OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 6 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 6 March 2018

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DELEGATED POWERS AND LAW REFORM COMMITTEE
7th Meeting 2018, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Neil Findlay (Lothian) (Lab)
*Alison Harris (Central Scotland) (Con)
David Torrance (Kirkcaldy) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Gerald Byrne (Scottish Government)
Graham Fisher (Scottish Government)
Luke McBratney (Scottish Government)
Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 6 March 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome members to the seventh meeting in 2018 of the Delegated Powers and Law Reform Committee, and I welcome the Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell, and his officials, who are here to give evidence on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill.

Before that evidence session begins, the committee must decide whether to take business in private. It is proposed that the committee takes agenda items 6 and 7 in private. Item 6 is consideration of the delegated powers provisions in the Prescription (Scotland) Bill, and item 7 is consideration of the evidence that we are about to hear from the minister and his officials. Does the committee agree to take those items in private?

Members *indicated agreement.*

UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

10:01

The Convener: Agenda item 2 is consideration of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. Our role in scrutinising the bill is to consider the delegated powers in it.

Michael Russell is supported by Gerald Byrne, team leader, constitution and UK relations division of the Scottish Government, and Graham Fisher, head of branch 1, constitutional and civil law division of the Scottish Government. Is there a branch 2?

Graham Fisher (Scottish Government): There are three branches.

The Convener: Wow. Michael Russell is also supported by Luke McBratney, policy officer, constitution and UK relations division of the Scottish Government.

I invite members to ask questions.

Alison Harris (Central Scotland) (Con): Good morning, minister.

My concerns about the bill boil down to concerns about the lack of scrutiny that this committee and other committees will be able to apply. I am sure that you appreciate and agree that a three-week timetable does not allow for proper scrutiny. Committees are required to scrutinise in order to allow Parliament to function correctly and properly. Ultimately, that is being denied to Parliament. What do you have to say about that? Could we have more time to deal with the bill?

Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe): I respectfully disagree on scrutiny. The situation is not ideal, but the bill relies very heavily on the United Kingdom European Union (Withdrawal) Bill. There are some differences between them, but there is also a great deal of similarity between them, and we will no doubt come on to that. I hope that we have improved the UK bill in the way that the committee sought, in light of the evidence that I gave last October and the committee's very helpful report on the UK bill. The concepts and some of the details of the bill should be familiar to committee members and members of the Scottish Parliament.

That we are in the position that we are in is not of our making. We have endeavoured and we continue to endeavour to reach an agreement with the UK Government on outstanding issues relating

to the UK bill, but that has not yet proved possible. It is therefore sensible for us and the Welsh Government—we have worked in lockstep on the matter—to put in place a backstop provision in case we do not get that agreement. If we get that agreement, section 37 of the continuity bill will allow us to remove the whole or parts of the act.

If the UK Government is inclined to be reasonable and to respect the devolved settlement, we will be in a position in which the bill will not continue. If we are not in that position, we will give the bill every opportunity to be scrutinised. Indeed, from looking at my diary over the next three weeks, it seems that the committees of the Parliament will be doing little but scrutinising the bill. I welcome that, as will the chamber. That will be very useful and important activity. Instead of simply talking about the lack of scrutiny of the bill, perhaps it would be useful if we got down and scrutinised it.

Alison Harris: I hear everything that you say, but this committee has been scrutinising the UK bill that you refer to for some considerable time—a lot longer than three weeks—so I respectfully disagree with you. My question is nothing to do with politics and everything to do with the committee and scrutiny. I do not see how you can fail to agree with my view and that of others that three weeks is simply not long enough to scrutinise something of this importance and magnitude.

Michael Russell: With the greatest of respect, you have just said that the committee has been scrutinising the UK bill for a considerable period. There are strong similarities between the two bills; indeed, there are some identical parts. In that sense, by your own admission, you will have a head start.

We are not in the position that we would like to be in. To put it bluntly and as non-politically as I can, the UK Government bears a responsibility for that. I continue to wish to negotiate. Indeed, this week, when I am not talking about the bill here, I will be talking about it in London, along with the Welsh and UK Governments, so perhaps we should go on and continue to scrutinise it. There is a choice to be made. You may not wish to scrutinise it in the circumstances but, if you wish to scrutinise it, I am at your disposal.

Alison Harris: I do not actually—

The Convener: Sorry, Mrs Harris. Minister, you do not need to tell us what our job is. We know what our job is—we are here to scrutinise—but members are free to ask whatever they wish, so please do not tell us what our job is.

Do you have anything to add, Mrs Harris?

Alison Harris: To be perfectly frank, the minister launched into a speech and totally ignored my question. I need to bring you back to the scrutiny role, minister. We have been scrutinising the UK bill for some time and there are undoubtedly similarities, but the fact remains that having three weeks for the bill does not allow members of this committee or other committees enough time to scrutinise. That is my point. I do not appreciate the patronising response that we can compare it to the UK bill.

Michael Russell: I am not trying to patronise you, but I disagree with the point, which was also made by your colleagues last week. We are not in the ideal situation, but it is the situation that we are in. It is not a situation of the Scottish Government's making; it is of the UK Government's making, because it has not yet agreed on clause 11 of the UK bill. The Welsh Government is in exactly the same position, and we have brought forward bills and are ready to have them scrutinised. I am simply making that point. We are ready to have the bill scrutinised. I am happy to appear before the committee now and again, should that be required. I have made myself absolutely available to all the committees of the Parliament and to the chamber. The bill and information on it are available, and we will add to that information in any way possible. I am trying to be as helpful as possible.

Alison Harris: I am not saying that you are not being helpful. Ultimately, you are agreeing with me that, although everything is not of our making, three weeks is not long enough.

Michael Russell: I am making the point that this committee and other parts of the Parliament have already scrutinised the UK bill, which is very similar, and that we are where we are and we need to go ahead. I could make a wider point about Brexit but, out of deference to the convener, who does not wish me to do so, I will not make it at this time.

Alison Harris: To be fair, my question was on scrutiny. Thank you.

The Convener: We have probably exhausted that one.

Neil Findlay (Lothian) (Lab): Any reasonable person would say that this level of scrutiny of such an important piece of legislation is not the way that things should be done, and it would be churlish for anyone to suggest that it is. The fundamental issue that we have to get to the bottom of is whether the whole process has substance or whether it is a depressing bun fight between two Governments for political reasons. I have asked twice—once in a parliamentary question and once in a debate—for the 25 areas of dispute to be published. Will you publish them?

Michael Russell: With respect, there are three Governments involved, because the Welsh Government is in the same position. I raised that issue again with my colleague Mark Drakeford last night. It is my wish to publish them. I will raise it at the meeting tomorrow and I hope that all three parties will agree to publish them. That is what I want to do. I cannot publish them ex cathedra, but it is my wish and intention to publish them, and I want to do so.

However, I will make one crucial point. The issue is not only about the 25 items that are left; it is about the principle that underpins those 25 items, which has been referred to by the Welsh Government and by us. That is the principle of imposition of action rather than agreement to action. The 25 items are of great importance on their own, but the principle is also of great importance.

I wish to publish them and I think that the Welsh Government wishes to publish them now. We want to get them published, and I will do my best.

Neil Findlay: What is stopping us from publishing them?

Michael Russell: I do not believe that I can publish them without the agreement of all three parties, as doing that might make the negotiating situation worse. However, I will request that we publish them. I want to publish them, and I hope to be able to as soon as possible after Thursday, and certainly before stage 2, so that you are fully aware of them.

Neil Findlay: The Welsh Government has agreed that it wants them to be published.

Michael Russell: I believe that that is the case.

Neil Findlay: After this session, could you go and lift a phone to your UK counterpart and ask whether they would agree to publish them, so that they could be published this afternoon?

Michael Russell: Discussion among civil servants is already taking place. My civil servants have asked for the issue to be raised at the meeting on Thursday, and it will be. That is the meeting at which the issue needs to be raised formally. I cannot give you more than say that I am willing to do so.

Neil Findlay: If there was agreement among the three ministers who are representing the respective Governments, the areas of disagreement could be published this afternoon.

Michael Russell: I do not think that we could publish them, because we have not agreed the nature of publication—how we will publish them. However, I want to publish them. I made that commitment to you last week. I have now raised the issue with the Welsh Government. I want to get it done, and I would like to do it.

Neil Findlay: I hope that you agree that this matter is absolutely fundamental to people's ability to understand whether we are going down a route for perfectly legitimate purposes or whether we are being led for political reasons.

Michael Russell: The identity of purpose between ourselves and the Welsh Government indicates that this issue is something that is shared by the Labour Party in Wales and the Scottish National Party Government. The issue is not one of politics, as you have indicated, but one of substance.

Neil Findlay: I hope that you will agree that not everything that we do is for a narrow party political reason. I wish that more people would understand that, irrespective of our party position, we have a role as parliamentarians to scrutinise the bill. That is the reason why I think that the areas of disagreement should be published.

Michael Russell: Absolutely. I agree that they should be published.

Neil Findlay: At this point, the political make-up of each Government is irrelevant. The quicker that the areas of disagreement are published, the better.

I have a question for Mr Fisher, I think. Are you the lawyer?

Graham Fisher: Yes.

Neil Findlay: What is the legal reason why we need to go through the emergency process?

Graham Fisher: There is a legal reason, as well as other reasons, why it would be significant if the UK bill was enacted before the continuity bill. Part of the reason is that it would amend the devolution settlement and prevent the Scottish Parliament from changing what would then be the withdrawal act.

Neil Findlay: Would that happen only on Brexit day?

Graham Fisher: No. The UK bill would amend the devolution settlement before Brexit day.

Neil Findlay: Is that because of the clause 11 element of the UK bill?

Graham Fisher: Not directly—there is a technical reason as well as clause 11.

Neil Findlay: Which is?

Graham Fisher: It is buried in the detail of schedule 3 to the European Union (Withdrawal) Bill, and it would amend schedule 4 to the Scotland Act 1998.

Neil Findlay: That is the first time that we have heard that.

Graham Fisher: It is part and parcel of the restrictions that the UK bill would put on the devolution settlement.

Neil Findlay: Could I request that the minister publish the legal reason why the emergency process is a necessity, so that we can test that legal argument? I have heard the political argument—I understand that argument—but we have never heard the legal reason why we have to get to the finish line before the other side.

Michael Russell: As I understand it, that legal argument is now on the record of this committee. I am happy to see that argument fleshed out and I will endeavour to write to the member so that he understands the legal reason.

The Convener: Perhaps the minister can write to me, as the convener, and I will pass on the letter.

Michael Russell: Absolutely—I am happy to do so.

Neil Findlay: The issue is not just relevant to this committee; it is of such importance that it would be helpful to Parliament to write to all members clarifying and fleshing out the legal reasons for treating the bill as emergency legislation, so that the matter is perfectly understood. The matters are complex and people have the right to have the information at their fingertips.

10:15

The Convener: You are right to raise the issue, Mr Findlay. When I receive the letter, I will make all members aware of it.

Luke McBratney (Scottish Government): It is also important to put this on the record. As well as the principled or legal reasons for the Scottish Government's proposed timetable, there are practical reasons for it: the requirement to enable changes to be made to the withdrawal bill, if necessary, and, possibly most pressing of all, the fact that Government—in any scenario, whether we are relying on the withdrawal bill, the continuity bill, or some combination of both—will have to start the practical work of preparing for EU withdrawal soon. The UK Government wants its bill passed by May, so that the practical and necessary preparation can take place shortly after that. We could not commit this Parliament to any timetable that would involve less time for preparation than the UK Parliament is getting.

The Convener: Do you have any other matters to raise at this point, Mr Findlay?

Neil Findlay: No, that is fine.

The Convener: I will make a point before we get into the substantive scrutiny of the withdrawal bill. How close are you to getting agreement with the UK Government?

Michael Russell: At the weekend, I made it clear that I consider that agreement is contingent on a simple change that the UK Government needs to make. In respecting the principles of devolution, it must make sure that the Scottish Parliament agrees to the subjects that would be in any frameworks and the governance of those frameworks. Presently, no mechanism is being discussed for agreement. If we move to agreement, agreement will be found; if we do not, it will be difficult to do so.

The Convener: Are you confident that agreement can be reached?

Michael Russell: No, I do not have confidence either way. The discussions, which have been detailed and going on since last July, are continuing. We have made progress on a range of issues, which we are glad about, but we have not made progress on that issue. The joint ministerial committee (European Union negotiations) is meeting on Thursday and the JMC plenary is meeting next Wednesday. Those are both opportunities for agreement to be reached. So far, there is no agreement, and I have seen nothing to show that the UK Government is moving towards agreement. On the other hand, we are still talking, which is positive.

The Convener: Yes, that is good. Potentially, by next week, you could have an agreement and the bill that we are discussing could be dropped.

Michael Russell: Yes. We have made it clear that, in those circumstances, we will come to the chamber and report on the agreement, after which the chamber will have the opportunity to say what should happen. However, as I have indicated, we have introduced the bill because we need a backstop in place. There cannot be a cliff edge, and we cannot agree to the process and some of the detail that the UK Government proposes.

Stuart McMillan (Greenock and Inverclyde) (SNP): On the back of the last week's publication of the continuity bill, has there been an increase in the number of discussions between your civil servants and UK civil servants?

Michael Russell: I do not think that the number of discussions is increasing, but discussion has been pretty constant for many weeks. For example, the so-called deep-dive process, which looks at individual subjects and how those might be subject to frameworks or to other actions, has been going on for a considerable time. That work was instituted as a result of progress that was made last year between the October and December meetings of the JMC.

The Convener: Minister, we have a series of pre-prepared questions, some of which are technical, so members may just read them out. I will start.

Section 7 of the bill is titled "Challenges to validity of retained (devolved) EU law". It is covered in paragraphs 20 to 25 of the delegated powers memorandum. Section 7(1) would prevent a challenge to "retained (devolved) EU law" after exit day on the ground that the EU instrument would be "invalid" before that date. Sections 7(2)(b) and 7(4) allow ministers to make regulations to disapply that rule for particular situations. Can you explain what situations might need to be dealt with by such regulations?

Michael Russell: I can, but I would like Luke McBratney to deal with some of the legal detail. As you will understand, we are sharing the task with regard to that detail and, if it is acceptable, we will all chip in where we can to help the committee.

Luke McBratney: At present, domestic courts have no power to disapply any EU instrument on the ground of validity—only the European Court of Justice can do that. It will be necessary in situations where the validity or otherwise of an instrument might prejudice an individual's rights or interests in some way to have the ability to provide for that after withdrawal. I imagine that the situations in which we are considering the disapplication of the rule under section 7 will be broadly similar to the current situations in which the Court of Justice uses its power to disapply instruments as invalid.

Our intention is to co-ordinate our use of the power with the UK Government's parallel and corresponding power in paragraph (1) of schedule 1 to the European Union (Withdrawal) Bill, but I am happy to write to the committee as a matter of urgency—indeed, in the next day or two—with more detail on the possible use of that power.

The Convener: That would be useful. However, given that the stage 1 debate is tomorrow, you might want to do that later today.

Luke McBratney: I will write to the committee later today.

The Convener: Thank you.

Introducing a right of challenge, as section 7 does, could create significant outcomes in the courts. Has any consideration been given to the regulations being subject to an enhanced affirmative procedure to give the Parliament an opportunity to review the regulations before they are formally laid for scrutiny?

Michael Russell: On all of these issues, we are happy to consider that as a positive step forward should that be helpful. I am not going to go to the wall on any of the issues with regard to affirmative or enhanced affirmative procedure. We have made that clear, for example, with regard to where we find ourselves on the issues that the committee raised with me previously. On almost all of those issues, we made the changes that the committee suggested. The UK bill was defective, and we made those positive changes. I therefore give that general commitment.

The conditions for enhanced affirmative procedure are clearly laid out in the bill, but if there is any suggestion to add to those conditions, we will look at it very carefully indeed. I think that we would require to do it in that way rather than on a case-by-case basis, because we need a template against which to judge which matters will be subject to enhanced affirmative or affirmative procedure and, therefore, which will be subject to negative procedure. If a case was made for adding to the three criteria that we already have, we would be happy to look at that, but we would be looking for suggestions about what any such criterion would be.

The Convener: That was very useful. Alison Harris will ask the next question.

Alison Harris: Section 11 confers a wide power on Scottish ministers to correct failures of "retained (devolved) EU law" to operate effectively and also to correct deficiencies in that law. The committee has already considered evidence in connection with similar powers in the European Union (Withdrawal) Bill, and in its report on that bill the committee concluded:

> "the powers should only be available where Ministers can show that it is necessary to make a change to the statute book, even if they cannot show that the particular alternative chosen is itself necessary".

It appears that the same principle applies to this bill. What reassurance can you give the committee that the powers in section 11 can be used only to make changes that are no more than necessary to make the law work efficiently on exit?

Michael Russell: We have done exactly what the committee suggested. Indeed, we, too, found the UK bill to be defective in that regard. As a result, we have changed the provision to a test of necessity, which is what now exists in the legislation.

That necessity test is a pretty strong one for any minister to meet, but we quite clearly believe it to be the right thing to do. Once the test has been met, the choice becomes one of appropriate policy solutions. However, with regard to the test of necessity itself, the committee made the point, we thought that it was correct and we put it in the bill.

The Convener: It is true that we made that point. However, when we took evidence, we also made the point the application of the test of

necessity is itself a judgment call. You might regard something as necessary that I do not.

Luke McBratney: The bill sets out the conditions for the minister to be satisfied of the need for the test of necessity. The minister must be satisfied that it is necessary for a particular purpose that is set out in the bill, which is to make provision for the purpose of preventing, remedying or mitigating a failure or other deficiency under section 11. It is a textured test rather than just an exercise of pure judgment by the minister.

Michael Russell: Yesterday, someone pointed out that the words "preventing" and "failure" are strong words in legislation—as the committee will know. That test is pretty severe for the minister. Inevitably, a judgment will be involved, but the nature of that judgment is contextualised by the legislation.

Alison Harris: Can you explain what will be identified as necessary in the context of a failure in the operation of retained devolved EU law?

Michael Russell: The bill defines prevention and contains the word "failure". The real issue is the need to consider the ways in which European law applies currently and how it should apply. For example, in agricultural support, there are structures that require to be changed because they cannot operate. However within the regulations for those structures, there may be things that those structures are meant to do but that they will not be able to do because they will no longer exist. Those are the circumstances that the provision is designed to address. We would consider the way in which things operate.

I do not have to remind members that these are exceptional circumstances, and I do not think that they are ones that we will ever see again. We must be able to ask whether we will have a functioning system after the day itself. If the system will not work and will fail because the legislation is not there, those are the circumstances in which we will have to move, perhaps rapidly and with greater scrutiny than is provided for under the UK bill.

Alison Harris: Let us consider section 11(3)(b) and get more specific. Can you explain the purpose of the power in section 11(3)(b) to allow ministers to further describe the deficiencies in retained devolved EU law? That power is not limited by being necessary in the view of the Scottish ministers. Why is that?

Luke McBratney: The new power in section 11(3)(b) reflects a concession made by the UK Government in the House of Commons during the debate on the European Union (Withdrawal) Bill that the list of deficiencies in section 11(2), which used to be non-exhaustive—in other words, it was only indicative of the sort of things that might be deficiencies—is now exhaustive. That means that, if something does not fall within the classes of deficiency enumerated in section 11(2), it is not a deficiency.

However, the entire basis of the exercise that we—the Scottish Government, the UK Government, the Welsh Government and the civil servants in Northern Ireland—are conducting is predicated on a substantial amount of uncertainty about exactly what a deficiency might involve. When the UK Government made that concession, it took the new power so that, if, during that exercise, it becomes clear that there is something that requires to be addressed in retained EU law, because it will stop functioning and needs to be added to that list, it can be addressed. In that sense it is a reserve or a backstop power.

The use of the power would involve the effective supplementing of primary legislation, because it would involve expanding a provision to make delegated legislation, and we consider it appropriate for that to be subject to the affirmative procedure.

Michael Russell: I emphasise the three steps that we have taken to address the issues that have been raised with us. First, we have applied the test of necessity, which is extremely important. Secondly, we have put additional limits on the powers that we think are appropriate. Thirdly, there is an enhanced role for the Scottish Parliament in the regulations. Those are all important steps, which contextualise what we are trying to do and ensure that there is an improvement on the current situation.

10:30

Neil Findlay: Section 13, which is titled "Power to make provision corresponding to EU law after exit day", deals with a very significant power. The delegated powers memorandum describes the power as giving Scottish ministers

"the power to, where appropriate, ensure that Scotland's laws keep pace with developments in EU law".

Why is such a power necessary in a bill that deals with the continuity of powers upon the withdrawal of the United Kingdom from the European Union?

Michael Russell: We have to go back to the expectations that we had of the UK bill. There were expectations that the UK bill would contain this provision, so that any Administration could ensure that, for example, an environmental regulation would continue to match an EU environmental regulation, because it did not want that to weaken in any way, or to ensure that a food safety regulation continued to match another EU regulation, because it did not want to risk exports or sales as a result of changes.

When we first saw the UK bill, we were surprised that that power was not part of it. We believe that that was the result of an ideological decision to prevent such things from taking place. From the beginning, we felt that that power should be available as an option to ministers, subject to parliamentary scrutiny and approval, and as a sunsetted option, which is what is in the section of the bill that you are talking about. Our bill, like the Welsh bill, introduces the power in order to allow ministers the flexibility to exercise that power in areas of importance.

The environmental charities, for example, have strongly stated that they want to see a continuation of the environmental regulations that are in place at the moment and our keeping pace with the EU in that regard. Other organisations have expressed fears with regard to areas such as human rights, where there is a fear of falling behind—that was part of the declaration that the third sector signed some weeks ago. Section 13 provides the opportunity for the appropriate steps to be taken in that regard.

The section firmly includes the issue of scrutiny, so the measure would be scrutinised. It does not keep us in the EU, which was one of the arguments against the power when the UK bill was originally published. The power is being included for practical reasons that are helpful to a variety of sectors. It will be up to ministers to bring forward their proposals and for Parliament to accept them or otherwise.

Neil Findlay: Why does the power have to be in this bill?

Michael Russell: Because I do not know anywhere else that we could put it. Where else is there?

Neil Findlay: Could it not come back in a separate piece of legislation, so that we could fully scrutinise it? It is a very wide-ranging power.

Michael Russell: It is a power that is subject to scrutiny, it is a power that is clear and it is a power that many people have called for. It is a power that will be useful to a vast range of organisations that want to see these things take place, and this bill is an appropriate place for it to be included. We expected it to be in the UK bill, but it was not there, so we are remedying that defect, just as we are remedying what we see as a mistake on the part of the UK Government in relation to the European charter of fundamental rights. That is why the power is in our bill.

Neil Findlay: Would you concede that the section gives ministers significant powers to introduce law through delegated powers that would not have the level of scrutiny that other pieces of legislation would be subject to?

Michael Russell: I would not concede that. What I would concede is that it allows the continuation of the present situation in key areas, which is what many people wish to see, and we think that that is a useful thing to do. If the committee thinks that the power is too broad, it will wish to say so. Similarly, if it wishes to see greater scrutiny of this process, I am sure that it will wish to say so, and we will consider that.

The Convener: Do you list those key areas anywhere?

Michael Russell: No, but any of the areas in which we presently operate under EU law would be covered by the power.

The Convener: Do you mean all areas of EU law?

Michael Russell: I mean the areas of EU law in which we are involved, of which there are a number. Clearly, we could not exercise the power in areas where we would change the structures. For example, we could not do so in relation to agricultural support if there was no equivalent mechanism, but we could do so in relation to environmental protection with regard to the habitats directive, for example.

The Convener: I want to ensure that we have clarity, for the benefit of people who are following this session. Are you essentially saying that, after we leave the EU, you want Scotland to take on board EU laws as they change?

Michael Russell: If there were areas in which that was deemed to be appropriate. For example, 98 per cent of our food standards legislation comes from the EU. Many people believe that it would be appropriate to continue to keep pace with changes in European law in that area. Ministers could bring that to the Scottish Parliament and say that that is what we would like to do, and it would be for the Scottish Parliament to say yea or nay. We also believe that, because it is a power that needs to be kept under review, it should be time limited, and the Parliament should be able to scrutinise that.

The Convener: What level of scrutiny would Parliament get? Let us say that you see a piece of EU law that you quite like the look of, and you bring that to Parliament. What level of scrutiny do we get in saying yes or no?

Michael Russell: It would be done in the context of the existing legal structure, in order to update that structure. What we are proposing is to have such things subject to the same level of scrutiny as the fixing powers. There could be affirmative, super-affirmative and enhanced regulatory means of scrutinising them. Obviously, if the committee wishes greater scrutiny, or if it has concerns, it will want to say so. In many people's

view, EU law on food safety should be continued because that would be vital for our exporting process.

Neil Findlay: Section 13(8) is about extending the period in which a section 13(1) regulation may be made. The period is to last for five years after exit day, but there is provision within section 13(8) for it to extend even further. Could you comment on that?

Michael Russell: I am sorry, Mr Findlay. What is your point?

Neil Findlay: The powers in section 13(1) last for five years after exit day, in accordance with section 13(7). However, section 13(8) allows ministers to make regulations that extend that five-year period further. Is that just an open "further"?

Michael Russell: Section 13(8) allows ministers to

"extend the period mentioned in subsection (7) by a period of up to 5 years,"

and to

"extend any period of extension provided by regulations under this subsection by a further period of up to 5 years."

It is a five-year cycle.

Neil Findlay: Does that mean that it can be extended by 10 years?

Michael Russell: It is five years followed by another five years, followed by another five years, if the Parliament says so, or there could be no extension because the Parliament said no.

Neil Findlay: I am playing my role as a parliamentarian—I am not playing a party role. I voted to remain, but I think that someone could read that section and say, "So they want powers to implement EU law that they like for five years, but that can continue for as long as they want." You can understand why some people would look at that and believe that your intention is just to frustrate the whole process.

Michael Russell: I can understand that, but that is not what is in the bill. What the bill is saying is that there may be areas in which those provisions would be useful and extremely important. In those circumstances ministers can make a recommendation, and if it happens it will be reviewed every five years. It will cease after five years if that is the view of Parliament, or it will continue for another five years. Five years is not an arbitrary period. It seems a reasonable length of time, but the bill could be amended to make the period three years or seven years. It would depend on what members wanted to do.

Neil Findlay: You could reword that section to say that you have the powers for however long, subject to Parliament ending those powers.

Michael Russell: No, there is a cut-off point, and there would require to be a renewal, which presumably would be subject to intensive parliamentary scrutiny, as the power itself has been. The question is, how long should the period be?

Neil Findlay: Okay, that is fine.

Stuart McMillan: Section 14 specifies that regulations under sections 11, 12 and 13 that contain provisions of the sort that are listed in section 14(2) must be subject to the affirmative procedure. How did you come to the decision that only those matters in section 14(2) should be subject to the affirmative procedure?

Michael Russell: As I indicated earlier to the convener, we applied a set of criteria. The question whether those criteria are adequate or whether they should be added to is germane.

We recommend that the enhanced procedure be used when an instrument establishes a new Scottish public authority, gives a function to a new Scottish public authority or removes a current EU function without replacing it. Those are clear and very serious issues that I think we would all accept are first-level issues.

The affirmative procedure would apply if we gave a current EU function to an existing Scottish public authority, imposed a fee or a charge for carrying out a function, created or widened the scope of a criminal offence, or created or amended a power to legislate. That is the second level.

All other regulations—to which neither of those sets of tests applied—would be subject to the negative procedure.

Those are the criteria that we have applied, and they are laid out clearly. I suppose that the question is whether those lists should be changed or enhanced in any way, and that is absolutely open for debate.

Stuart McMillan: Section 14(5) has the effect of making regulations that contain particular provisions subject to the enhanced affirmative procedure provision. Can you explain the reasons why those particular types of regulation would be subject to the enhanced affirmative procedure?

Also, although your earlier comments about the enhanced affirmative procedure were very helpful, paragraph 41 of the delegated powers memorandum says that "any regulations" that provide

"for any function of an EU entity to be exercised ... by an existing Scottish public authority"

would be subject to the affirmative procedure. Can you explain how that would be achieved under section 14(2)?

Michael Russell: Yes, I can, by reference to what I have just said. You raise the issue of public authorities. The enhanced procedure would apply to new authorities and to functions that are given to new authorities. The affirmative procedure would be applied to existing authorities; it also applies to other matters.

Those are the distinctions that we are applying with regard to public authorities. One level applies to new authorities and new functions; the other applies to existing authorities and existing functions. The approaches are absolutely subject to discussion and debate, and it may well be that other views will apply.

We have also extended the period for approval from the 40 days that normally applies in such circumstances to 60 days. That provides for a higher level of scrutiny.

Stuart McMillan: The Government's delegated powers memorandum points to a choice of procedures for the various powers in sections 11, 12 and 13. How do you envisage that choice being made? Why is there no role for the Parliament in considering whether the appropriate level of scrutiny has been chosen?

Michael Russell: There is a definition of "necessity", as we know. Once we move from necessity in terms of the appropriate level, the appropriate level is defined in relation to the circumstances that I have mentioned. Therefore, there is a context for all these decisions. None of them would be made without that context, which is given in the bill.

Stuart McMillan: The effect of sections 14(7) and 14(8) is that ministers have a choice of whether to comply with the use of the enhanced procedure, as their having not complied does not prevent regulations from being laid before the Parliament and approved. Why is it appropriate for the bill to include provision that ministers may proceed to lay regulations that do not comply with the procedures, as approved by the Parliament?

Luke McBratney: Those provisions are the equivalent of the provisions that apply to the affirmative procedure generally and to any failures by the Scottish ministers, when laying an instrument, to meet the ambitions of the affirmative procedure. In that situation, there is an obligation on Scottish ministers to write to the Presiding Officer with an explanation. The provisions that you mention simply echo that for the additional requirements that are imposed under the enhanced affirmative procedure.

We would never lay an instrument without intending to meet the ambition of the procedural requirements of the enhanced affirmative procedure.

Michael Russell: I will just make the additional point that this committee asked for SSIs to be accompanied by explanatory statements. The European Union (Withdrawal) Bill has been amended to do that, and the continuity bill provides for that in the Scottish Parliament.

Let me be clear about what those statements would do—I think that this will add to the belt-and-braces explanation. A statement would include the fact that the Scottish ministers consider the instrument to do no more than is appropriate. It would state whether the instrument modifies any provision in equalities legislation and, if it does, what that effect is. It would state that the Scottish ministers have had regard to their duties under equalities legislation. It would include a report on any consultation, and it would include an explanation of the instrument, the reasons for making it, the pre-withdrawal law that is being modified by it and its effect on retained EU law. That is a pretty comprehensive set of pieces of information that would be given.

10:45

The Convener: We move on to section 19, which is the power to provide for fees and charges. You will recall that, in our report on the European Union (Withdrawal) Bill, we expressed concern about ministers' capacity to impose taxation measures in regulations under schedule 4 to that bill. We also raised concern about the potential for sub-delegation and the scrutiny procedure attached to regulations under schedule 4. Those concerns appear not to have been responded to in section 19 of the continuity bill. Can you explain why you have retained the approach taken in the European Union (Withdrawal) Bill?

Michael Russell: We are happy to listen to that point again. The consistent view that we have taken until now is that the super-affirmative procedure is appropriate and necessary when there is a new fee or charge but, thereafter, its use is simply repetition. We accept absolutely that the first time that a fee is applied, there should be such scrutiny, but we do not see it as necessary thereafter.

On the other matters, we are open to having a discussion and to seeing whether there is more that we can do. We think that what is in the bill is appropriate, but the committee may still wish further action to be taken, in which case we will very much listen to the committee on that.

Fees and charges seem a bit abstract but, depending on what trade agreements are reached—this all depends on that—there could be a wide-ranging system of fees and charges. Presently, salmonella testing attracts fees and

charges, but there could be fees and charges for shellfish exportation. That is a real, live situation. Consignments of live animals from third countries at border inspection posts may attract more fees and charges. There are a range of issues. If fees and charges are to be applicable, there will be a reasonable burden of new regulation, which will require to be scrutinised at the first stage. Thereafter, we would expect it more likely that they will be simply applied.

Luke McBratney: At present, the scrutiny arrangement for the fees and charges powers echoes the arrangement in the UK bill, which the committee made recommendations about, and the arrangement for the existing powers under the European Communities Act 1972 and the Finance Act 2017. As the minister said, we will reflect on that issue before stages 1, 2 and 3.

The Convener: Stage 1 is tomorrow, so we might want to look at the issue for stage 2, which is next week. Would it be a matter of the committee coming up with a suggestion?

Michael Russell: We are open to a suggestion and happy to discuss it—with urgency, of course, given the circumstances. With the greatest respect, I am also aware of the timetable that is pressing on us.

The Convener: Section 28 allows the Scottish ministers to set an exit day by regulations, which is relevant for a number of other provisions in the bill. There are no limits on the date that can be fixed. Surely, wherever we come from politically, exit day is the day that the UK leaves the EU. Why do we not just say that in the bill?

Michael Russell: As you know, that issue has caused huge debate at Westminster. The first phase of that debate involved everybody saying, "Let's just put the date on the face of the bill," so, eventually, the date was put in the bill. Now there is a huge wave of people saying, "Hang on a minute—there might be circumstances in which the date needs to change."

We have therefore taken the agnostic position on the issue. There is no possibility that the provision does anything other than mirror the exit date as set by the UK Government—it cannot be used for any other function. We accept that unless something very dramatic happens—many of us are aye hopin—the UK will leave the EU at 11 pm on 29 March 2019. However, it is not yet absolutely set in stone, and until it is, it would seem sensible to have the ability to set the provision later.

Honestly, I will not go to the wall over this, but I note that the debate has raged backwards and forwards at Westminster, and sometimes it is quite wise to watch others, holding the jackets, and say, "We'll just wait and see what happens instead of getting involved in the debate."

The Convener: But it is a matter of fact that exit day is the day that the UK leaves the EU. However, the bill says:

> "In this Act, 'exit day' means such day as the Scottish Ministers may by regulations appoint. ... The power under subsection (1) to appoint a day includes a power to appoint a time on that day."

Basically, it gives Scottish ministers the power to decide when exit day is, but, factually speaking, exit day and the time of that exit is a matter for the UK. It is not a matter for you. Why does the bill not just say that exit day is the same as when the UK leaves?

Michael Russell: I am happy to consider that as an amendment that we can look at lodging, but there is no intention of saying anything other than, "This is a decision for the UK—we're no gettin involved in it, and we're not deciding anything differently ourselves."

Neil Findlay: It is a rather bizarre way of saying that.

Michael Russell: I do not think that it is bizarre at all. It is the way in which it has been said; I will not go to the wall over it if there is another way of saying it.

The Convener: So that could be another amendment for next week.

Michael Russell: It could be.

The Convener: So we will just clear that up in the bill, then.

Luke McBratney: In any scenario, there will need to be an ability to alter the date of exit and, as a result, how that applies under the regime. The UK and the European Council can, under article 50, adjust the time and date of exit day, so we need, at least in principle, to be able to contemplate that happening.

Neil Findlay: My understanding is that the bill's premise is to create some certainty and continuity. Is that right?

Michael Russell: Yes.

Neil Findlay: Such a provision does not create certainty—in fact, it does the complete opposite.

Michael Russell: I said this in response to a question from you last week, and I am going to say it again now, but it is absolutely clear that exit day will be the day on which the UK leaves, if it leaves, and that is likely to be 11 pm on 29 March 2019.

Neil Findlay: I suggest that the minister lodges an amendment on this ASAP to resolve the issue.

The Convener: The minister appears to have agreed to do that.

Michael Russell: I will take it away and look for a suitable amendment.

The Convener: Good. I call Stuart McMillan.

Stuart McMillan: Section 31, which relates to the scrutiny of regulations in urgent cases, provides for an urgent procedure to be used in the limited circumstances of the powers listed in subsection (1). When might those powers be used and how might a decision to use the urgent procedure be reached?

Michael Russell: This is required in a lot of legislation as a just-in-case provision. After all, you do not want to find yourself in circumstances where you can do nothing at all. However, I have made this commitment before and I make it again here: it could and would be used only where absolutely necessary. Given the scale and pace of EU withdrawal, we would have to use it, should it become necessary to do so, but there are safeguards around it and things that we would need to do in all these circumstances. Frankly, I suspect that we would be roundly criticised for endeavouring to use it, but it has to be there as a backstop.

Stuart McMillan: So is it correct to say that the wording is utilised quite consistently in most legislation?

Luke McBratney: This particular formulation is identical to that used in the withdrawal bill; in fact, I believe that it was recommended by the committee that the two Governments consider whether an urgent or made affirmative procedure should be available to the Scottish Parliament. We have reflected on that and entirely accept the UK Government's reasons for seeking to have this urgent procedure. We are, unusually in a programme of pretty substantial subordinate legislation, up against a very hard and fast deadline; as Mr Findlay has pointed out, 29 March 2019 is coming and is, at present, the date on which the UK will leave the EU. In those circumstances, and given the on-going uncertainty about the scenario in which the UK is going to leave the EU, we anticipate that there may be a requirement for instruments to be made under the urgent procedure. However, the minister has given the commitment that they will be made only in exceptional circumstances.

Gerald Byrne (Scottish Government): You will have seen that the Secretary of State for Scotland wrote to the Scottish Government, particularly on the made affirmative procedure and whether we wanted that to be extended to Scotland in the UK withdrawal bill if an agreement is reached on that bill. The minister's response, which was copied to the committee, reflected your recommendation and our view that that is probably a good idea because of all the circumstances that Luke McBratney set out in relation to the need for speed, flexibility and robustness. That is really what we have been looking for both throughout the provisions in our bill and when we look at the UK withdrawal bill.

Quite a few of our criticisms of the UK withdrawal bill have been based on the fact that there are gaps in the Scottish ministers' powers, unlike in those of the UK ministers. We see a need for those to be mirrored precisely to allow for the flexibility that we have described, particularly in relation to clause 17 and section 32. A parallel process is going on between what we have in our bill and the improvements that we are seeking to the UK bill, in the event that we reach agreement on that.

Stuart McMillan: That is helpful—thank you.

I think that the minister dealt with section 37 quite comprehensively in his earlier comments.

Michael Russell: Yes—it simply honours the commitment that we have made about what will happen should we be able to reach agreement, even after our bill is passed. Section 37 is a sort of autodestruct button.

The Convener: So it is contingent on reaching an agreement, and nothing else.

Michael Russell: That would be the most likely circumstances in which it would operate. I made a commitment in the chamber last week, I think, that during the passage of the bill, we could still withdraw it up until stage 1—although that happens to be tomorrow, and I am pretty sure that that is not going to happen. If required, we would obviously have to bring a motion to the chamber. After that, there would be regulations that would be subject to the affirmative procedure.

Alison Harris: The committee has heard from stakeholders about the need for early engagement on consultation drafts of regulations to be made under the bill. Those concerns apply here as well. To address them, can the minister explain what steps the Government will take to ensure that there is early engagement on legislation that might be brought forward under the bill? Is there scope for more legislation to be brought forward under the affirmative procedure?

Michael Russell: The super-affirmative procedure has substantial stakeholder consultation in it, and we will make sure that that is observed to the letter. We would want to make sure that, with each step on all regulations, there is full engagement from stakeholders. There are vast areas of Scottish life and sectors of Scottish business and the economy where people are very worried indeed about the implications of Brexit,

and I spend a lot of my time talking to them, trying to understand their concerns and trying to reassure them. As we move into a process where legislative action is being taken, I think that there will be an element of reassurance just from the fact that legislative action is being taken, but we will want to make sure that it is the right action and that it engages properly with the stakeholders in the key areas. That is exactly what we will do, and it is what we have been doing up until now.

Alison Harris: Is there scope for more legislation?

Michael Russell: Sorry—in what way?

Alison Harris: To be brought forward under the affirmative procedure.

Michael Russell: Really, I am not sure about that at the present moment. Which areas are you thinking about?

Alison Harris: Just generally.

Michael Russell: There will be a considerable amount of legislation, as we have indicated throughout the process. Whatever happens—whether we get an agreement with the UK and the UK bill moves forward or whether our bill moves forward in parallel with the UK bill—this is the start of a major process. Some of that is contingent on the timetable that the UK Government sets. If it manages to achieve a transition period and the acquis continues to apply, the period in which the changes will be required may be extended.

Going back to the leaving date, I note that it depends on the definitions of when we leave, what happens when we leave and what applies. However, if we assume that the acquis and the legislation will continue to apply, the period of time for those changes to come through will be the period of transition. That is likely to be December 2020, although there seems to be some speculation that it might be longer. If that is the case, it gives us a bit more time to bring that volume of legislation through and to have those conversations.

11:00

The Convener: On that point, we have previously raised the issue of preparations for the potential volume of statutory instruments—I seem to recall that we asked you about it when you last appeared before the committee.

Michael Russell: Considerable preparations have taken place across the Government. There are estimates—they are only estimates—of the numbers, which are that there might be around 300 items. That is equivalent to a year's Scottish statutory instruments for this issue alone, which is clearly a considerable number. Were that to be the case, we anticipate that we would deal with those SSIs methodically and carefully. That process could take place over a three-year period. For the sake of argument, let us assume that, whatever happens, royal assent to the bills takes place at some stage in the late spring. We are then talking about a period from May until the end of 2020, which would give us 2019 and 2020; with an additional half year, there would be two and a half years for the process. We would have to prioritise those instruments. A great deal of work has been done in the Government to work out the areas that we are concerned with, and we will continue in that way.

As far as resourcing that process is concerned, as you know, the UK Government has allocated resources for Brexit, and we would expect to be able to draw down a share of that.

The Convener: Do members have any further questions?

Neil Findlay: I have one final point. Forty years of economic and political convergence or integration—whatever you want to call it—with the EU is proving hugely problematic to unravel. Does that provide any lessons for those such as you who would seek to unravel 300 years of political, economic and social integration with the rest of the UK?

Michael Russell: I am happy to answer that question, if you wish me to do so.

The Convener: I might rule that one out, Mr Findlay. It was a bit mischievous.

Michael Russell: I would simply mention preparation and thoughtfulness, neither of which we have seen from the UK.

The Convener: You never let us down, Mr Russell.

That exhausts our questions. You have agreed to write to us on a couple of matters. You have also helpfully agreed to a couple of amendments, so we will presumably hear from you on that, or we can suggest them—it is up to you.

Michael Russell: We will endeavour to come back to you on those matters today. On the issue of the date, I am happy to take that on board and we will get on with it. On the issue of amendments, let me consider it in the next half hour or so and we will come back to you very promptly. I am grateful to the committee for its time.

Neil Findlay: And the list of 25 areas of dispute?

Michael Russell: I have made a commitment to Mr Findlay and to the committee on that, and I will write to the committee when we have the agreement that we hope to have from the UK Government.

11:03

Meeting suspended.

11:04

On resuming—

Instrument subject to Affirmative Procedure

Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2018 (SSI 2018/87)

The Convener: Under item 3, we have one affirmative instrument to consider. No points have been raised by our legal advisers on the instrument. Is the committee content with it?

Members *indicated agreement.*

Instruments subject to Negative Procedure

National Health Service (General Medical Services Contracts) (Scotland) Regulations 2018 (SSI 2018/66)

11:04

The Convener: Under item 4, our legal advisers have identified a number of errors in Scottish statutory instrument 2018/66 relating to ground (i), defective drafting, as well as other drafting errors relating to the general ground.

The following errors have been identified in relation to ground (i). On paragraph 33(3)(e) of schedule 6, which provides for a modification of the "NHS dispute resolution procedure", the first occurrence of subparagraph (e) should be head (c) of the list in preceding subparagraph (19). The second occurrence of subparagraph (e) should be on a separate line, and is intended to be paragraph 33(3)(e).

The duties of the person nominated to work with the data protection officer in paragraph 70(2) of schedule 6 should refer to matters set out under paragraph 67(b) and (c), rather than paragraph 67(b) only.

Paragraph 89(3)(a) and paragraph 89(3)(b) of schedule 6 are intended to obligate the parties to attempt informal resolution and to bar them from beginning the more formal national health dispute resolution procedure until the less formal local dispute resolution process is attempted. As the health board that is a party to the contract is defined as "the Second Health Board", the references in paragraph 89(3)(a) and paragraph 89(3)(b) should be to "the Second Health Board" rather than "the first Health Board".

Paragraph 109(1) of schedule 6, which relates to the imposition of contract sanctions, ought to refer to all heads of paragraph 109(2).

There are missing paragraph references at the end of paragraph 110(5) of schedule 6, on termination of contract by the health board, which should refer to paragraphs 101 to 107.

The other errors that were identified by our legal advisers in relation to the general reporting ground will be set out in the committee's report.

Does the committee wish to draw the regulations to the attention of the Parliament on ground (i) in respect of defective drafting, and on the general ground?

Members *indicated agreement.*

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2018 (SSI 2018/67)

The Convener: Our legal advisers have identified an error in the instrument relating to ground (i), defective drafting, as well as other drafting errors under the general ground.

Does the committee wish to draw the regulations to the attention of the Parliament on ground (i), as the provision in schedule 2, paragraph 26(3)(a) appears to be defectively drafted—a cross-reference to "paragraph 28(1) of schedule 2" is included, but the reference should be to "paragraph 26(1) or (2)"—and on the general ground, as there are other drafting errors in the instrument?

Members *indicated agreement.*

The Convener: Does the committee wish to welcome the Scottish Government's commitment to lay amending regulations in early course?

Members *indicated agreement.*

The Convener: Does the committee wish to indicate that the Scottish Government's quality control procedures ought to have avoided the high number of errors that appear in those instruments by the time that they were made and laid before the Parliament?

Members *indicated agreement.*

The Convener: No points have been raised by our legal advisers on the following four instruments.

Non-Domestic Rates (Levying) (Scotland) Regulations 2018 (SSI 2018/74)

Non-Domestic Rates (New and Improved Properties) (Scotland) Regulations 2018 (SSI 2018/75)

Non-Domestic Rates (Transitional Relief) Amendment (Scotland) Regulations 2018 (SSI 2018/76)

Non-Domestic Rating (Unoccupied Property) (Scotland) Regulations 2018 (SSI 2018/77)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

11:08

The Convener: No points have been raised by our legal advisers on the following two instruments.

United Nations (International Residual Mechanism for Criminal Tribunals) Order 2018 (SI 2018/187)

Lobbying (Scotland) Act 2016 (Commencement No 2) Regulations 2018 (SSI 2018/73 (C7))

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: We will now move into private session.

11:09

Meeting continued in private until 11:33.

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