Submission from the Law Society of Scotland

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

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law sub-committee welcomes the opportunity to consider and respond to the Finance and Constitution Committee consultation: Stage 1 Evidence to the Financial and Constitution Committee on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. The sub-committee has the following comments to put forward for consideration.

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?

The answer to this question depends on how the keeping pace power is used, to what EU policy areas the Scottish Government decide to apply the legislation and what the UK and other devolved administrations decide to do in relation to EU legal and policy development.

The power to make regulations under section 1 of the Bill can only be exercised within devolved competence and apply in Scotland and it may therefore be thought that the implications for the rest of the UK would be few.

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?

In so far as the regulations might competently affect matters in the rest of the UK, the scope for substantial policy divergence will be limited by whatever is agreed or enacted by the UK Parliament to be the Common Frameworks and by whatever is

also enacted by that Parliament to be the principles of the UK internal market (see paragraphs 4 b and c below).

Section 1 (1) (a) entitled ‘Power to make provision corresponding to EU law ‘states:

(1) The Scottish Ministers may by regulations—

(a) make provision—

(i) corresponding to an EU regulation, EU tertiary legislation or an EU decision,

(ii) for the enforcement of provision made under sub-paragraph (i) or otherwise 15 to make it effective,

(iii) to implement an EU directive, or

(iv) modifying any provision of retained EU law relating to the enforcement or implementation of an EU regulation, EU tertiary legislation, an EU decision or an EU directive, so far as the EU regulation, EU tertiary legislation, EU decision or EU directive has effect in EU law after IP completion day […]’.

These powers will allow Scottish Ministers to make regulations corresponding to EU regulations, tertiary legislation or decisions. The regulations will also be able to enforce these laws, implement directives or modify any retained EU law relating to implementation or enforcement. Furthermore Section 1(6) provides that ‘Regulations under subsection (1) may make any provision that could be made by an Act of the Scottish Parliament.

The Scottish Government’s justifications for the powers in section 1 is contained in paragraphs 26 and 27 of the Policy Memorandum. The first justification is that -

“26… In order to ensure the effective operation of Scots law, to provide for the most flexible approach to regulation, and to reflect Scotland’s desire to remain a European nation closely aligned to the EU (so far as within devolved competence), upon the ending of the implementation period, the Scottish Government considers it necessary to give Scottish Ministers the power to make secondary legislation to ensure that Scotland’s laws may keep pace with changes to EU law, where appropriate and practicable…

27… If there is no other power to regulate in an area, the alternative could be considerable primary legislation, so it is pragmatic to legislate for a power to keep pace with post-withdrawal developments in EU law and ensure, as appropriate, continuity of law in certain devolved areas after the implementation period ends’.

It is a political or policy question as to whether it is necessary to keep pace with future EU law as to which the Law Society has no view but it is a separate question

as to whether, even if it is, it is necessary to give Scottish Ministers the power to make the regulations under section 1.

Section 1 of the Bill is modelled upon section 2(2) of the European Communities Act 1972 which empowers regulations to be made to implement EU law but in the case of the Bill there is no legal necessity to implement EU law within a particular period of time. It is simply a policy requirement to keep pace with EU law.

It is appreciated that it would be impractical to require all changes in EU law to be given effect to by primary legislation in the Scottish Parliament because this would hold up the normal legislative programme.

However, some future changes in EU law could involve substantial policy considerations which would not have been subject, within the UK, to the usual EU consultation. This means that neither the UK nor Scottish Governments and stakeholders would have had the opportunity to influence those proposals or even to become familiar with them (see the Answer to Question 3).

Section 5 and 6 of the Bill make provision for Scottish Ministers, when laying a SSI, or a draft of it, to make a statement explaining, among other things, the instrument or the draft and why Scottish Ministers consider that there are good reasons for making it. In the case of proposals which involve substantial policy considerations it is not thought that such a statement, by itself and without extensive scrutiny, would make up for the absence of proper consultation and consideration. In these circumstances, it is suggested that the power to make regulations under section 1 should be restricted to where the changes in EU law do not involve substantial policy considerations unless they are subject to super affirmative procedure as described below.

The second justification put forward by the Scottish Government attempts to give a legal justification for the power in section 1.Pargraph 26 of the Policy Memorandum states that, in the event of the UK and EU reaching a trade agreement, there may be a requirement for a form of “dynamic alignment” with EU law and it is therefore prudent to legislate for a power to make regulations to achieve this alignment. However, it is very uncertain whether there will ever be such a trade agreement which requires alignment with EU law and, even if there was, the implementing UK legislation would make provision for any necessary powers to achieve that alignment.

(b) Scrutiny

Section 4 of the Bill provides that some regulations under section 1 are to be subject to affirmative procedure and all other regulations are subject to negative procedure.

Affirmative procedure will be used where the subordinate instrument:

1. abolishes any function of an EU entity or public authority in a Member State without providing for an equivalent function to be exerciseable by any person or

provides for any function of an EU entity or public authority to be exerciseable instead by a Scottish public authority,

2. Imposes fee or charges in respect of the function exerciseable by a public authority,

3. Creates, or widens the scope of, a criminal offence; or

4. Creates or amends a power to legislate.

The Policy Memorandum confirms that where the provision in regulations made under section 1 of the bill “does not fall under the category as noted above, negative procedure will apply subject to a discretionary decision by the Scottish Ministers to apply affirmative procedure”(paragraph 35).

The bill also requires Scottish Ministers to produce an explanatory statement to accompany each instrument proposed under the keeping pace power.

There is no discussion in the Policy Memorandum of super affirmative procedure such as was contained in section 14 (5) to (9) of the UK Withdrawal from the EU (Legal Continuity) Bill.

It is suggested that the power to make regulations under section 1 should be subject to super affirmative procedure in the cases where the changes in EU law involve substantial policy considerations.

The explanatory statements which Scottish Ministers must produce to accompany each instrument proposed under the keeping pace power and the expiry of the subordinate powers at 10 years with the possibility of two further five year extensions may provide some safeguards but these are procedural mechanisms rather than provisions for adequate scrutiny (see further discussion below).

Accordingly, the presumption must be that wide secondary legislative powers such as section 1 of the Bill are inappropriate unless justified by some overriding justification and even then, with enhanced scrutiny. It is a policy question as to whether it is necessary to keep pace with EU law but, even if it is, it is suggested that the normal rule must be that its exercise is subject to affirmative procedure or even super affirmative procedure except in minor cases (see paragraph 8 below).

We note that the powers in Section 1 are only one of the ways in which keeping pace could be achieved. The Government should set out the circumstances in which it would use Primary legislation to achieve that policy aim.

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?

In *Beyond Brexit: how to win friends and influence people*, a Report by the House of Lords European Union Committee (HL322), the Committee analysed the means of UK influence in the EU in a post-Brexit context:

1. Interaction with EU agencies;
2. Participation in EU programmes and other areas of cooperation; Through the UK Representation to the EU (UKRep);
3. The work of other Brussels-based UK offices and organisations;
4. The role of the devolved administrations;
5. Bilateral dialogue with EU Member States.

Whilst not taking issue with anything raised in that report we would like to focus on three aspects:

1. UK Representation to the EU (UKRep) now UKMission (UKMis) to the EU
2. The work of other Brussels-based UK offices and organisations
3. The role of the devolved administrations.
4. UKMis will be a significant route to UK influence among the EU institutions and Member States. However since the UK left the EU, the UKMis does not have automatic access to information or the relationship to which it had become accustomed with EU institutions or Member States during the UK's membership. After Transition ends the UKMis will be a third country mission and will require to re-engineer its relationships with the EU institutions and member states with the objective of maximising the U.K.'s influence. The scrutiny model will need to take into account the political and legal context of exit, for example, the level of access the UK will have to the EU (in the short/medium/long term). Less access would necessarily reduce the kinds and level of documentation/evidence that can be offered. The House of Lords Committee heard evidence that some third countries such as Norway and Switzerland had significant presence in Brussels. Irrespective of the nature of the future relationship between the EU and the UK, the UK Government (and the devolved administrations) will have to consider what type and style of representation they will wish to maintain in Brussels.
5. The work of other Brussels-based UK offices and organisations will be very important in a post exit environment. The Law Society of Scotland in conjunction with the Law Society of England and Wales and the Law Society of Northern Ireland maintains a Brussels office. The core objectives of the Brussels office are to represent, support and promote solicitors in the EU. There is a strong element of public interest objective in its work since the Office aims to promote better

quality legislation, and improved functioning of the justice and legal system. The Office represents the profession to the EU institutions and international organisations such as the World Trade Organisation. The focus is on legislation and policies that impact the solicitor profession, substantive and procedural laws on which solicitors advise their clients and wider issues such as better regulation or proper administration of justice. It also provides information and raises awareness about relevant EU legislation. The role of the Brussels office is likely to change in the post Brexit environment. While the Brussels joint team will continue to seek to influence and inform EU policy this will increasingly be on an informal basis, whereas there will be much greater focus on monitoring and scrutinising EU policy developments for the purpose of ensuring awareness within those parts of the Scottish profession with EU operations, and who will be directly impacted. Furthermore the Society will undertake scrutiny of relevant EU policy developments to identify the impact on UK/ Scottish Law and to consider a corresponding response within the UK, whether this is to maintain alignment or pursue an alternative approach. Additionally, in the event that an FTA is agreed between the UK and EU, it will be necessary for the Brussels team to take the lead on examining whether EU developments are compliant with obligations under the Agreement.

6. The Scottish Government European Union Office in Brussels works ensure that Scotland, Scottish issues and the work of the Scottish Government are understood by the EU Institutions, Member States and regions. The Brussels Office currently provides support to Scottish Ministers to participate in EU Council meetings, to meet with the EU Commission or the European Parliament, and also monitors developments in the EU Institutions and reports to colleagues in Scotland. This work is complemented by policy and cultural events that take place in the conference centre in Scotland House, also based in Brussels. This current work is likely to change after the UK leaves the EU as Scotland will be a part of a third country, and restrictions in relation to information and access will apply to the Scottish Government's EU office in the same way as to UKMis. Accordingly, the Scottish Government will need to consider how the EU Office will change in a post-transition environment.

Providing information to the UK and Devolved Governments and Legislatures about what the EU is doing and how the UK Government is engaging with the EU and its Member States to represent UK interests is an essential output from scrutiny. The mounting of relevant inquiries in all the Legislatures around the UK into how UK policies touching on EU interests and EU policies touching on UK interests are being implemented will continue to be extremely important.

Better internal and external communication is needed so that the Legislatures and the public are better informed about the interface between domestic and EU laws and policies, including any divergences which may affect stakeholders

1. 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 –

1. Compliance with UK international obligations including future trade deals and other international agreements;

The Scottish Parliament and Scottish Government do not play a formal role in negotiating treaties but are bound to observe and implement those international obligations undertaken by the UK Government. The Scotland Act 1998 Schedule 5, paragraph 7 provides that:

“1) International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters.

2) Sub-paragraph (1) does not reserve—

(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law,

b) assisting Ministers of the Crown in relation to any matter to which that sub-paragraph applies.”

In *Processes for making free trade agreements after the United Kingdom has left the European Union* (CM 63) published in February 2019 the UK Government set out its proposals for the approval of free trade agreements within the Parliamentary and devolved structures.

The UK Government confirmed its commitment to “working closely with the devolved administrations to deliver a future trade policy that works for the whole of the UK” within the current constitutional make-up of the UK and acknowledging that the devolved governments have a “strong and legitimate interest” where the trade agreements intersect with areas of devolved competence.

The answer to this question will, we expect feature in the Review of Intergovernmental Relations Report. In the meantime, the Command Paper highlights the engagement on trade policy between the UK Government and the devolved administrations which include regular Senior Officials ’Groups and monthly round-tables on technical policy areas.

Discussions with the devolved administrations their role in future FTAs with a view to agreeing new arrangements to complement the existing Devolution Memorandum of Understanding (MoU).

Accordingly, until the detail of any revisals to the MoU are made public we will not know the detail of how Scottish Ministers (and the other devolved administrations) will be able to influence the UK Government in their negotiations. The Command Paper confirms that UK Government will continue to “work with the devolved administrations to secure legislative consent” for UK-wide legislation where appropriate.

However, Scottish Ministers and the Scottish Parliament will continue to be responsible for observing and implementing international obligations in areas of devolved competence and the provisions of any FTA will restrain any Scottish Government proposed keeping pace legislation if it does not comply with the provisions of that FTA.

The Command Paper covers FTAs only, but we expect that the UK Government’s policy regarding involvement of the Scottish Ministers and Parliament will also apply to other types of International Agreement.

Statutory and non-statutory common frameworks;

In October 2017, the UK and devolved governments agreed a set of principles “that common frameworks will be established where they are necessary in order to: enable the functioning while acknowledging policy divergence”.

There are no domestic legal constraints on the powers of the UK Parliament or UK Government concerning common frameworks. Transforming the common frameworks principles into functional structures has been largely achieved through inter-governmental negotiations. There are a “wide variety of approaches, levels of detail and progression” among the framework structures.

Inter-governmental negotiations on resolving these issues have taken two tracks.

Discussions around the Common Frameworks analysis: The number of policy areas within the analysis is 160 and over the course of the past 3 years there has been change in the number of policy areas in each category, including a reduction from 24 to 21 in the category where legislation may be required in whole or in part. The number of areas non-legislative arrangements are being considered is 78. The number of areas where no further action is required to create a common framework is now 63.

There are now four policy areas that the UK Government believes are reserved but remain subject to ongoing discussion with the devolved administrations.

Common frameworks are therefore in place either because of non-legislative agreements or because legislation provides a statutory arrangement for regulating the points of intersection between Devolved Matters and EU law.

Accordingly, the Scottish Ministers will be bound to such common frameworks either because they have agreed to them or because they are bound by law. Either result will constrain the ability to keep pace in those areas covered by such common frameworks

The functioning of a UK internal market;

On 16 July 2020 UK Government published the White Paper entitled "UK Internal Market" (CP278) which seeks to create arrangements for the functioning of the UK internal market following IP completion day (31 December 2020). The White Paper sets out three policy objectives

a) to continue to secure economic opportunities across the UK;

b) to continue competitiveness and enable citizens across the UK to be in an environment that is the best place in the world to do business; and

c) to continue to provide for the general welfare, prosperity, and economic security of all our citizens.

These objectives will be supplemented by the following aims:

a) to continue frictionless trade between all parts of the UK;

b) to continue fair competition and prevent discrimination; and

c) to continue to protect business, consumers and civil society by engaging them in the development of the market.

Finally, the UK Internal Market will also follow two main design rules:

a) foster collaboration and dialogue; and

b) build trust with business and maintain openness.

The UK Government intend to seek legislation that will provide for free access to economic activity across the UK. The legislation will seek to ensure continued market access across the UK, delivered through the principles of mutual recognition and non-discrimination.

The principle of mutual recognition would seem to mean that, even if Scottish Ministers made regulation to keep alignment with EU law on food labeling would be lawful for food to be labelled in accordance with whatever was in the law in England,

Wales or Northern Ireland. This will substantially detract from Scottish Ministers' objectives in seeking to enact section 1 of the Bill.

This will also be the effect of the principle of non-discrimination which seems to mean that any regulations under section 1 of the Bill would be prohibited if they had the direct, and perhaps the indirect, effect of discriminating against goods or services originating in any other part of the Union.

The details of the Internal Market bill are not yet available but when the bill is published its impact on the keeping pace power will be clearer and more certain. It is likely to have an impact on the competence of Scottish Ministers or the Scottish Parliament to legislate in the areas of intra-UK movement of goods and services and state aids or subsidy control.

The replacement of EU funding.

We have no comment to make.

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

The bill contains limits on the powers of the Ministers to act under section 1(2).

The bill contains limits on the powers of the Ministers to act under section 2(1) in as much as Regulations under section 1(1) may not—

(a) impose or increase taxation,

(b) make retrospective provision,

(c) create a relevant criminal offence,

(d) provide for the establishment of a Scottish public authority,

(e) remove any protection relating to the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office, or otherwise make provision inconsistent with the duty in section 1 of the Judiciary and Courts (Scotland) Act 2008 (guarantee of the continued independence of the judiciary),

(f) confer a function on a Scottish public authority that is not broadly consistent with the general objects and purposes of the authority,

(g) modify any of the matters listed in section 31(5) of the Scotland Act 1998 (protected subject-matter),

(h) modify the Scotland Act 1998, or

(i) modify the Equality Act 2006 or the Equality Act 2010.

Section 3 also introduces a limitation by providing for the expiry of the legislation 10 years after it has been implemented with the possibility of extending that period for a further total period of 10 years in five-year increments. Scottish Ministers in 2040 Would be limited by the terms of the legislation at that point although they could seek to amend the Act.

The Government should explain why the sunset provisions in the Bill differ so much from the provisions in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill sections 13 (7),(8) and (8A) which provided that:

'(7) No regulations may be made under subsection (1) after the end of the period of 3 years beginning with exit day.

(8) The Scottish Ministers may by regulations—

(a) extend the period mentioned in subsection (7) by a period of up to one year,

(b) extend any period of extension provided by regulations under this subsection by a further period of up to one year.

(8A) The period during which regulations under subsection (1) may be made may not be *10* extended by regulations under subsection (8) so as to last for more than 5 years in total'.

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?

The powers which Scottish Ministers use to implement EU law under section 2 (2) of the European Communities Act 1972 relate to the implementation of EU law which already has direct effect under section 2(1) Of the Europe communities act 1972. The

As we have indicated in response to question 1, EU law brought into effect prior to 31 December 2019 has been subject to a consultation and scrutiny process, including democratic input from UK and Scottish elected persons. However, the legislation which is to be implemented by this bill will not have been scrutinised by UK interests in a determinative way. There is therefore a qualitative democratic difference between the effect of these provisions. The 1972 act operates within a framework for democratic engagement in respect of the EU regulations whereas the bill purports to implement in Scotland law which has been not been subject to democratic input from the UK or Scotland.

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?

Yes, the Bill makes no provision for the criteria to be applied to EU law in deciding whether it should be enacted into Scots law. It would be clearer for those who use the legislation and their advisers were the criteria open and available.

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

Section 4 of the bill provides that certain regulations under section 1(1) are subject to the affirmative procedure.

Affirmative procedure therefore applies to regulations which (i) abolish a function of an EU entity or a public authority in a member State without providing for an equivalent function to be exercisable by any person, (ii) provide for a function mentioned in section 1(3) or (4) to be exercisable by a Scottish public authority, or by a different Scottish public authority, or by any person whom the Scottish public authority delegates functions on its behalf, (iii) fall within section 1(5), regarding the charging of fees or other charges in connection with the exercise of a function by a Scottish public authority, except for inflationary increases, (iv) create, or widen the scope of, a criminal offence, (v) create or amend a power to legislate.

Such regulations as these are important due to their subject matter and the serious powers they confer.

Whilst affirmative regulations provide more scrutiny than negative regulations there is no provision in the bill for super affirmative procedure or for consultation on the draft regulations. We believe that the most significant regulations should attract the most significant scrutiny and that the bill should be amended to provide for such scrutiny in connection with the regulations contained in section 4(2). There should also be provision for adequate pre-legislative consultation.

Section 4(3) provides “Any other regulations under section 1(1) are (if they have not been subject to the affirmative procedure) subject to the negative procedure”.

The bill therefore only offers a choice between affirmative and negative resolution procedures— there should at least be the option to use super-affirmative powers for the most significant regulations.

Does the Financial Memorandum reflect all of the costs of implementing the Bill?

We have no comments to make.