Submission from Faculty of Advocates

UK Withdrawal from The European Union (Continuity) (Scotland) Bill

Q.1 *What are the implications of the keeping pace power in the Bill potentially leading to substantial policy divergence with the rest of the UK following the end of the transitional period?*

It is clear that use of such a keeping pace power may contribute to policy divergence from the rest of the UK. For the purposes of our response, we consider the legal implications of such a power and of such potential divergence.

Those legal implications will depend, at least in part, upon the outcome of the continuing negotiations among the four nations of the UK with respect to common frameworks. In terms of §4 of Schedule 3 to the European Union (Withdrawal) Act 2018, the Cabinet Office publishes regular reports to Parliament on the progress made in the development of common frameworks under the principles agreed between the UK Government and Scottish and Welsh Governments at the Joint Ministerial Committee (European Negotiations) in October 2017. The latest such report was published in May 2020, reporting on progress up to 25 March 2020. These negotiations are of vital importance. As explained by the Supreme Court in *Regina (Miller and another) v Secretary of State for Exiting the European Union* [2018] AC 61 at §130, the repeal of the European Communities Act 1972 will, if no new legislative constraints are introduced, result in a major increase in the powers of devolved authorities such as the Scottish Parliament and Scottish Government. Section 30A of the Scotland Act 1998 provides that, within certain limits, a Minister of the Crown may by regulations specify particular modifications of retained EU law that are to be outside the legislative competence of the Scottish Parliament, even where the Scottish Parliament has not given its consent to such regulations. To date, the UK Government has not sought to use this power. However, the latest report to Parliament makes clear that before the power will be repealed, further progress towards the implementation of common frameworks will be needed: see §2.8 of the May 2020 report.

The European Union (Withdrawal) Act 2018 may not be modified by the Scottish Parliament except in relation to certain excluded provisions: see §1(2)(g) & §1(3) in Part 1 of Schedule 4 to the Scotland Act 1998. This may constrain the exercise of the powers created by the new Bill. We also note that the Trade Bill currently before the House of Lords would place restrictions on devolved authorities' powers to make provision for the purpose of implementing (i) the Agreement on Government Procurement and (ii) international trade agreements: see clauses 1-3 and Schedules 1 & 3. These provisions too may therefore serve to limit the exercise of any power conferred by the European Union (Continuity) (Scotland) Bill.

It seems clear that the task of monitoring and assessing each new EU instrument or decision will be considerable. So too will the process of deciding whether the new power conferred by section 1 of the Bill should be exercised in any particular case. Given the potential importance of such regulations, it will be important to ensure transparency of process and, to the appropriate extent in each case, to provide for

adequate consultation with stakeholders and assessment of the potential impact of proposed regulations on all interests affected.

Q.2 *What are your views on the proposals within the Bill for the Scottish Government to voluntarily maintain regulatory alignment with EU law in devolved areas using secondary rather than primary legislation?*

This question plainly raises important issues of principle. These overlap with Question 6 and it is therefore logical that they be dealt with together.

6. *The current power which Scottish Ministers have to implement EU law under section 2(2) of the European Communities Act 1972 will not be available after 31 December 2020. How does the proposed keeping pace power in the Bill compare with the current arrangements for implementing EU law?*

Currently, section 2 of the 1972 Act is the channel for EU law to be incorporated into the various UK legal systems. Section 2(2) empowers ministers to make secondary legislation for the enactment of EU obligations and matters arising from them. Section 1 of the Bill seeks to provide a similar power. Unlike section 2 of the ECA, section 1 is subject to limitations of scope: see sections 1(6) and 2(1) of the Bill. Otherwise, it is functionally similar.

It appears that the rationale for taking powers in the Bill to use secondary legislation is the same as that for the form of powers conferred in section 2(2) ECA, namely: (a) possible volume of legislation (such that the parliamentary timetable might be overwhelmed at times if primary legislation were required); (b) the technical nature of some, but not all, legislation; (c) the need at times to make urgent changes at short notice. As paragraph 29 of the Policy Memorandum comments, the alternative – utilising primary legislation -

'…would potentially consume a significant amount of parliamentary time, sometimes with short notice, limiting space for the remainder of the legislative agenda. It could also introduce a significantly longer time-lag between the identification of an issue and its remedy than in the case of the keeping pace power being available'.

The Faculty considers that these points have force. The power created also has the benefit of being a general rather than subject-specific power (as at present, under the ECA) and therefore maintains a broad-based ability to regulate, particularly in areas where there may be no scope for delegated legislation under existing Scottish primary legislation.

Clearly, the extensive use of secondary legislation for this purpose raises the issue of parliamentary scrutiny, which is the subject of Question 8. Care will also need to be taken that those affected by forthcoming changes effected in this way are aware of what is proposed, able to call for scrutiny of specific aspects and positioned to prepare to meet any new requirements on them or on their businesses. Given that the power is permissive, there is, of course, the potential for primary legislation to be resorted to as an alternative in relation to proposals causing particular controversy.

Q.3 *What are the implications of the UK and devolved governments no longer having a formal role in influencing the EU policy making process on the keeping pace proposals within the Bill?*

We see two immediate implications.

First, the absence of a formal role moves the UK and devolved governments from 'rule makers' to 'rule takers'. The extent of that move will, of course, depend on the nature of the future UK-EU relationship and whether it will make provision for the UK (and by extension, the devolved governments) to participate in EU law-making in areas where the UK wishes to pursue close alignment with the EU. Absent such a formal role in influencing the EU policy/law-making process, there may be problems in the Scottish Ministers implementing EU laws that Scotland has not had a say in making and thus which might not take account of Scotland's particular circumstances. This too will depend on the nature of the EU instrument that the Scottish Ministers wish to enact under the 'keeping pace' proposal. EU regulations will have to be enacted without any changes (anything else would not be 'keeping pace'). But there will be more scope to take account of Scottish circumstances when transposing directives, because these, by definition, allow States greater latitude in choosing the means by which they are implemented.

The second implication is that the Scottish Government will not be able to 'keep pace' in areas of EU law which depend on reciprocal arrangements between Member States. The European Health Insurance Card and the European Arrest Warrant are obvious examples which touch on devolved competences. The UK will not participate in either reciprocal arrangement in its current form, and thus Scotland cannot participate in these arrangements simply by passing legislation; without a UK decision to participate, such legislation would not enable participation in these arrangements. This is implicitly recognised in the Bill: section 1(2) makes provision, in terms similar to section 8 of the European Union (Withdrawal) Act 2018, for the Scottish Ministers to omit to make provision for reciprocal arrangements with the EU which longer exist or are no longer necessary. But the fact remains that, even if the Scottish Ministers chose to make such legislation, it would not be sufficient to enable Scotland to keep pace because this depends, not simply on passing legislation, but on participation in reciprocal arrangements.

Q4. *The policy memorandum states that "the Scottish Government considers it necessary to give Scottish Ministers the power to ensure that Scotland's laws may keep pace with changes to EU law, where appropriate and practicable." The Committee would welcome your views on how wide-ranging this power is likely to be given the following statutory and non-statutory constraints –*

- *Compliance with UK international obligations including future trade deals and other international agreements;*
- *Statutory and non-statutory common frameworks;*
- *The functioning of a UK internal market;*
- *The replacement of EU funding.*

We refer to our response to Question 1 above. The range within which this power may come to be exercised is hard to predict given (among other things) the continuing

uncertainty about (i) the final shape of the internal common frameworks, (ii) the scope of any future trading agreement with the EU and (iii) the direction of future EU policy in areas likely to be attractive to the Scottish Government.

Q.5 *Are there any other constraints which may affect the Scottish Ministers' ability to use the keeping pace power in the ways envisaged?*

UK primary legislation is the obvious other source of limitations, although that may relate to one of the four areas listed as sources of constraint in question 4. There is potential for such legislation to overlap with at least some areas of devolved competence. Current political controversy between UK and devolved governments about the Trade Bill is an important concrete example.

Q.7 *Is there a need for clearly defined criteria to apply to assessing whether or not to replicate any particular EU law into domestic law and, if so, should this be set out in more detail on the face of the Bill?*

This is principally a policy question. However, we consider that the range of EU law that might be the object of such regulations – both as to subject matter and nature of the instrument - is such that the definition of criteria within the Bill would be an impossible task. Accordingly we do not recommend that criteria be set out in the Bill. It may be helpful, however, for the Scottish Government to issue forward guidance about the manner in which they anticipate exercising the new power and any specific policy areas in which they consider it may be used; and for the Scottish Parliament to ensure that adequate time and due process is dedicated to the scrutiny of draft regulations.

Q.8 *Are the arrangements for scrutiny by the Parliament of subordinate legislation made under the keeping pace power adequate?*

For the reasons discussed in relation to [QQ2&6] use of secondary legislation to implement a 'keeping pace' policy is not constitutionally illegitimate. It does, of course, pose important questions about the scrutiny of the operation of such legislative powers.

There are three aspects of scrutiny which we suggest the Committee will wish to consider:
(1) The procedure for adoption of legislation;
(2) The information provided about the legislation; and
(3) The interaction with UK legislation.

1. The procedure for adoption of legislation

Since it is not possible to predict the future direction of EU legislative policy, it is not possible to give an exact estimate of the number of EU legislative instruments likely to be transposed using the powers proposed in the Bill; however the figure is likely to be of the same order as the current number of Scottish Statutory Instruments which have their origin in EU obligations. An estimate at around that level allows both for

discounting of legislation affecting areas subject to new UK-wide schemes, as well as additional legislation to make more detailed provision in Scotland-only matters implementing the policy of the Bill.

It is likely that many instruments will be purely technical, particularly where these relate to amendment or development of existing statutory schemes; a smaller number will be of great significance, and may involve a policy change. Those are the ones on which the Parliament is likely to want to focus attention. They will include instances where the affirmative procedure is invoked under section 4(2) of the Bill.

Section 4(2) of the Bill lists a number of purposes for which legislation will require the affirmative procedure. We consider those are appropriately identified as requiring the affirmative procedure because of the importance of the subject-matter. There are no additional categories which suggest themselves as requiring the affirmative procedure. All other provisions are subject to the negative procedure.

There is no provision in the Bill for circumstances in which primary legislation ought to be brought forward instead. We recognise there are good practical reasons for using secondary legislation in many circumstances here; equally there may be significant policy choices, for example in relation to food or the environment, or where the subject matter falls within section 4(2) of the Bill where primary legislation would be appropriate. The Committee may wish to explore with Ministers circumstances in which they would envisage primary legislation being appropriate.

2. The information provided about the legislation

In evidence to the Scottish and UK Parliaments about the European Union (Withdrawal) Bill, the Faculty, along with a number of other commentators, raised concerns about what information was to be provided in support of secondary legislation made under the very wide-ranging powers in that Bill (now the European Union (Withdrawal) Act 2018). We consider that the Bill represents an improvement on the 2018 Act.

Section 5 contains the duty on the Scottish Ministers, but the substantive content of that duty is found in section 6. That section sets out a series of headings which the Scottish Ministers require to address in the material provided to the Parliament, and we consider section 6(2) is particularly important in this regard. The devil will of course be in the detail in each case, but we consider that this is a good starting place.

Section 7 is also a useful provision, and the Parliament may wish to consider which committee might usefully add to its agenda consideration of the reports from Scottish Ministers required by this section.

3. The interaction with UK legislation

An added dimension requiring legislative scrutiny which is less likely to arise in other areas is conflict with UK Government policy and potentially UK primary legislation. This is not likely in other areas because of the boundaries on the Scottish Parliament's

legislative powers in section 29 of the Scotland Act 1998 and the operation of the Sewel convention. However, in the subject area of this Bill there is scope for real divergence, given the UK Government's current policy to eschew alignment with the EU after the end of the Transitional Period.

International trade agreements concluded by the UK post-transition will have an impact, as will the so-called UK internal market which has had a lot of recent airplay. Current political controversy between UK and devolved governments about the Trade Bill currently before the UK Parliament is an important concrete example. In the Trade Bill, there are provisions which directly affect the powers of devolved institutions (clauses 2-4 & Schedules 1-3).

The policy choices are not matters on which the Faculty would wish to comment. However the practical effect may very well be to circumscribe the power of devolved institutions to legislate, whether by primary or secondary legislation. It follows that that situation gives rise to a further scrutiny question in relation to the exercise of powers under this Bill, namely whether proposed legislation although on the face of it not dealing with a reserved matter, is nonetheless caught by provisions of UK legislation made under the Trade Bill. That is a matter which the Parliament may well want to be assured about. It might be that this can be addressed by amendment of section 6 of the Bill to require a statement from Scottish Ministers about this aspect.

Q.9 *Does the Financial Memorandum reflect all of the costs of implementing the Bill?*

It appears to the Faculty that it is almost impossible to identify the costs of implementing the Bill, at least at this stage.