Advocate* 1980 SC 319).

16. Clause 6(3) is equally unclear. It applies only so far as the retained law is unmodified. It tells the court to have regard 'among other things' to the limits of EU competences; but there is no indication as to what other things may be relevant. The principles and decisions comprising retained case law

must be applied as those principles and decisions are modified by or under the Act or by other domestic law from time to time.

17. Another example of uncertainty, to which others have drawn attention, is whether there may be more than one exit day. Clause 14(1) & (2) define exit day, and §13(a)(ii) in Part 3 of Schedule 7 allows for Ministers to exercise their regulation making powers to make different provision for different cases or descriptions of case, different circumstances, different purposes or different areas. Thus, there may be one exit day for one purpose, another for a different purpose. It is not clear how this would affect the definition of 'pre-exit enactment' in §4(2) in Part 1 of Schedule 8. We also note the compelling need for proper notice to be given of when the (or any) exit day will be.

18. The draftsman's lexicon contains a selection of terms whose meaning is clearly left to the courts. Thus, the concept of a 'deficiency' is not defined; however it seems likely that ministers will need to be prepared to justify in advance the substance of any identified deficiency: see the discussion of that term in the context of housing law in e.g. *Hall v Wandsworth LBC* [2005] 2 All ER 192 (CA) per Carnwath LJ at §29: 'The word 'deficiency' does not have any particular legal connotation. It simply means 'something lacking'. There is nothing in the words of the rule to limit it to failings which would give grounds for legal challenge.'

Loss of constitutional rights

19. The Faculty agrees with the Committee that the Bill touches upon many fundamental aspects of the Constitution, including fundamental rights, the separation of powers and the devolution settlements. It is important that such far-reaching legislation should be carefully structured and reflect clear policy goals.

20. The Bill removes rights from UK citizens. For example:-

- Until exit day, if a person suffers loss through the UK state's serious breach of EU law, she has a right to damages under the rule in *Francovich*. In Scots and English public law, a public authority's failure to comply with the law does not of itself ground a claim in damages.[3] The *Francovich* rule was used recently in Scotland to claim damages for breaches of EU law in relation to the administration of an EU subsidy scheme: see *Angus Growers Ltd v Scottish Ministers* 2016 SLT 529. Paragraph 4 of Schedule 1 removes this right, although *Francovich* cases which are already pending would appear to be permitted to continue, according to Schedule 8, paragraph 27(3). (We observe that these important transitional provisions are difficult to locate, particularly in the absence of any forward reference in Clause 6 or Schedule 1).
- The Bill would also remove rights to found upon breaches of the general principles of EU law: see §§2 & 3 of Schedule 1. Member States are obliged to comply with these principles when implementing EU law or otherwise acting within the scope of EU obligations. Their removal means, for example, that the structured approach to proportionality evident from EU law is likely to be lost: see e.g. *R (on the application of Lumsdon) v Legal Services Board* [2016] AC 697. Non-discrimination too is an important general principle that would fall away from retained EU law.
- The restriction on Scottish Ministers acting incompatibly with EU law is removed: no such restriction applies in relation to 'retained EU law': see §1 in Part 1 of Schedule 3.

[3] 'Illegality without more does not give a cause of action.': *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1 at §229 per Lord Hobhouse.

- The right to challenge EU law on the basis that it is invalid is removed: see §1(1) in Schedule 1.

21. While these changes may be said to result from the demise of the principle of the supremacy of EU law (clause 5(1)&(2)) and/or from the very fact of deciding to leave the European Union, it is clear that one consequence is to remove at a stroke a series of checks on executive power.

22. The Committee has also highlighted as a specific issue the legal and practical challenges of producing a copy of retained EU law post-exit. In our experience, it can be difficult to source a version of an EU instrument as at a particular past date where that instrument has since been amended or superseded. There are estimated to be over 12,000 EU regulations currently in force in the UK (paragraph 2.6 of White Paper). The process by which versions of these accurate at Exit Day are to be preserved and made available throughout the UK in future is not explained. Similar points can be made about the difficulty of researching and establishing the position in case-law at a particular point in time past.

C. Devolution

23. The following effects will arise for Scotland's devolved parliament and government.

a. UK ministers are given the power to make far-reaching changes to the law by means of regulations: see clause 7. Many such regulations may affect Scotland, and indeed on matters that have thus far not been reserved under the Scotland Act 1998. Yet there is no provision for advance consultation on any such instruments, or for their scrutiny by the Scottish Parliament (as noted above).

b. Where a devolved authority makes regulations to remedy any failure or other deficiency in retained EU law, the entire instrument falls if any provision in it is outwith devolved competence: see §2(1) in Part 1 of Schedule 2; and compare *DPP v Hutchinson* [1990] 2 AC 783 per Lord Bridge at p804D-G. It is not clear that such a stringent consequence is necessary; the test of severability appears to be applicable to instruments made by UK ministers.

c. The Bill could give rise to significant problems in relation to retained EU law in matters not reserved by the Scotland Act 1998. There is the obvious point that policy matters require to be coordinated between the UK government and the devolved authorities. In addition, at various other points the Bill would permit regulations to be made that might cause conflict in the absence of a clear mechanism for co-operation. For example, Scottish Ministers may make regulations to remedy failures or deficiencies in retained EU law, and such regulations will be within the Ministers' devolved competence if their provisions would be within the Scottish Parliament's legislative competence contained in an Act of that Parliament (ignoring the limit on competence imposed by section 29(2)(d)): see §9(1)(a) in Part 1 of Schedule 2; compare (i) the new limit on the Scottish Ministers under section 57(4) of the Scotland Act 1998 and (ii) the exception at sub-para. (b) in section 57(5) of the Scotland Act 1998, both as inserted by §1(b) in Part 1 of Schedule 3. Such provisions may invite conflict on a political plane, but it is not clear at present what mechanisms the UK government intends to create in order to ensure that there is timely coordination and discussion between it and the devolved authorities.

d. Moreover, the Faculty notes the following statement in paragraph 34 of the Explanatory Notes concerning Clause 11 (legislative competence):

> the devolved legislatures or administrations may only modify retained EU law to the extent that they had the competence to do so immediately before exit. This means that devolved institutions will still be able to act after exit as they could prior to exit in relation to retained EU law.

While the fetter represented by the need to comply with EU law is retained, and the statement is therefore accurate to that extent, the practical position of the devolved legislatures or administrations after exit is not unaltered. In practice, the UK Parliament will gain control over legislative areas where, at present, the UK government does not have the right to prevent the Scottish Parliament from legislating. In future, the Scottish Parliament will only gain the power to legislate on matters formerly covered by EU law if enabled to do so by Order in Council. This is a major alteration in the balance between London and Edinburgh.

24. Paragraph 36 of the Explanatory Notes endeavours to offer reassurance:

> The UK Government hopes to rapidly identify, working closely with devolved administrations, areas that do not need a common framework and which could therefore be released from the transitional arrangement by this power.

Matters are unlikely to prove so clear in practice.

25. The list of areas where the UK government considers that a common policy framework may be required is long, and its content is very broadly drawn. Some of the 111 areas listed are so imprecise as to be incapable of meaningful understanding, for example 'land use'. If this list is the basis for identifying where proposed legislation of the Scottish Parliament post exit may involve an area that 'need(s) a common framework', it threatens to encroach on matters that are already devolved and legislated on by Holyrood under the current settlement. Moreover, the Faculty entertains considerable doubt that identification and release of areas that matter to the Scottish administration could take place 'rapidly'.

26. The reference to the 'transitional arrangement' connotes the running of the 'common market' of the UK post exit according to retained EU law, a set of rules made in the context of a much larger market with different organisation and membership. The period envisaged is indeterminate: there is no sense of the timeframe within which any common framework can be expected to emerge. It appears to be anticipated that the determination of the areas requiring a common framework will be made by the UK government, albeit with consultation of the devolved authorities. Missing from the 'transitional arrangement' represented by retained EU law is the principle of subsidiarity, and there is no indication that the future framework will prioritise the regulation of an issue by devolved rather than central government wherever possible.

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