

LEGISLATIVE CONSENT MEMORANDUM

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL

Background

1. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill was introduced in the House of Commons on 5 March 2020. Progress through the UK Parliament, and our progress in Scotland towards developing the Scottish Government's position on the Bill, were impacted by the Covid-19 pandemic.

2. The Bill and supporting documents can be found at: <https://services.parliament.uk/Bills/2019-21/immigrationandsocialsecuritycoordinationeuwithdrawal.html>. This memorandum relates to the Bill as introduced.

3. This memorandum has been lodged by the Cabinet Secretary for Social Security and Older People, Shirley-Anne Somerville MSP, under Rule 9.B.3.1(a) of the Parliament's standing orders.

4. The Bill is necessary as a result of the UK's withdrawal from the EU. The Scottish Government deeply regrets the withdrawal of Scotland, as part of the UK, from the EU on 31 January 2020. This action was taken with no democratic mandate for withdrawal in Scotland.

5. The Scottish Government does not currently intend to lodge a legislative consent motion in relation to the Bill. In line with Rule 9B.3.3(d) of the Standing Orders, the Scottish Government's reasons for not including a draft motion are set out in paragraphs 11-14 below.

Content of the Bill

6. In summary, the Bill makes provision to achieve three main objectives:
- Repeal the main retained EU law relating to free movement and bring EEA nationals and their family members under UK immigration control;
 - Protect the status of Irish citizens in UK immigration law once their EU free movement rights end; and
 - Take powers to amend, by regulations, retained EU law governing social security co-ordination, enabling policy changes to be delivered post-EU Exit.

Provisions which relate to Scotland

7. Clause 7 provides that the Bill, once enacted, will extend to England and Wales, Scotland and Northern Ireland.

8. Part 1 of the Bill makes provision to end the free movement of persons and to protect the status of Irish citizens in UK immigration law after their EU free movement rights end. It repeals retained EU Law relating to free movement of persons which will otherwise be saved in domestic law by the European Union (Withdrawal) Act 2018.

9. Part 2 of the Bill concerns social security coordination. There are detailed EU regulations that coordinate the social security systems of EU Member States. The rules do not replace national systems with a single European system. Each state remains free to decide the nature of its benefits, eligibility criteria and levels of payment. Instead the rules control how the systems fit together, ensuring that people exercising freedom of movement to live and work in other member states are able to access pensions and benefits on a broadly equal basis compared to those who have always resided there, and in some circumstances require the payment of certain forms of social security assistance to individuals living in the EEA or Switzerland.

10. The Bill will create a power for the UK Government to adjust the retained EU rules on social security coordination for future policy development and to implement any future reforms of the rules. As the UK Government can exercise this power for the whole UK, including where the exercise of the power affects devolved interests, the consent of the Scottish Parliament is required. The powers in Part 2 of the Bill would allow modification of the retained EU rules on social security coordination in part or in full. It is not possible to predict with confidence exactly how these powers could or might be used until the nature of any potential future social security relationship between the UK and the EU becomes clearer. Negotiations on this point are ongoing.

11. The Bill proposes conferring on the Scottish Ministers and the devolved administration in Northern Ireland an equivalent power, for matters which are within devolved competence. So far as that provision extends to Scottish devolved interests, in connection with devolved disability and carers assistance, it also requires consent from the Scottish Parliament. Any approach followed by the devolved administrations would have to comply with any new international agreements made by the UK. Therefore, whilst these powers are useful, the extent to which they would offer meaningful scope for divergence from the UK's future approach is unclear at present.

Reasons for not seeking a legislative consent motion

12. The UK Government's view is that only the social security coordination provisions are within the legislative competence of the Scottish Parliament. The Scottish Government agrees with this conclusion.

13. The proposal to confer a power on devolved administrations to make technical fixes to retained EU social security rules is useful but not essential to the delivery of the devolved social security programme. The Bill will also enable UK Ministers to make provision in secondary legislation in devolved areas. However, it does not contain any requirement for the UK Government to seek the consent of the Scottish Ministers before making any such legislation in devolved areas. The Scottish Government is concerned by this, as it does not fully respect the devolution settlement.

14. Part 1 of the Bill relates to reserved matters, having regard to the B6 reservation in schedule 5 of Scotland Act 1998, which reserves "the status and capacity of persons

in the United Kingdom who are not British citizens” and “the free movement of persons within the European Economic Area”.

15. Whilst Part 1 does not require the consent of the Scottish Parliament, the immigration policy approach the UK Government is pursuing through this Bill will have pronounced and wide-reaching impacts across almost all areas of devolved responsibility. Scotland’s experience of migration is different from the rest of the UK’s. Until 2001, Scotland’s population was decreasing but since then it has recovered due to migration from the rest of the UK, the EU and the rest of the world. All of the projected growth in Scotland’s population is from immigration. There is no natural growth projected, with more deaths than births projected each year. The ending of free movement will be challenging for sectors of the Scottish economy reliant on lower-paid non-UK workers. It will particularly disrupt rural and remote areas, where the age profile means immigration is the only means of countering depopulation.

16. While the purpose and effect of the social security provisions, for which consent is sought, is not, in itself, objectionable, the provisions themselves do not fully respect the devolution settlement. Moreover, their inclusion as part of a Bill which is primarily aimed at ending the free movement of persons means the Scottish Government cannot recommend that Parliament grants its consent to those provisions. Doing so would significantly undermine the Scottish Government’s consistent message that it is opposed to ending the free movement of persons and that EU Citizens in Scotland are valued and welcome. This would exacerbate the considerable uncertainty already facing EU Citizens in Scotland. The social security provisions in Part 2 of the Bill cannot be wholly severed from the wider context of the Bill of which they form part. Given that context, and the lack of any commitment by the UK Government to seek the consent of the Scottish Ministers before making secondary legislation in devolved areas, the Scottish Government cannot recommend consent to any part of a Bill which will end the free movement of persons and cause substantial social and economic harm in Scotland. The Scottish Government is examining alternative approaches to secure the powers on social security coordination. The ways those powers can be used will in any case only become clearer after the outcome of ongoing UK-EU exit negotiations is known.

Consultation

17. The UK Government has not conducted any formal consultation, and the Scottish Government was not consulted on the provisions affecting devolved interests prior to the Bill’s introduction. A number of conversations about the content of the Bill have taken place at official level since its introduction. Arrangements for future migration from the EU would be set out in the UK Immigration Rules, and the UK Government published a white paper on its proposals on 19 December 2018¹.

Financial implications

18. The Bill presents no direct financial implications. The financial implications of the power depend on whether and how Scottish Ministers choose to use it. Use of the power could affect the eligibility of European citizens moving to Scotland for devolved

¹ <https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system>

social security after the end of the EU Exit transition period, but those individuals are already eligible under current rules, so it is not anticipated that use of the Bill power would require any additional spending.

Scottish Government View

19. The legislative consent memorandum on the European Union (Withdrawal) Bill, submitted to the Scottish Parliament on 12 September 2017², set out the Scottish Government's position that policy responsibility and expertise for matters within devolved competence lie with the Scottish Government, accountable to the Scottish Parliament³. As noted above, provisions in the Bill deal with matters that, in the Scottish Government's view, fall within the legislative competence of the Scottish Parliament in relation to adjusting retained EU rules on social security coordination.

20. Under Rule 9B.3.3(d) of the Parliament's Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. As the Scottish Government is not in a position to recommend consent to the Bill, no draft motion is included.

21. The Scottish Government cannot recommend to the Parliament that it gives consent to the Bill as currently drafted for the reasons set out in paragraphs 12-15.

Conclusion

22. It remains a matter of regret to the Scottish Government that the UK has withdrawn from the EU. The Scottish Government considers this will have widespread detrimental effects on the UK and Scotland, and has deep concerns over the harm that will be inflicted on Scotland by withdrawal from the European Union.

23. Whilst the devolved social security elements of the Bill are useful, they are not required to deliver the devolved social security programme, and they do not fully respect the devolution settlement. Furthermore, any potential benefit which might be derived from these non-essential powers does not override the Scottish Government's deep concerns over the pronounced and wide-ranging harm that will be inflicted by those provisions in the Bill which end the free movement of persons.

24. For all of these reasons, the Scottish Government is not in a position to recommend that the Scottish Parliament consents to the relevant provisions of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill.

SCOTTISH GOVERNMENT
June 2020

² <http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf>

³ See paragraph 17 of that Memorandum.

This Legislative Consent Memorandum relates to the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (UK legislation) and was lodged with the Scottish Parliament on 25 June 2020

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