



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Thursday 3 May 2018

Session 5



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DELEGATED POWERS AND LAW REFORM COMMITTEE
15th Meeting 2018, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

*Tom Arthur (Renfrewshire South) (SNP)

*Neil Findlay (Lothian) (Lab)

Alison Harris (Central Scotland) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bill Bowman (North East Scotland) (Con) (Committee Substitute)

David Mundell MP (Secretary of State for Scotland)

Chloe Smith MP (Minister for the Constitution)

CLERK TO THE COMMITTEE

Andrew Proudfoot

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Thursday 3 May 2018

[The Convener opened the meeting at 11:01]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome members to the 15th meeting in 2018 of the Delegated Powers and Law Reform Committee. Alison Harris has submitted her apologies. The background noise is from a stream of officials who are pouring in.

There is one piece of business that we must deal with before the evidence session begins. It is proposed that the committee take in private agenda item 3, which is consideration of the evidence that we are about to hear on the European Union (Withdrawal) Bill. Do members agree to take agenda item 3 in private?

Members *indicated agreement.*

European Union (Withdrawal) Bill

11:02

The Convener: Agenda item 2 is the European Union (Withdrawal) Bill. The committee will take evidence on supplementary legislative consent memorandum LCM-S5-10a.

We have before us David Mundell, the Secretary of State for Scotland, and Chloe Smith, the Minister for the Constitution at the Cabinet Office. I welcome both of you.

I realise that you have already been through a gruelling session with the Finance and Constitution Committee. I sat at the back of that meeting, so I am a bit of a glutton for punishment today.

You will appreciate the tight timescale in which the committee has to consider and report on the supplementary LCM. We are really grateful that you have come along.

On the committee's approach, our role is to ensure that appropriate powers are delegated to the Scottish ministers and that there is effective scrutiny of secondary legislation. Our questions will therefore stem from that.

I will ask a question about the earlier session that I sat in on, as I was not clear about something in the answers that Mr Mundell gave. You described negotiations that involved you, Mr Russell and the Welsh Government. Was it your view that you had an agreement with Mr Russell that he had to get cleared? Did you think that you had an agreement with him?

David Mundell MP (Secretary of State for Scotland): No. Mr Russell always made it clear that he was not the decision maker in the process, so we did not expect that the arrangement that had been discussed with him could be agreed by him, and he never led us to believe that. We knew that, when he took the arrangement back from the discussions that he had had with Mark Drakeford and David Lidington and the discussions that officials had had, that arrangement would require the agreement of the First Minister. We were always clear about that, and I have never suggested that we had an agreement with Mr Russell that he reneged on. That is not the case. Mr Russell was always absolutely clear about where the lines of authority lay.

The Convener: That is useful. We are going to get into the questions that this committee has to deal with, which will be of a different nature to the ones that you dealt with earlier.

The committee is considering the delegated powers that are proposed in the European Union

(Withdrawal) Bill, as amended—amendments were made to it last night—and whether the bill provides for effective scrutiny of those powers by the Scottish Parliament.

The bill provides for the concurrent exercise of powers by UK and Scottish ministers to fix deficiencies in retained EU law. What co-ordination and co-operation exist between the Governments in relation to delivering the proposed programme of legislation by exit day? Is it deliverable in the 10 months that remain?

Chloe Smith MP (Minister for the Constitution): I am happy to begin our answers.

We think that it is deliverable, although it will be challenging, without a doubt. You have probably heard some of the figures that have been discussed. We are talking about many hundreds of pieces of secondary legislation that will need to be produced. That is a UK figure rather than a specifically Scottish Parliament figure, but it gives a sense of scale.

Many of those instruments will need to be properly co-ordinated across the devolved Administrations, and we are extremely keen to continue with the strong co-operation that we have had at official level and between the Administrations at every level to do what needs to be done. The context in which we come here today is that, unfortunately, we do not at this point have the agreement of the Scottish Government to the full package. Nevertheless, underpinning that situation is a lot of good-quality work that I am confident will allow us to get the necessary work done. You will see reference to that in some of the papers and correspondence on the subject. The leaders in the fields say that they recognise the amount of work that needs to be done, and we will work together to do it.

David Mundell: I, too, would like to reassure the committee. We are all familiar with what appears in the media and what politicians say, but there are strong and good working relations between UK Government and Scottish Government officials. Detailed discussions are being held on a whole range of issues.

I have also sought to ensure that there is detailed engagement with parliamentary officials here and that the Scottish Parliament and the Presiding Officer are updated on how arrangements will impact on them.

Neil Findlay (Lothian) (Lab): When agreement is reached between the UK and Scottish Governments that UK ministers should make regulations to correct deficiencies, what opportunities will there be for the Scottish Parliament to scrutinise any resulting legislation?

David Mundell: Whether we reach agreement here, we will abide by the agreement that we have reached with the Welsh Government. When regulations are made under clause 11 of the withdrawal bill, we will seek the consent of the Scottish Parliament to those regulations. The Scottish Parliament will have the opportunity to scrutinise and debate those regulations and to deliver a decision. If that decision is not to agree to them, under the agreement a report will be laid before the UK Parliament, setting out the Scottish Parliament's position.

Neil Findlay: Are you aware that a protocol is being developed in the Scottish Parliament for that scenario? Do you anticipate there being ample time for the Scottish Parliament to scrutinise anything that is brought forward?

David Mundell: I think there will be. We are not going to pretend that there is not going to be a heavy workload. That would not be correct. However, I think that it will be a manageable workload. It is not necessarily the case that all the issues on the list of 24 issues that will be subject to UK-wide frameworks will be dealt with in that regulatory way. Some might be the subject of primary legislation, which would then follow exactly the same route as at present, with a legislative consent motion coming forward in the usual way. The view might be that it would be better in some areas to have primary legislation rather than regulation.

Neil Findlay: Okay.

The Convener: Do you know about the protocol that officials have worked up?

David Mundell: I am aware of it in the general sense but I would not be able to be questioned on the detail of it, I am afraid.

The Convener: Okay. It is probably worth having a look at it at some point.

Tom Arthur (Renfrewshire South) (SNP): Good morning. What is the UK Government's view on how many of the deficiencies will have to be remedied through UK regulations as opposed to regulations made in the Scottish Parliament? In what circumstances, specifically, do you envisage that scenario arising?

Chloe Smith: The short answer is that I cannot give you a numerical answer. We are not in a position to be able to give you that. I can also answer the principal part of your question in only quite a general way. The very reason why the powers are concurrent powers is so that there can be a sensible and co-operative way of working and deciding where such things need to be done. I fully hope that, within that, there is a sensible and suitably speedy procedure for doing what needs to be done.

Tom Arthur: Can you give examples of specific areas where you think it will be preferable for regulations to be made at a UK level rather than at a Scottish level?

Chloe Smith: I can refer to the frameworks analysis that has been done, which is very much public. Mr Simpson will have heard me say, in the earlier committee meeting upstairs, that arriving at that analysis represented a considerable body of work by all the Administrations and by officials, which should be commended. That analysis stemmed from principles—which have clearly been agreed—that explain why we might need to do something at the level of the United Kingdom, whereas with other things we might not need to do that.

At the other committee meeting this morning, I read into the record the principles that were agreed in October at the joint ministerial committee (European Union negotiations), and the list of examples that I gave began with those circumstances in which we would want to be able to protect the UK internal market. That is obviously a case in which we would want to be able to act UK wide rather than separately.

I expect that some of those principles would be serviceable to the question that you asked but, as I said, I think that the way ahead is framed by the bill as it was amended by the House of Lords last night. It is underpinned by the frameworks analysis, but there is, of course, still plenty to do to. We simply need to get our sleeves rolled up and get stuck into the amount of secondary legislation that that will require.

Stuart McMillan (Greenock and Inverclyde) (SNP): Good morning. In the event that the Scottish Parliament refused consent to the bill, which is a possibility, would you respect that decision? Another possibility is that partial consent could be provided. It has been suggested to the committee that it would be possible to provide for the continuity of retained EU law and the correction of deficiencies by relying on a mix of powers in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill and the European Union (Withdrawal) Bill. Would that mix of powers be workable?

David Mundell: In my view, the best outcome—we can still do this, even at this late hour—is that we reach agreement with the Scottish Government in relation to the approach to the European Union (Withdrawal) Bill, that this committee and the Finance and Constitution Committee feel able to recommend to the Scottish Parliament that it grant consent and that the Scottish Parliament does so. That is how we are approaching the matter at this time. I am not going to speculate on other outcomes—I did not do so in the other committee, either.

We hope that our appearance before this committee and the other committee today will play a positive part in allowing the committees to take an approach involving a recommendation that the legislative consent motion be granted and that the members of the Scottish Parliament—Mr Russell has always been clear that this is a decision for the Scottish Parliament, not the Scottish Government—agree that that consent be granted. That is the focus of our attention.

11:15

Stuart McMillan: I was in another committee this morning, so I am not aware of what was discussed in the Finance and Constitution Committee.

David Mundell: I have repeated what I said upstairs. The convener can confirm that.

The Convener: I can.

Stuart McMillan: We all accept that the best outcome is that an agreement be reached. The situation is quite similar to the situation that continued right up to the wire when the most recent Scotland Bill was going through the UK Parliament. Do you anticipate that a deal will be done? What are your contingency plans for a situation in which consent is withheld by this Parliament?

David Mundell: My experience is that, however hard we try to reach agreement, things go to the wire. I have observed that not only in relation to matters concerning the Scottish Parliament and the Scottish Government; across the piece, agreements appear to require to go to the wire. Indeed, our friends in the European Union used to stop the clock in order to extend the wire.

The third reading of the bill is currently scheduled for 16 May. Clearly, within that timescale, we would be looking for agreement to be achieved if it could be. Today, we have set out the UK Government's position and Mr Russell has set out the Scottish Government's position, as has the First Minister. Yesterday, at the JMC(EN), we had a productive discussion on a range of issues and agreed that our doors were open for the purposes of continued dialogue. That is where we are. Anything that this committee or others can do to add some momentum to the process is welcome. However, if we were to take something forward, it would have to be something that has not previously been suggested.

Stuart McMillan: You used to be a member of this Parliament, so you will be aware of the importance that members of this place attach to the Parliament and the devolved powers that the Parliament has. I am sure that you understand why the Scottish Government and many members

of the Scottish Parliament are concerned about the suggested amendments to clause 11—particularly the proposed sections 30A(4)(b) and 30A(4)(c).

David Mundell: We have made significant changes to clause 11 because of the issues that have been raised by members of this Parliament, committees of this Parliament, members of the House of Commons and members of the House of Lords. We have made significant changes to the bill, and I am satisfied—as is the Welsh Government—that the clause respects the devolution settlement and in no way threatens it. In the debate last night, Jim Wallace, whom everybody would recognise as one of the leading advocates or proponents of the creation of this Parliament and who served with distinction as the Deputy First Minister, was clear that the arrangements that had been proposed were fair and reasonable in relation to the specific issues that had been raised and in no way prejudiced the devolution settlement. Obviously, that is the view that I take, too.

The Convener: Can we move on?

Stuart McMillan: Sure.

Bill Bowman (North East Scotland) (Con): Thank you for that useful summary, secretary of state. I have a couple of longish questions, which I hope will have short answers.

David Mundell: If they are long questions, they will be for Chloe Smith. [*Laughter.*]

Bill Bowman: The committee previously recommended that further consideration be given to basing the powers in the bill on a test of necessity rather than of appropriateness. We understand that a non-Government amendment that makes such a change for the exercise of UK ministers' powers under the bill has been made at report stage in the House of Lords. Will the Government look to amend the bill to make an equivalent change to the Scottish ministers' powers under the bill, for reasons of consistency?

The Convener: The change was made in the continuity bill, as a result of our recommendation.

Chloe Smith: Thank you, Mr Bowman. Unfortunately, I do not think that there is a short answer to that question, try as I might to give one.

That was an instance of a vote in the Lords that, unfortunately, we did not win. The Government's position on the set of those instances is that, obviously, we find it disappointing and we will reflect on the debate that took place in the Lords. There is a double question of consistency here. There is the question of consistency in relation to what the committee asked for in the context of the continuity bill, as Mr Simpson said, but also in

relation to what the position should be between UK Government ministers and Scottish ministers.

The procedural answer to your question is that, as the bill moves from the House of Lords back to the House of Commons for what is known as ping-pong—we have to finish off the work in the UK Parliament—the Government will have to consider the position and what it will offer at report stage and what it will offer back to the House of Commons. We will certainly give careful consideration to this committee's views and the arguments that you have put forward for why that change is a sensible one. The arguments that we have made against that change are also quite clear, in that, legally speaking, there can be occasions when we might have to make a choice between two things that could be seen either way, and using the word "appropriate" is the simplest way to allow the right judgment to be made in those cases. Those arguments have been well rehearsed; however, as I say, I will give more consideration to the matter, given your question today.

Bill Bowman: That sounds to me like a maybe, but veering towards no.

Chloe Smith: As I say, it is not possible to give a short answer to that question.

Bill Bowman: The committee also recommended a change to the parliamentary procedure for the power in schedule 4 to create or increase fees and charges in connection with functions that public bodies in the UK take on exit day. The recommendation was that the power be subject to the affirmative procedure, not just for new fees but for significant increases to existing fees. Does the Government propose to table amendments to achieve that change?

Chloe Smith: Not as things stand, I believe, but, as I said in answer to the previous question, I am very happy to give that some thought, given that you have raised the question. I will be happy to come back to the committee with that thinking.

The Convener: Okay. That is useful.

Neil Findlay: I have a general question about the reason why we are in this position, which is, effectively, because commitments that Mr Mundell gave in the Commons to resolve the issues were reneged on. This committee, other committees, this Parliament, ministers and Mr Mundell have had to go into extended periods of work, negotiations and scrutiny because that commitment was not delivered. Does Mr Mundell have anything to say about that?

David Mundell: I am very clear, Mr Findlay. I gave a commitment that we would bring forward an agreed amendment in the House of Commons. I wanted to do that, and I think that it would have

been much better to have reached an agreed position in the House of Commons, but that was not achieved within the timescale in which we were operating. I place a great deal of emphasis on agreement.

Of course, I could have brought forward our own amendment, but we wanted an amendment on which we could reach agreement with the Scottish Government and with the Welsh Government. We have worked really hard to try to achieve that; we thought that we were close to achieving it. Your Welsh colleagues ultimately did reach agreement with us. The House of Lords, in its deliberations, has accepted that we have brought forward something that is fair and reasonable, having made significant movement from where we were originally.

We are still not in a position to agree with the Scottish Government. I am disappointed about that, but, as I have indicated to the convener, I have not given up trying. I am committed to working on the basis of agreement to the extent that that is at all possible. Therefore, I did not act unilaterally—I continued to work to get agreement.

Neil Findlay: I think that—

The Convener: Mr Findlay, I will have to cut you off there because time is really short and I want to let Mr Arthur in.

Tom Arthur: Secretary of state, you rightly highlighted earlier that the decision on legislative consent will be one for this Parliament to take; it is a decision that this Parliament will have to take within the next two weeks. Can you say categorically that if this Parliament withholds consent, the UK Government will not impose frameworks on Scotland against the will of this Parliament?

David Mundell: There are a number of issues in there, so let us work backwards. I have been clear that we are not seeking to impose frameworks; we are seeking to agree frameworks—

Tom Arthur: I am very clear that you are seeking—

The Convener: Mr Arthur, let him answer.

David Mundell: The current piece of legislation is not, of course, about the frameworks; it is about freezing the current arrangements—that is, the arrangements that apply right now, here in Scotland. That is what it is about and, based on the discussions today, we need to make everybody absolutely clear that the legislation that the Parliament is being asked to consent to is not about new frameworks; it is about 24 areas where we are saying that we want things to remain the same as they are now after we leave the EU, and I want—

Tom Arthur: The corollary of which will be frameworks. If this Parliament does not grant legislative consent, will the UK Parliament overrule it? As a member of the UK Government, will you recommend that the UK Government overrules the will of this Parliament? Yes or no?

David Mundell: My position is quite clear—

Tom Arthur: No, it is not clear. I am asking a straight yes or no question—

David Mundell: My position is clear—I do not want—

Tom Arthur: I know that you do not—

The Convener: I am going to jump in as the convener. Mr Arthur, please do not interrupt when somebody is answering. I will move on to questions from Mr McMillan once Mr Mundell has finished giving his answer.

David Mundell: My focus, Mr Arthur, remains on getting agreement with the Scottish Government and persuading even you, as well as this committee and the Finance and Constitution Committee, to come to the view that you can recommend consent and this Parliament granting consent. That is what my focus is on over the next two weeks and that is what I will continue to do.

Tom Arthur: From that, we know—

The Convener: Mr Arthur, we are moving on to Mr McMillan. We have time for one more question.

Stuart McMillan: Secretary of state, in your 5 April letter to Michael Russell, you write in section 3.2, regarding the restrictions on delegated powers that

“We would expect to add any gaps found to the list.”

That certainly concerns me. It seems to say that the UK Government could add to the list of 24 areas at will at some point in the future. Can you explain that, please?

David Mundell: We are very short of time. As Mr Simpson will know, I answered that question extensively during the Finance and Constitution Committee’s meeting earlier this morning, so you will be able to read my answer in the *Official Report* of that meeting.

I also made a commitment that if there were to be any changes either way, they would be done on the basis of that intergovernmental agreement—they would be done on the basis of agreement.

Stuart McMillan: But—to come back to Mr Arthur’s point—if there is no consent from this Parliament, how could there then be agreement for that to take place?

David Mundell: We have set out the list of areas in an intergovernmental agreement; there

was an extensive debate as to whether the list should be set out in primary legislation. I think that all parties—including even the Scottish Government—were of the view that the intergovernmental agreement was the best way to do that because it allowed for flexibility.

I can make a commitment to you that any changes either way, in terms of taking things out, would be done on the basis of that agreement—they would be done by seeking agreement.

Stuart McMillan: I will check the *Official Report* of the Finance and Constitution Committee's meeting.

David Mundell: There was a more extensive dialogue, so you will be able to reference that.

The Convener: I thank both witnesses for coming. Sadly, time is up. Thanks again for attending.

11:30

Meeting continued in private until 11:38.

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