OFFICIAL REPORT
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Delegated Powers and Law Reform Committee

Wednesday 8 November 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 8 November 2017

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DELEGATED POWERS AND LAW REFORM COMMITTEE
30th Meeting 2017, Session 5

CONVENER

*Graham Simpson (Central Scotland) (Con)

DEPUTY CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

COMMITTEE MEMBERS

Alison Harris (Central Scotland) (Con)
*Monica Lennon (Central Scotland) (Lab)
David Torrance (Kirkcaldy) (SNP)

*attended

COMMITTEE SUBSTITUTES

Bill Bowman (North East Scotland) (Con)

THE FOLLOWING ALSO PARTICIPATED:

Chris Skidmore MP (Minister for the Constitution)
Robin Walker MP (Parliamentary Under-Secretary of State for Exiting the European Union)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Wednesday 8 November 2017

[The Convener opened the meeting at 12:00]

Decision on Taking Business in Private

The Convener (Graham Simpson): I welcome members to the 30th meeting in 2017 of the Delegated Powers and Law Reform Committee. David Torrance and Alison Harris have submitted apologies, and Bill Bowman is taking Alison's place today.

Agenda item 1 is a decision on taking items 7, 8 and 9 in private. Those items concern: the contents of our report to the Justice Committee on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill; consideration of the evidence heard on the European Union (Withdrawal) Bill; and the committee's draft report on instruments considered during the first quarter of the parliamentary year. Does the committee agree to take those items in private?

Members *indicated agreement.*

European Union (Withdrawal) Bill

12:01

The Convener: Agenda item 2 is on the European Union (Withdrawal) Bill. I welcome from the United Kingdom Government Robin Walker MP, Parliamentary Under-Secretary of State for Exiting the European Union, and Chris Skidmore MP, Minister for the Constitution.

We will move straight to questions, and I will ask the first few.

I think that we all want to get to a point where all the Parliaments in the UK can agree to a legislative consent motion. How will we get there?

Chris Skidmore MP (Minister for the Constitution): First, I thank the committee for the opportunity to speak to you today. As Minister for the Constitution, I am responsible for constitutional policy and democracy in the UK Government Cabinet Office, and I am part of the team that is responsible for taking this essential piece of primary legislation through the UK Parliament.

It is very much in the spirit of engagement that I welcome this opportunity to speak to you today. As members of the UK Government, we are extremely keen to engage all parties that are involved in the process for the bill, which is obviously yet to finally reach the floor of the House of Commons. The Secretary of State for Exiting the European Union has stated repeatedly—on the floor of the house, in committees and in the explanatory notes to the bill—that we will be seeking agreement to a legislative consent motion on the bill, and we want to ensure that we work with committees such as this one as well as other members of the Scottish Parliament, the devolved Administration and Scottish members of the House of Commons. Indeed, I have recently had several meetings with Scottish members of the House of Commons to discuss the bill and amendments.

We want to ensure that we have an inclusive process by which we can secure agreement to the legislative consent motion for this crucial piece of legislation. The legislation is needed to ensure that, come exit day, the United Kingdom and the internal market of the United Kingdom are prepared and there is stability and security for all of our constituents and businesses across the United Kingdom. They need us to ensure that EU law, once retained in UK law, is transferred over with the minimum possible disruption. That is why we want the bill process to take place as rapidly as possible and to ensure that we obtain consent. As we go forward with the committee process in the House of Commons and while we are here today, we want to have a conversation in which we pick

up any concerns and points of detail to ensure that we can secure agreement to that legislative consent motion.

Robin Walker MP (Parliamentary Under-Secretary of State for Exiting the European Union): It is important to look at the issue in the context of the purpose of the bill, which is very much about providing continuity and certainty for all parts of the United Kingdom and each of the devolved Administrations. It is very important that we ensure that we do that with the consent that is being sought, as Chris Skidmore said.

The bill has been carefully drafted with a view to preserving the devolved arrangements as they stand today, and contains mechanisms for increasing the powers of each of the devolved legislatures. We have been clear throughout this process that our intention is that each of the devolved legislatures should see a significant increase in its powers, and that is what we believe the outcome will be.

Of course, the committee stage of the process is still to come. You will understand that we cannot pre-empt that process too much by discussing the detail of individual amendments. However, we respect the fact that a large number of carefully drafted amendments have been tabled, and we will consider all of them carefully and respond to them at committee stage.

Alongside that, a process of discussion is under way, between the Administrations and in the joint ministerial committee process. It is very positive that there has been agreement both on where common frameworks might be required and—just as important—on the respect that needs to be shown to the existing devolution settlement and protecting the powers of each of the devolved legislatures.

The Convener: This committee will have to produce a report—probably several reports—and our first report will be based on the bill in its original form, although it is clear that the bill is going to change. Can you give us an idea of the timeframe in the Commons in that regard?

Robin Walker: Let me talk through that in a bit more detail. The second reading of the bill took place in September and we now move to committee stage. The first two days of committee stage have been announced: they are 14 and 15 November. There will be eight days in all of committee stage, and the devolution clauses will be debated on the fourth and fifth days.

There are no set dates yet in that regard, because in the House of Commons the Leader of the House comes forward on Thursday of each week with a business statement, which sets out the next week's business. The next opportunity for her to do that will be 16 November.

The Convener: Thank you, that is useful.

The bill confers wide powers on UK and devolved ministers to correct "retained EU law". This committee has heard from witnesses that there are concerns about the breadth of those powers and, in particular, about the wide reach of the term "deficiencies". At the same time, we recognise that deficiencies must arise from the UK's withdrawal from the EU and fall within the scope of the correcting power. Will you explain how the term "deficiencies" is to be understood with regard to the powers in the bill to prevent, remedy or mitigate deficiencies in retained EU law?

Robin Walker: The deficiencies power, which is set out in clause 7, is simply about ensuring that the statute book works; so, where there might be references to EU institutions, which will no longer be appropriate in the context of our membership, for instance, we will need to make appropriate references domestically to ensure that the statute books are functional in each part of the UK.

A very important point is that the deficiencies power is not about making changes. The whole approach in the bill is about continuity and certainty as we go through the process; it is not about making policy change. The focus on deficiencies in clause 7 clearly limits the power to putting things right.

Also, it is important to recognise that each of the powers of ministers to bring forward devolved legislation is constrained and sunsetted. The sunset clauses are important in this respect, because the bill is about how we exit the European Union and ensure that we have a functioning statute book through that period of exit, so that, the day after we are out, the law continues to function in each part of the United Kingdom. It is not about setting how we develop policy thereon in; that will be in the hands of the respective Parliaments and legislatures, which will determine what our laws should be going forward.

Chris Skidmore: It is also important to note that the deficiencies that will need to be corrected have been tightly defined in terms of not only time but scope—there are lists of powers that cannot be enacted through the deficiencies power, such as tax-raising powers.

The majority of deficiencies will be technical, and the changes that will be needed are part of a process to ensure that the statute book is ready for exit day and that the correction process for the vast amount of legislation that will need to be corrected can take place with the minimum disruption possible.

The Convener: We have heard evidence on framing the powers so that they are available only where necessary to correct deficiencies in retained

EU law rather than where considered appropriate. That point was raised in the House of Lords Delegated Powers and Regulatory Reform Committee. What are your views on that?

Robin Walker: We will be debating that issue at committee stage. There are some concerns but where, for example, two different solutions might be possible, neither one of them would be necessary, so there is a need for a power to introduce delegated legislation where that is "appropriate", rather than just where it is "necessary". Having a constraint of a change having to be necessary would in some circumstances lead to our not being able to take steps that you or I would see as being necessary, because there is a choice of a different way of addressing the issue.

Chris Skidmore: On the point of "necessary" versus "appropriate", it is worth taking into account the comments of the House of Lords Constitution Committee in its ninth report of the previous session, which said:

"it will be difficult tightly to define, in advance, the limits of the delegated powers granted under the Bill without potentially hobbling the Government's ability to adapt EU law to fit the UK's circumstances following Brexit. We do not think it is realistic to assume that the Government will have worked out, in advance of the Bill being considered by Parliament, what amendments will be needed to the corpus of EU law. That being the case, it is unrealistic to assume that Parliament will be able tightly to limit the delegated powers granted under the Bill—because it will not be clear what, exactly, they will be required to do."

The question of appropriate versus necessary must also be considered in the context of the negotiations.

The Convener: I will quote from the House of Lords Delegated Powers and Regulatory Reform Committee's report on the subject:

"Ministers have powers to alter 60 years of EU law when they consider it appropriate to deal with deficiencies arising from the UK's withdrawal from the EU. This goes much wider than the Government's White Paper commitment not to make major changes to policy beyond those that are necessary to ensure UK law continues to function properly".

Is this a bit of a U-turn?

Robin Walker: We still see it very much as a bill that provides continuity rather than one that makes changes to policy in any way. The specific point about using "necessary" as the terminology in drafting the bill is about ensuring that we are able to act in cases where there are a number of different options available, thus making no one option strictly necessary.

I want to reiterate the key assurance and the point that we made in the white paper, which is that the focus of the process is to provide continuity and certainty; it is not about making changes to policy. Where we see there being changes to policy, we will introduce primary legislation. The Government has announced primary legislation in several areas, so we have already seen that happening. After the point of exit, there will be further primary legislation to make policy changes. In the meantime, that is not in the interests of the United Kingdom because we recognise that people are calling out for maximum certainty and assurance through the process.

Chris Skidmore: The Constitution Committee report also stated that the bill would be

"an exceptional piece of legislation, necessitated by the extraordinary circumstances of Brexit: while the Government may make a case for a wide array of discretionary powers, this should in no way be taken as a precedent when considering the appropriate bounds of delegated powers in future."

The committee went on to recognise the sunset provision and the fact that the correcting power is curtailed by the sunset provision in clause 7(7). Even though the circumstances are exceptional in order to change legislation to adapt to the circumstances of leaving the EU, the committee welcomed the fact that the sunset provisions were in place.

The Convener: On the sunset provisions, will you explain the approach that you have taken in the sunset clauses? Why did you choose those time periods for the powers to lapse?

12:15

Robin Walker: Obviously, there are different sunset clauses in different areas in the bill. The withdrawal agreement powers under clause 9 are sunsetted at the point of withdrawal, as that is about making preparations so that the statute book is in the right place at that point. With regard to the deficiencies powers, we have recognised that it might not be possible to get all the relevant delegated legislation and corrections through by that point and we will need to prioritise those that are most important, so there is a two-year sunset clause on those particular powers, after the point of exit.

The important point that there are sunset clauses on those powers has been acknowledged by the various committees in the UK Parliament. It is important that we listen to the debate on that and make sure that that works in the most effective way.

The Convener: Would Chris Skidmore like to comment?

Chris Skidmore: I have no further comment on that point.

The Convener: Do you think that a sunset clause should apply to clause 11, which has caused quite a lot of controversy?

Robin Walker: That point was made to me at the Exiting the European Union Committee the other day. I will give the same answer as I gave the select committee, which is that I hope that the discussion on common frameworks can make progress so that there is no controversy, and that we can agree where the powers in clause 11 to use orders in council—because there is an agreement that common frameworks are not required—can be put to use to release certain areas. That should happen on a timetable that is sooner than any of the sunset clauses in the bill; it is something that we need to press on with. We need to make sure that we have that agreement, which would deal with the issue without the necessity of putting a sunset clause into the bill.

The Convener: How confident are you that you will get agreement on the common frameworks?

Robin Walker: It is obviously a good sign that the JMC agreed the key principles of that a short time ago. It is a very balanced agreement that reflects a respect for the devolution settlement and an agreement that there will be a requirement for common frameworks in some areas. We now need to move forward with the discussions; the Cabinet Office is leading that process in the JMC.

Chris Skidmore: When it comes to clause 11, we have been very keen to state in the clause itself that none of the powers that one sees if one looks at the powers that are currently held by devolved Administrations will be taken away. That is clearly stated in proposed new subsection (4B) of the Scotland Act 1998. There is also a commitment when it comes to proposed new subsection (4C) to release non-common framework powers, as and when those are suitably identified.

That was done in conjunction with the JMC on European Union negotiations. We agreed in a concordat on 16 October to investigate where common frameworks will be needed. That comes back to the point about the certainty and understanding that we want for all of our constituents across the UK and ensuring that, as we leave the EU, we protect the integral single market of the UK and ensure that we have stability for businesses and employers.

When it comes to those common frameworks, another meeting of the JMC(EN) will take place in December and we are willing to get to work as fast as possible. Minister Walker made the absolutely vital point that that work needs to happen now; it is not work on which we will create an artificial boundary in legislation that suggests that it can be completed in two years' time. It needs to happen now, in order to give the Scottish Parliament and all devolved Administrations confidence that we want to respect the devolution process.

The legislation, including clause 11, is framed within the existing devolution legislation. We believe in a strong UK and that can only be delivered through having a stronger devolution process. We hope to prove our commitment to returning more powers to the Scottish Parliament and other devolved Administrations by identifying areas of non-common frameworks that can be released. That is why the section 30 order in council process that is already in the Scotland Act 1998 will be used in future.

The Convener: The key thing is to do it through agreement.

Chris Skidmore: Absolutely. That is why I view today as an opportunity not only to be questioned by the committee, but to listen to and reflect on your concerns, and to take them back to Westminster. It is also an opportunity to invite members of the committee to write to the Cabinet Office or the Department for Exiting the European Union if they have additional concerns that are not raised today, because we are in the process of listening to what needs to be done.

The Convener: Mr Walker, when you appeared before another Scottish Parliament committee earlier today, an interesting phrase was used. You described something as a "deep-dive process".

Robin Walker: It was probably the Secretary of State for Scotland but, yes, that was discussed.

The Convener: All right—we will blame Mr Mundell for that. Do you have any idea what he was talking about?

Robin Walker: I think he was talking about the work that is being done to move forward from the previous JMC to the next one and to look into areas where, having agreed the principles on common frameworks, we can then take forward some detailed technical work at official level to begin to scope out where common frameworks might be needed and where they might not. It is important that that work between the Governments moves forward.

I cannot go much further than that, because I am reporting back on what my colleague said rather than on something that I said.

The Convener: We will take it that "deep-dive process" means detailed work.

Chris Skidmore: I am not betraying secrets by saying that, in the deep-dive processes that we are engaged in, areas such as agriculture and justice are being discussed regularly, if not daily, between officials, although I am not party to those discussions. As a minister, I have been struck by the enthusiasm with which officials from both the devolved Administrations and the UK Government are working together. There are significantly increased levels of co-operation, and rightly so,

because we need to ensure that all our constituents are confident that we in the Scottish and UK Parliaments are doing the right thing and making sure that the process works for all of us.

The Convener: Should those common frameworks appear on the face of the bill?

Robin Walker: The bill holds the power in the orders in council process, which was modelled on the approach that was taken in the Scotland Act 1998, where common frameworks are agreed not to be required to release areas and, where they are required, clause 11 provides for them to be maintained.

The aims of the bill are to provide continuity and certainty, which we need to do with regard to not only the existing domestic statute books but also our negotiations with the European Union, in order to show that we can deliver on the outcomes that we will commit to in any future trade negotiation. It is hugely in the interests of all the devolved Administrations and Parliaments and of the UK to agree between ourselves, so the fact that the bill provides that mechanism is key. What we have said, and I stand by this, is that we want the conversation on common frameworks to move forward as quickly as possible.

The Convener: The bill restricts any amendment of the Northern Ireland Act 1998, but it does not restrict amendment of the Scotland Act 1998. Why is it appropriate that provisions of the Scotland Act 1998 should be capable of amendment or repeal in regulations made under the bill?

Robin Walker: Across the range of legislation, there are references in provisions that would not make sense when we leave the EU. Unlike in other pieces of legislation, which will predominantly be corrected using the powers in the bill through secondary legislation, we have recognised the special standing of all three devolution acts, which is why the bill corrects as many deficiencies as possible in those acts in paragraph 2 of schedule 3.

You are right that the bill maintains a correcting power for the Wales act and the Scotland act, but that is limited to the correction of deficiencies and it is provided as a contingency arrangement to prevent gaps in the statute books. The Northern Ireland act is the main statutory manifestation of the Belfast agreement so, if it requires correction, that has to be carried out by primary legislation.

Bill Bowman (North East Scotland) (Con): Good afternoon. I have some questions on devolved authorities' powers. Can you explain the reason for the limitations on the correcting powers in schedule 2, which apply to devolved authorities but not to UK ministers?

Chris Skidmore: Again, it comes down to protecting the integrity of that single market. We want to ensure that there is no divergence. When we look at EU law, we see that there has not been any divergence. We have had those common frameworks, and we are simply carrying on the process by which section 2(2) of the European Communities Act 1972 has operated. That will ensure that, as we look at where common frameworks will or will not need to be established, we have certainty and security through knowing that, when it comes to ensuring that we have retained EU law, the situation is exactly the same as it currently is.

Robin Walker: I echo that. The key point with regard to schedule 2 and clause 10 is that they give the devolved legislatures important powers to make necessary corrections to their statute books, but that is within the framework of existing EU frameworks and the approach that they provide. As Mr Skidmore said, it is important to recognise that that approach echoes our current arrangements under European law.

I return to the point that the bill is about providing some continuity through the process rather than making big changes. We believe that it reflects the existing balance of the devolution settlement in allowing the devolved legislatures and Administrations to take decisions in all the areas where they could previously take decisions.

Bill Bowman: I have a related question. There is no procedure in the bill that allows Scottish ministers to make regulations urgently, although such a procedure is available to UK ministers. Can you explain the circumstances in which UK ministers would expect to use the procedure? Why is it not available to Scottish ministers?

Chris Skidmore: I think that there has already been a commitment in that regard. When it comes to the delegated powers memorandum for the bill, the Government has committed to not normally using the correcting power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority. That is a commitment to engagement and consent that we have looked at and that was made when the Secretary of State for Exiting the European Union, David Davis, made his second reading speech. It goes back to the point about certainty and control with regard to ensuring that we have a statute book that is ready for exit day.

Robin Walker: On the point about scrutiny, it is important to be clear that we would absolutely be prepared to listen to any suggestions from the Scottish Parliament or the Scottish Government about the appropriateness of the approach that we have for the UK Parliament. The reason why we have not written that into the bill is because of respect for the fact that, at the end of the day, the

Scottish Parliament sets its own scrutiny procedures. We would not want to introduce a novel concept without having had feedback from the Scottish Parliament that it would be welcomed. We would therefore appreciate your feedback and views on whether the area would be valuable to explore.

Bill Bowman: Are you saying that there could be such a procedure for Scottish ministers?

Robin Walker: If the Scottish Parliament decides to create such a procedure, it is certainly within its competence to do that. However, if the committee feels that the issue is something that we should look at further for the bill, we would be keen to hear that, because that is not something that we have heard to date from the Scottish Government or the Scottish Parliament.

The Convener: That is very useful. Thank you.

Monica Lennon (Central Scotland) (Lab): Good afternoon. Sticking with the theme of the devolved authorities' powers, I note that there is no equivalent for the devolved authorities of the power in clause 17 to make consequential or transitional provision in connection with the bill. Will you explain the reasons for that?

Chris Skidmore: Certainly. Consequential and transitional powers are standard powers that are included in most bills. The consequential power in clause 17 may be used by ministers to amend other laws only to the extent that they think that that is needed as a result of something that is done by the bill. The transitional powers will be used to manage the change from the old legal regime to the new regime that is introduced by the bill.

It is not normal practice to confer such a power in an act of Parliament on ministers in devolved Administrations. The Scotland Act 2016 and the Wales Act 2017 provide such powers but confer them only on UK ministers. However, in the interests of transparency and accountability, we have sought to put a number of significant consequential and transitional provisions that are necessary in relation to devolved matters on the face of the bill, where we could do so.

For instance, paragraphs 21 to 23 of schedule 8 introduce new definitions to the Interpretation and Legislative Reform (Scotland) Act 2010 on concepts created by that act that might have been lost by virtue of repeal of the European Communities Act 1972. Furthermore, powers are provided to the devolved Administrations elsewhere in the bill to make consequential provisions when they are exercising their powers under schedule 2. That means that they can make provisions that are consequential to the secondary legislation that they make using their powers under the bill.

The process is not exceptional but follows the existing pattern of legislation when applied to devolved Administrations. That is what we did previously in the Scotland Act 2016 and the Wales Act 2017. However, if there is a concern about that, we will take it back and look at it again.

12:30

Monica Lennon: Does that mean that there could be an opportunity to amend the bill to give more power to Scottish ministers?

Chris Skidmore: As Minister Walker, said at the beginning, we do not want to prejudge what will take place on the floor of the House. We have the committee stage to undertake and there are now more than 100 amendments specifically on the clauses that relate to devolution. I am in the process of meeting some of the authors of those amendments to discuss their concerns.

It is our duty as ministers to make sure that we reflect on all opinions. We value input from those people who want to make the bill work and want to ensure that we have a transition period that creates stability and security as we leave the European Union. We will listen to concerns during the bill process—we will have committee stage and then report stage. We are keen to ensure that we take the devolved Administrations with us and that we obtain support for the legislative consent motion at the end of the process.

Monica Lennon: Thank you. Notwithstanding the volume of possible amendments and the suggestions that people are making, what assurance can you give us that you will respond favourably and in a timely manner to requests from Scottish ministers for the UK to exercise the powers in clause 17 where that is considered necessary?

Chris Skidmore: I return to my original point. If Scottish ministers have concerns, we will listen to them and respond appropriately at the point at which the legislation allows us to do so during committee stage. I am not sure on which day clause 17 will be reached, but the relevant minister who responds to amendments on that day under the appropriated schedule set by the House will reflect on such concerns.

Monica Lennon: Can you explain why Scottish ministers' powers are restricted so that they cannot amend retained direct EU legislation? The committee has been reflecting on that matter and I hope that you can help us.

Robin Walker: This is fundamentally about where frameworks currently sit above both Scottish and UK law, at the EU level. We are having a conversation about frameworks through the JMC process. In order to provide continuity

and certainty, which is the aim of the bill, we need to maintain those frameworks where they are important, find areas where we do not necessarily need legislative frameworks as quickly as possible, and agree between us that we can use the order in council mechanism to move on.

There is no intention that there should be any permanent restriction on the powers that are held; it is about making sure that we have a process in place to provide continuity and certainty on the frameworks that we have and to increase the powers of each devolved Administration. That is absolutely our intent, which was set out in our white paper. We will continue to focus on that through the bill process.

Monica Lennon: We all appreciate that the discussions on common frameworks are on-going. The Minister for UK Negotiations on Scotland's Place in Europe has argued that the Scottish ministers should have that power and has suggested that, as devolution is predicated on subsidiarity, there should be scope for variation within the UK, with decisions being made at the appropriate level. How do you respond to that?

Robin Walker: There is already significant scope for variation within the UK in relation to the implementation and interpretation of EU law. Of course, the devolved Administrations already have significant powers in some of these areas, but they are constrained by the frameworks that sit at the EU level. We want to have a proper process for agreeing how we treat those constraints going forward so that there are not sudden changes that could disrupt the functioning of the very important UK internal market.

I appreciate that the minister has a different view of what the approach is setting out to achieve. Our view is that the approach respects the existing frameworks of devolution and the ability of the devolved legislatures to have their say on all the issues, while ensuring that we have a process for dealing with the frameworks that are required to continue functioning.

Monica Lennon: Thank you.

Bill Bowman: The committee is always interested in fees and charges. Schedule 4 confers on the UK ministers and devolved authorities a wide power to create and modify fees and charges in connection with functions that public bodies in the UK will take on exit.

The power goes beyond enabling public authorities to recover the cost of their functions. It is wide enough to enable taxation measures to be imposed, for example to cross-subsidise or cover the wider functions and running costs of a public body, or to lower regulatory costs for certain groups or sectors. Why is it appropriate for taxation measures to be included in subordinate legislation?

Robin Walker: We see two distinct categories of existing fees and charges relating to EU law: fees and charges that are made at EU level by institutions and agencies of the EU, and domestic fees and charges that are created in the UK for functions that UK public authorities perform and which stem from UK law.

As part of the preservation of EU law, directly affected provision on how an EU institution or agency can levy fees or charges on individuals will be converted into domestic law. The bill enables us to preserve UK domestic fees and charges that are connected with EU law under section 2(2) of the European Communities Act 1972 and section 56 of the Finance Act 1973: we will repeal the former, and the latter will no longer be exercisable in relation to EU obligations on exit, which means that a replacement power to make and update fees and charges is needed.

This is a very technical issue. I assure you that there is no intention to introduce new taxes or use broad powers under the provisions; it is very much about keeping things working in the way in which they have done previously.

Chris Skidmore: Schedule 4 exists simply because the bill provides that the deficiencies power in clause 7 cannot be used to

"impose or increase taxation",

so it cannot be used in all cases where fees or charges needed to be updated or set. The power in clause 7 is also sunset, so it would not be possible to keep fees and charges up to date in line with changes to inflation and increases or decreases in the cost of services. Also, the clause 7 power can be used only for fixing deficiencies, and not all fees will be deficient as a result of exit. That is why schedule 4 provides devolved ministers with powers in that regard; it is right that those powers are there.

Fees and charges that are set for services on a strict cost-recovery basis are not taxes, but a fee or charge might go further than direct cost recovery—for example if it cross-subsidises, is a compulsory levy or funds the broader functioning of an organisation—which suggests that there are fees that need to be flexible. Therefore, the power in that regard is in the schedule.

Bill Bowman: Why is it appropriate for ministers or devolved Administrations to sub-delegate the power to create fees or charges to a public body, and for that body to impose those fees or charges administratively rather than by way of statutory instrument?

Robin Walker: Again, that is really about replicating the effect of arrangements that exist in

the European Union. Where there are bodies that are able to apply fees and charges, clearly it will be necessary for us to replicate their effect. The approach allows the effect to be maintained, but there is no suggestion that sub-delegation will take place in areas in which it does not already take place under the existing arrangements.

Bill Bowman: Let me take that a step further. The bill provides that where regulations under the schedule 4 power impose a new fee or charge, the affirmative procedure will apply to scrutiny of those regulations, but that where subsequent regulations modify the fees or charges, the negative procedure will apply. In theory then, successive Governments may impose massive fee increases by regulations that are subject only to scrutiny under the negative procedure—a £10 charge might later become a £100 charge. Why is that considered appropriate?

Chris Skidmore: I do not think that there is any change. The Government's aim is to have the same continuity and certainty that exists with regard to the regulation of the fees that are applicable at the moment.

We need look only at existing fees and charges across the UK and the fees that are being paid at EU level by EU bodies and functions that will be transferred. An illustrative example of an area where we would expect an EU regime to be replaced by an equivalent UK regime is the chemical industry, where, in addition to functions relating to EU legislation, the Health and Safety Executive charges for approving pesticides. The executive would take on the functions carried out by, say, the European Chemicals Agency such as evaluating and authorising chemical substances on which the ECHA charges UK firms under EU registration, evaluation, authorisation and restriction of chemicals—or REACH—legislation. Without the ability to charge fees, the HSE would need to meet the costs of carrying out those functions from Government funding.

Of course, I cite that example without any prejudice to any future arrangements for any interim period or co-operation that we might negotiate with the EU, but the current fee and charging structures at EU level are simply being carried over. What we have here is continuity and stability instead of our disrupting a process for which we already have arrangements in place as part of our European frameworks.

Robin Walker: Just to go back to the point about replicating current arrangements, I believe that the scrutiny procedures that you have referred to also reflect the current scrutiny procedures for fees and charges. The creation of a new fee will require the affirmative procedure, but its maintenance—updating it for inflation, for example—will require only the negative procedure. I am happy to double check that and write back to you if necessary.

Bill Bowman: Perhaps there is room for better scrutiny.

The Convener: We will move on to a different line of questioning.

Stuart McMillan (Greenock and Inverclyde) (SNP): Good afternoon, gentlemen. The bill provides a choice of three legislative routes to exercise the powers of correction: first, regulations that are made by UK ministers acting alone; secondly, regulations that are made by a devolved authority acting alone; and thirdly, regulations that are made jointly by UK ministers and the devolved authorities. What factors will determine the choice of the route that is chosen?

Chris Skidmore: Let me use the joint procedure as an example. When will we expect such a procedure to be undertaken? At the moment, it provides a mechanism for allowing the devolved legislatures to scrutinise legislation. It is likely to be used when a devolved Administration requests that the UK Government legislate on its behalf but the appropriate change in order to retain EU law is so significant that we agree that it would be appropriate for the relevant devolved legislature to scrutinise the regulations, too.

What we are talking about is a process of evolution, not some new creation or new precedent. For example, the joint procedure was used by the UK Government and the Welsh Government in making the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017, which consolidated existing legislation and implemented EU obligations to provide a common strategic framework for the protection of the water environment in England and Wales. Given that the regulations were made under the section 2(2) power in the European Communities Act 1972, legally, they could have been made by the UK alone; however, in the circumstances and given their significant policy content, it was felt appropriate that they be made jointly to allow the National Assembly for Wales to participate in the scrutiny process. We will look at using the joint procedure on a case-by-case basis. Moreover, when it comes to powers that are conferred on UK ministers to act, we will not seek to take a conferred power without the devolved Administration first agreeing to that.

Again, I come back to the point that, until we understand where we need common frameworks and in which areas we can further strengthen the devolution settlements, we will, on issues of retained EU law for which there would traditionally have been a UK-wide operating framework, work together with the devolved Administrations on those areas in which conferred powers will be

needed—with regard to which we will ask for permission and try to get that request accepted—and on the joint procedure. Obviously, that will be taken on a case-by-case basis and based on an understanding of where such significant issues arise.

Stuart McMillan: What role do you envisage the Scottish Parliament having in decisions to proceed with the joint power and in decisions that the UK Government alone should exercise powers in devolved areas?

12:45

Chris Skidmore: The bill is explicit that we have provided for it to be in the Scottish Parliament's legislative competence to change the arrangements for scrutiny. We want to ensure that the scrutiny arrangements that are available to the Scottish Parliament will be decided by the Scottish Parliament with the devolved Administration—the Scottish Government. We also want to ensure that the Scottish Government is able to come up with its own arrangements for scrutiny of those issues going forward.

Stuart McMillan: The bill does not provide any mechanism for Scottish Parliament scrutiny of regulations that are made by UK ministers acting alone, irrespective of whether the regulations deal with a matter of significance for Scotland or would have attracted the benefit of the Sewel convention if the matter had been included in primary legislation. Will you explain why that is the case?

Chris Skidmore: The key point is that, as set out in the bill, the scrutiny procedures that apply in the devolved legislatures are the equivalents of those that apply in the UK Parliament. We have invited comments from the Scottish Government on the appropriateness of the scrutiny arrangements in the bill.

Defining and providing the scrutiny procedures is an integral part of creating a secondary legislative power and the legal position is that, if no scrutiny procedure is specified when that power is created, the relevant authority can exercise that power simply by making the instrument without any oversight role for the legislature. That would be unorthodox and irresponsible, which is why we have created provisions in the bill to ensure that the Scottish Parliament can provide for scrutiny of the use of the powers. However, we recognise the need for flexibility and that the Scottish Parliament may wish to adapt those scrutiny procedures at a later stage. An example of the evolutionary principle is the fact that we have added into schedule 7 of the bill the framework by which scrutiny should take place.

As a Government minister, I took the Digital Economy Act 2017 through Parliament. That act confers a number of new powers on the Scottish ministers and sets out the procedures for the Scottish Parliament's scrutiny of them. In its report as part of the LCM process, the Delegated Powers and Law Reform Committee commented on those procedures but at no point questioned the appropriateness of their inclusion in the bill.

When it comes to scrutiny, we have applied several different kinds of resolution, whether affirmative or negative, but we want to ensure that we work with the Scottish Government and the Scottish Parliament, and that the Scottish Government works with the Scottish Parliament. We recognise that the Scottish Parliament has different scrutiny procedures and technicalities that we want to be reflected in its ability to scrutinise future delegated legislation and regulations.

As you can see, the entire bill process has been framed as being about continuity, stability and certainty, which is why we have used existing frameworks and legislation. We have not looked to create new constitutional contexts; the bill is a process bill through which we need to ensure that the statute book remains applicable on exit day. That is why we have used existing processes to ensure the minimum degree of change and the maximum degree of stability.

Stuart McMillan: I did not hear you mention agreement with, or the consent of, the Scottish ministers in your reply, Mr Skidmore. The delegated powers memorandum states:

"The UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority."

I want to get a better understanding of what the word "normally" means in that sentence.

Chris Skidmore: You are absolutely right that that is in the delegated powers memorandum. I quoted that earlier. David Davis wrote to Mike Russell and Mark Drakeford on 13 July stating:

"I will commit at second reading that the Government will not use these powers to amend such legislation without first consulting you, and I have placed such a commitment in the bill's explanatory notes".

In the second reading, he stated:

"The Government are committed to ensuring the powers work for the Administrations and legislatures. For instance, I have already confirmed that we will always consult the Administrations on corrections made to direct EU law relating to otherwise devolved areas of competence."—[*Official Report*, *House of Commons*, 7 September 2017; Vol 628, c 356.]

We are determined to ensure that such engagement takes place and that, when we introduce legislation, we arrive at a process that enables that consultation to happen.

Stuart McMillan: The views of this committee and other committees are listened to in this Parliament. How can the committee's views, and those of the Scottish Parliament as a whole, be fed into the scrutiny of the statutory instruments at Westminster?

Chris Skidmore: We have a process by which we are legislating—the European Union (Withdrawal) Bill process. The bill is subject to the committee stage and report stage of the House of Commons. We want to have a bill that works for the whole of the United Kingdom. We want it to work for the devolved Administrations and to be able to receive legislative consent from them. First and foremost, we want to work with you to ensure that we get the bill right and take the Scottish Parliament and the devolved Administrations with us in the process.

We are here to listen and we look forward to the committee's report, which will feed into the Finance and Constitution Committee's interim report, which I believe will come out on 23 November. I will read that closely. I give you a commitment that this committee's work will be considered closely by ministers in the Cabinet Office and DEXEU to ensure that we have a bill that works for the United Kingdom's devolved Administrations.

The Convener: You talk about using the power to amend domestic legislation in areas of devolved competence and say that you want to work with the Scottish Government. However, what if you want to do something to which the Scottish Government does not agree? What happens then?

Chris Skidmore: When you look at the order in council process in proposed new section 29(4C) that clause 11 would insert into the Scotland Act 1998, you see that we have put into the bill a commitment to ensure that, when we have established what the common frameworks are, we can use a section 30 order under the 1998 act to provide further powers, using the existing reserved powers model, to strengthen devolution.

I want to ensure that the bill is seen as a process. It is absolutely necessary for ensuring that, when we exit the European Union, our statute book is correct and not deficient. That is its purpose. It is not to seek to redefine our constitutional processes, which is why it has been established on the basis of the successive devolution settlements. We will go away from the committee and reflect on any reassurance that we, as ministers, can provide.

Stuart McMillan: There have been a lot of positive comments about trying to get to a successful outcome for the four nations within the UK, which I welcome. Mr Skidmore, you spoke about providing stability and security and listening with regard to what needs to be done. On Thursday, at the Culture, Tourism, Europe and External Relations Committee, the Secretary of State for Scotland, Mr Mundell, spoke of wanting to

"have a united and cohesive approach."—[*Official Report, Culture, Tourism, Europe and External Relations Committee*, 2 November 2017; c 22.]

Scrutiny is crucial to that.

The JMC process, which you have touched on, has certainly not been working in the way that it should. This morning, at the Finance and Constitution Committee, Mr Mundell spoke of the need for intergovernmental relations to improve. What would the UK Government like to do? How do you envisage the IGR process improving not only to give the three Governments in the UK a better process but to allow the committee and this Parliament to have greater and better input?

Robin Walker: A lot of that fits into Chris Skidmore's area, so I will let him expand on it. However, from the start of the process, our department has recognised that there is a really important intergovernmental conversation to be had. We need to engage with the First Ministers and the relevant Europe ministers. There has been a lot of contact between David Davis and Mike Russell. We need to engage in contact through the JMC and bilaterally. It is important to recognise that, even though the JMC did not meet for much of this year, a lot of direct, bilateral contact went on between ministers. I welcome the fact that the JMC has now reconvened. In its new format, it has made welcome progress with the statement of joint principles.

We need to keep working on this. We need to make sure that we continue to lean into the relationship with each of the devolved Administrations. In that respect, we would really like to have an Executive in place in Northern Ireland. At the moment, we can deal directly with ministers in Scotland and Wales but we cannot in Northern Ireland, which is certainly a problem. It would be good to get beyond that. As the minister responsible, I know how seriously my secretary of state takes the issue—it is a major priority for us. Given that the Cabinet Office is leading on the cross-Government work, Chris Skidmore might want to add something.

Chris Skidmore: It is important to reflect that the consequential effect of the vote in 2016 is that there has been a necessary strengthening of the intergovernmental process. That relates not only to the number of occasions on which the JMC process is enacted—not just the JMC(EN) but the JMC (Plenary), which it feeds into—but to our ensuring that we have stronger working. We have an opportunity to reflect on the union, with an

understanding that we need to protect the single market that we operate within the UK for the livelihood of businesses across every border.

At the same time, in working together and creating strong bonds of co-operation, we must reflect on the fact that a union is only as strong as the devolution settlement that underpins it. I passionately believe that ensuring that we have a union that is fit for the 21st century is about reflecting the rights and responsibilities that are in the devolution settlement and understanding where we might be able to devolve further powers—that commitment is in the bill. It will begin a process through which the common frameworks arrangements and discussions will continue.

The concordat that was agreed on 16 October was a huge step forward in intergovernmental working. I am positive about the commitment that all the Administrations—the UK Government, the Scottish Government and the Welsh Government—have made to work together. We recognise that we have a duty and responsibility to ensure that our legislation works.

Stuart McMillan: The convener posed a question about the common frameworks, which you have touched on, too. That issue was discussed in the Finance and Constitution Committee this morning, when the convener of that committee asked whether the common frameworks should be included in the bill in order to allow scrutiny of them, given how important they are. Should that not happen?

The Convener: I have already asked that question.

Robin Walker: I tried to answer that question earlier. Given that the common frameworks process is running alongside the bill process, the bill deals with that issue through the order in council mechanism. Powers can be released when common frameworks are not required, and in clause 11 the ability is provided to maintain them where they are required. We all recognise the importance of moving forward with the discussion on common frameworks to a timetable. That will help to define the scope of clause 11. I discussed that with the Finance and Constitution Committee earlier. We are clear that that discussion will have some bearing on people's understanding of the clause.

Stuart McMillan: The detail of the frameworks is crucial for wider scrutiny, not just within the Parliament but by external organisations, particularly business interests. I accept the comment that there must be as little negative economic impact as possible when we leave the EU. The issue of the frameworks is crucial to making sure that the whole population are aware of the details.

My final question is on the issue of scrutiny and what information is available. There has been discussion about whether the 58 papers exist and, if they do, what detail they contain by way of economic and sectoral analysis. That came up at the Finance and Constitution Committee this morning and also at the Culture, Tourism, Europe and External Relations Committee on Thursday of last week. Can you clarify what the situation is regarding those papers? Do they exist?

13:00

Robin Walker: The most straightforward thing for me to do is to refer the committee to the written ministerial statement that was posted by our department earlier this week, which sets out some of that detail. I also discussed those matters in the debate on the original Opposition motion in the House of Commons the previous week. We have said that the information does not exist in the form that has been asked for—the 58 economic impact assessments to which the motion referred—but we have also said that there is sectoral analysis. In yesterday's debate, my colleague Steve Baker said:

"The sectoral analysis has been discussed with the devolved Administrations and the Joint Ministerial Committee, and we will give careful consideration, as and when information is released to the Select Committee, to how we share that information with the devolved Administrations."—[*Official Report*, *House of Commons,* 7 November 2017; vol 630, c 1335.]

I reiterated that in my evidence to the Finance and Constitution Committee earlier today. As I made clear in my speech during the House of Commons debate, there are some legal constraints on what information ministers can release, and we have to operate within those legal constraints. Because the motion in question asked us to refer information to a select committee, we need to make sure, first and foremost, that we agree with that select committee the terms on which the information will be released. However, as my colleague said, we will give careful consideration to how that information can be shared.

Stuart McMillan: If there are any aspects of that information in relation to which there could be a delegated powers aspect that needs scrutiny, will consideration be given to whether this committee can also have that information?

Robin Walker: I will certainly take note of that, but the analysis that we are talking about is sectoral analysis across the UK economy. I am not sure that that would necessarily be a relevant consideration, but if it is, we will come back to you.

Stuart McMillan: Thank you.

The Convener: We have a couple of questions on scrutiny. Schedule 7 to the bill lists specific provisions which, if included in secondary legislation, will require to be subject to the affirmative procedure. How did you choose the categories and is there any scope for including additional categories?

Chris Skidmore: The affirmative procedure for clause 7 applies where an instrument establishes a new public authority, transfers functions to newly created public authorities, transfers EU legislative powers—powers to make delegated or implementing acts—to a UK body, relates to fees, creates or amends criminal offences, or creates or amends a power to legislate . The restrictions on what could be used as the affirmative procedure and what could be used as the negative procedure reflect some of the restrictions that are in clause 7 as well. When we come to take forward secondary legislation or regulations, the understanding is that we have that scrutiny and the affirmative procedure in place. There is a commitment to ensuring that the devolved legislatures and the UK Parliament have the ability to monitor effectively the processes that are taking place.

Robin Walker: In relation to scrutiny it is important that, as a bill before the UK Parliament, it sets out a scrutiny procedure for the UK Parliament, and that it echoes that for the approach of the devolved Parliaments. However, we are very clear that, at the end of the day, control of the scrutiny procedures in the devolved Parliaments is a matter for them. If the devolved Parliaments want to take an approach to scrutiny at their level that is different from what is set out in the bill, they are absolutely empowered to do so.

The Convener: We explored that when we had Mr Russell in front of us, and we actually discussed the possibility of coming up with a bespoke procedure. You might want to think about that for the UK Parliament.

Robin Walker: We will be very interested to see your suggestions on that front.

The Convener: Okay—lovely.

Monica Lennon: I have some questions on engagement, which links to Stuart McMillan's questions about scrutiny. I am aware that there is a high volume of amendments. That might just be due to MPs doing their job well, but I think that there is a feeling that there was not enough effective consultation with stakeholders during the drafting of the bill.

The committee has heard from some stakeholders about the need for early engagement on consultation drafts of regulations to be made under the bill. There has been a strong emphasis on how important it is for stakeholders and, of course, the Parliament to have opportunities to propose amendments to draft legislation. I do not know whether you recognise those concerns. Do you consider that there is scope for strengthened scrutiny in some areas, along the lines of a superaffirmative procedure?

Robin Walker: Broadly, there has been a huge amount of engagement around the bill. We published a white paper and we have been engaging up and down the United Kingdom on the whole approach to our EU exit and, within that, on the bill.

The approach that is set out in the bill, which focuses on certainty and continuity, is very much a response to what we have been hearing from stakeholders about the importance of these matters. Again, that is set out in the Government's strategy. We constantly hear about the need to provide the maximum certainty through the process. The bill is therefore not, as some people might have liked it to be, a huge departure from the rules that we have worked under previously. It is very much focused on providing that certainty and continuity through the process.

There has been a high degree of engagement. You are right to say that there are a very large number of amendments, and the reason why we have such a long committee stage, with eight days in committee and eight hours guaranteed for each day, is that we want to have an opportunity to properly and fully respond to those. I recognise that some of the amendments have been very carefully drafted.

It is worth pointing out that there are large numbers of amendments partly because there are consequential amendments to some of the key ones, which have effects on different parts of the bill. In the area of devolution, a large number of the amendments are consequential. They amend clause 10 or 11, the detail of which is then picked up in the schedules.

With regard to scrutiny, we have to strike a balance. We want to make sure that all the delegated legislation under the bill can be properly scrutinised, and of course there are procedures in place to do that, but we also need to make it clear that a very large number of technical changes need to be got through in the time that we have available so that the statute book works in time for exit.

That is why it is so important that we focus on getting the workload done. I think that that is in the interests of each part of the United Kingdom. We will look very carefully at all the suggestions for scrutiny procedures, but we need to make sure that there are scrutiny procedures that enable the workload to be got through in time for our exit, and that is one of the mechanisms by which we will judge them.

Chris Skidmore: On the engagement to date, between 9 August and 24 October, when it comes to UK Government engagement at official level, with officials talking to the Scottish Government, the Scottish Parliament or Scottish MPs, or with ministers having those discussions, I can count on my list 14 separate occasions, and I am very keen to ensure that there is further engagement. My door is certainly open to any Scottish MPs who wish to discuss the bill with me. I have met Tommy Sheppard twice and Stephen Gethins once to discuss Opposition amendments, and I hope to meet anyone who has any issues as the bill goes forward.

There is a wider point about scrutiny once the bill is in place. We are seeking a legislative consent motion for the scrutiny arrangements for the bill, and that is why we have specifically provided for it to be within the legislative competence of the Scottish Parliament to change those arrangements, just as it is in relation to other powers of the Scottish ministers, because that is in the Scotland Act 1998.

At the moment, the scrutiny arrangements are simply the equivalent scrutiny procedures that apply in the devolved legislatures as they apply in the UK Parliament. However, as is normal practice, we have invited comments from the Scottish Government on the appropriateness of the current scrutiny arrangements in the bill. We respect the responsibility of the devolved legislatures to scrutinise subordinate legislation that is made by the relevant devolved authorities, and we remain open to suggestions and thoughts on how to ensure that the bill works in delivering a function to the statute book including scrutiny procedures. We very much welcome any future engagement.

Monica Lennon: It is helpful to know that lots of conversations are taking place between different parliamentarians and ministers, but I was thinking more in my question about some of the stakeholders outside Parliament, including some environmental organisations that we heard from at committee recently. Although “certainty and continuity” is quite a nice strapline, I do not think that many of those organisations feel that they have certainty in their areas of interest. To go back to the question, if the UK Government is not considering the superaffirmative procedure, how else do you propose to address the very real concerns of those stakeholders and of politicians who might share them?

Robin Walker: We have made a number of commitments publicly on the UK Government’s position that we want to be the greenest Government ever and to leave the environment in a better state than we inherited it in terms of our international and existing environmental commitments. We certainly recognise the importance of the environmental stakeholders in that space. I have been meeting many of them, as has my secretary of state. I know that this committee has taken evidence from RSPB Scotland, and we have had a number of meetings with that organisation.

Clearly, we have to ensure that we are taking an approach to this area in the bill that preserves the existing body of environmental law, which the bill absolutely does. However, we also have to look at what the policy is more broadly. As my colleague Steve Baker said to the Exiting the European Union Committee, there is very important work going on in the Department for Business, Energy and Industrial Strategy and the Department for Environment, Food and Rural Affairs to look at UK policy in this area going forward.

I am sorry if I am getting boring in repeating this but, to return to a basic point about the bill, it is not about making changes in the spaces that we are discussing but about writing into place the existing arrangements and protecting them as we exit the European Union. That is a crucial point when it comes to our environmental commitments. You will see under clause 8 that there are powers to ensure that we maintain our commitments to international agreements, which include a number of international environmental commitments. It is very important that we protect those as we go through the process. However, we have said to non-governmental organisations that, if they have specific concerns, we want to hear directly from them and we will respond to those concerns.

Monica Lennon: Brexit is many things, but boring is not one of them.

I think that we all agree about the importance of UK ministers, Scottish ministers and officials all working together and having lots of dialogue, but the point has been made to us that there is the potential for overlap and that sequencing issues could arise, too. Is there an intention to establish a cross-Administration steering group?

Chris Skidmore: The current process of intergovernmental relations is being led through the JMC (EN) process. With the concordat that was agreed on 16 October, there is a stepping up both the quantity and the frequency of engagement. There will be another meeting of the JMC (EN) in December, and the processes that have been established are being well used for engagement.

Monica Lennon: I was not clear in my question, because I was referring to a steering group for secondary legislation. Do you think that such a cross-Administration steering group could be useful?

Chris Skidmore: I can only restate my and the UK Government's willingness to listen to the Scottish Government and the Scottish Parliament regarding the appropriateness of scrutiny arrangements when it comes to the bill. We respect the responsibility of the Scottish Government and Scottish Parliament in that regard and we have given powers in the bill—this is obviously for a later stage—for it to be within the legislative competence of the Scottish Parliament to change the scrutiny arrangements. However, we want to be in a space where we are listening to ideas that reflect the concerns that are raised by both the Scottish Government and parliamentarians such as yourself.

Monica Lennon: Sure—

The Convener: I will just jump in there, Monica, on that point.

Monica Lennon: You are the convener.

The Convener: I am indeed.

I am just thinking out loud about that steering group idea. As Mr Walker knows, I went down to the House of Lords for a meeting of parliamentarians from all the devolved nations and, tomorrow, the deputy convener and I will meet members of the Public Administration and Constitutional Affairs Committee. There is dialogue between parliamentarians, but it is informal at the moment and I wonder whether there is merit in making it more formal.

13:15

Robin Walker: Formal and informal mechanisms both have their place and value. As I mentioned, our focus is on ensuring that we get the statute book into the right shape for exiting the European Union. In that process, it is important that we do not aim to rewrite the rules of the UK constitutional settlement, although of course we have to constantly look at how the arrangements between us can work better and more properly. Therefore, if there are ways of doing that, we should explore them.

Monica Lennon: I realise that we are probably watching the clock now—I can see that it is all a race against time—but there will be a huge amount of information coming forward. What will the UK Government do to share with us at an early stage information on the preparations for the volume and flow of statutory instruments? When can we expect to get information on that?

Robin Walker: That is a good question. When the statutory instruments have been enabled by the bill, we will have to consider what the best process will be to deal with that. Obviously, with the UK Parliament, we are looking at the appropriate mechanisms for managing the volume of statutory instruments that we are talking about. It is a substantial volume, although you will know that, under the existing arrangements, we have large numbers of statutory instruments, not least under the powers in section 2(2) of the European Communities Act 1972. The current arrangements are used to handling a certain amount of delegated legislation. In the approach that we take to the delegated legislation under the bill, we might want to find new mechanisms for communication as we move forward. We would have to ensure that we established the approach with the UK Parliament first and then followed up on that.

Monica Lennon: What information will you be able to share with devolved legislatures on forthcoming statutory instruments that amend domestic legislation in areas of devolved competence?

Chris Skidmore: Understandably, we are engaging actively with the Scottish Government to discuss how best to deliver the secondary legislation that is required for exit. That is being done behind the scenes with officials, to build up a shared understanding with the devolved Administrations of where the corrections to the statute books will be needed. Obviously, the Scottish Government is best placed to assess its capacity and the necessary resourcing to make all the secondary legislation that is required to prepare the statute book for exit. We believe that, when it comes to correcting deficiencies, the devolved Administrations, such as the Scottish Government, are best placed to know where those deficiencies are, and a commitment on that is integral to the bill. We want to work together, as we already do frequently, when it comes to statutory instruments that affect different nations in the UK. As Mr Walker said, we currently have powers under section 2(2) of the European Communities Act 1972, and we will see a continuation of those working practices.

Obviously, the volume of statutory instruments will need to be assessed, but it will be significant, and we want to understand where the Scottish Government will need assistance and where that is possible. We are determined to ensure that we work on this together, because there is a significant volume of legislation that requires deficiencies to be corrected. Many of those will obviously be technical corrections, and there might be a process by which technical amendments can be sifted faster. Engagement on that has already begun.

The Convener: Thank you, Mr Skidmore. You probably deserve a medal if you have had two meetings with Tommy Sheppard.

Chris Skidmore: He is my counterpart in constitutional affairs, and we have had constructive dialogue behind the scenes.

Obviously, when it comes to debates on matters of constitutional theory on the floor of the house or Westminster Hall, the UK Government's position may differ from that of the Scottish National Party, but I am determined to ensure that we can work together, because I believe, as I think Mr Sheppard believes, that that is in the common interests of our constituents.

The Convener: I am sure that he does.

As we have no further questions, thank you very much for your time. We will report by the end of next week, and we will make sure that you get a copy of the report. We will of course be interested in your response to it. As I said, it will probably be the first of a number of reports, so I hope that you will be prepared to come back at some point.

Robin Walker: If diaries allow, I would be happy to come back. It is important that we do that.

The Convener: That would be great.

I suspend the meeting briefly to allow you guys to get on with your day.

13:20

Meeting suspended.

13:22

On resuming—

Instruments subject to Affirmative Procedure

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

Registers of Scotland (Digital Registration etc) Regulations 2017 [Draft]

Land Registration etc (Scotland) Act 2012 (Amendment) Order 2017 [Draft]

Public Records (Scotland) Act 2011 (Authorities) Amendment Order 2018 [Draft]

First-tier Tribunal for Scotland (Transfer of Functions of the Additional Support Needs Tribunal for Scotland) Regulations 2018 [Draft]

First-tier Tribunal for Scotland (Transfer of Functions of the Scottish Charity Appeals Panel) Regulations 2018 [Draft]

First-tier Tribunal for Scotland Health and Education Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018 [Draft]

Criminal Justice (Scotland) Act 2016 (Modification of Part 1 and Ancillary Provision) Regulations 2017 [Draft]

Criminal Justice (Scotland) Act 2016 (Consequential and Supplementary Modifications) Regulations 2017 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328)

13:23

The Convener: The Tribunals (Scotland) Act 2014, under which the regulations were made, created a new structure for tribunals that deal with devolved matters, and provided for a first-tier tribunal and an upper tribunal. Within that structure, the first-tier tribunal has been divided into chambers according to subject matter, and one of those is the housing and property chamber. The regulations make provision for the rules of procedure for that first-tier tribunal.

Our legal advisers have drawn our attention to 10 errors in the regulations, three of which are recommended for reporting on significant grounds. The committee might wish to comment that, although it notes the explanation that has been given for each of the errors in the Scottish Government's response, it is highly unsatisfactory for the regulations to have been laid before the Parliament in their present form. The committee's role is not to provide a substitute for internal checking by the relevant Scottish Government department. It is worth noting that the Government has already responded to the questions raised by our legal advisers by laying an amending instrument.

The committee expressed considerable concern about the previous package of instruments relating to tribunals. In that context, it is very disappointing that an improvement has not been made. We have just been discussing the likelihood of a substantial increase in statutory instruments. I urge the Government to examine its quality control procedures in order to avoid laying instruments that contain so many errors in the future.

I will now set out where our legal advisers consider that there are errors in the rules in the schedule to the regulations, to which the committee might wish to draw the Parliament's attention.

On reporting ground (e), there appears to be a doubt as to whether rule 37(3)(a) is intra vires—that is, within the scope of the powers in the parent Tribunals (Scotland) Act 2014. In particular, the rule appears to preclude an appeal that is permitted by section 46(1) of the 2014 act in relation to a decision arising from a re-decided matter that has been made by the first-tier tribunal on review.

On reporting ground (i), the instrument appears to be defectively drafted in two respects. First, rule 86 refers to the "lessor" making an application under section 76 of the Rent (Scotland) Act 1984 and requires that the application must be signed and dated by the

"lessor or a representative of the lessee".

However, as applications under section 76 of the 1984 act are made by the lessee, the references to "lessor" should be to "lessee". That seems a basic point. Secondly, rules 106(a)(iv) and (v) do not make provision in relation to applications made by landlords under section 14(2) of the Private Housing (Tenancies) (Scotland) Act 2016.

On reporting ground (h), the meaning of the instrument could be clearer in three respects. First, the term

"assured tenancy reference to the First-tier Tribunal"

in rule 1 could more clearly align to the words "assured tenancy reference" in the remainder of the schedule. Secondly, it could be clearer in rule 10(4) that anything that is permitted or required under a practice direction or order may be done by a lay representative on behalf of a party. Thirdly, in rules 44(4) and 53(4), it could be clearer that sufficient notice of an inspection should be given in writing by the first-tier tribunal to both parties rather than to "the party".

On the general reporting ground, there are four issues. First, subparagraph (f) of the list in rule 43(1) unnecessarily duplicates the requirement in section 17(2) of the Property Factors (Scotland) Act 2011, which is already referred to in rule 43(1). Secondly, the reference in rule 69 to an application under section 36(6A) or (6B) of the Housing (Scotland) Act 1988 is incorrect. Thirdly, rule 92(g) in chapter 8 of the schedule appears to be unnecessary in so far as it refers to an application made under section 92(2) of the Rent (Scotland) Act 1984 in circumstances where chapter 8 does not make substantive provision in relation to that section. Fourthly, the requirements in rules 97(1) and (2) for the first-tier tribunal to notify "both parties" in relation to the variation or revocation of a letting agent enforcement order are inconsistent with rule 96(c), which refers to more than two parties.

I bet that members are grateful that they are not sitting in my place and having to read out all these mistakes.

Does the committee wish to draw the regulations to the Parliament's attention on those grounds?

Members *indicated agreement.*

The Convener: Does the committee wish to welcome the fact that the Scottish Government

agreed to make an amending instrument to address those points?

Members *indicated agreement.*

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

Development of Water Resources (Designated Bodies: Modification) (Scotland) Regulations 2017 (SSI 2017/347)

Water and Sewerage Services to Dwellings (Collection of Unmetered Charges by Local Authority) (Scotland) Amendment Order 2017 (SSI 2017/348)

Rent Regulation and Assured Tenancies (Forms) (Scotland) Regulations 2017 (SSI 2017/349)

Town and Country Planning (Fees for Monitoring Surface Coal Mining Sites) (Scotland) Regulations 2017 (SSI 2017/350)

Section 70 (Procedure) (Scotland) Regulations 2017 (SSI 2017/353)

Additional Support for Learning (Collection of Data) (Scotland) Regulations 2017 (SSI 2017/355)

Additional Support for Learning Dispute Resolution (Scotland) Amendment Regulations 2017 (SSI 2017/356)

Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2017 (SSI 2017/367)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

13:30

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

Criminal Justice (Scotland) Act 2016 (Commencement No 5, Transitional and Saving Provisions) Order 2017 (SSI 2017/345 (C 25))

Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No 3, Amendment, Saving Provision and Revocation) Regulations 2017 (SSI 2017/346 (C 26))

Education (Scotland) Act 2016 (Commencement No 3) Amendment Regulations 2017 (SSI 2017/352 (C 27))

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

The Convener: In relation to SSI 2017/346, does the committee wish to welcome the fact that the Scottish Government has revoked and replaced the Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No 2 and Saving Provision) Regulations 2017, which meets the commitment that was given to the committee in relation to that earlier instrument?

Members *indicated agreement.*

Housing (Amendment) (Scotland) Bill

13:31

The Convener: Agenda item 6 is the Housing (Amendment) (Scotland) Bill. This is an opportunity to identify matters in relation to delegated powers in the bill that the committee might wish to raise with the Scottish Government.

The purpose of the bill is to ensure that the influence that the Scottish Housing Regulator and local authorities can exercise over registered social landlords is compatible with RSLs being classified by the Office for National Statistics as private sector bodies in the United Kingdom's national accounts.

There are a number of delegated powers in the bill. Our legal advisers have suggested that the following questions could be raised in written correspondence with the Scottish Government.

The delegated powers memorandum indicates that the Scottish Government intends to use the power in section 8 only for the purpose of providing the ONS with the basis for classifying RSLs as private sector bodies in the national accounts if the bill, when enacted, does not achieve that. However, section 8(1) enables the modification of the functions of the Scottish Housing Regulator that relate to social landlords, which does not limit the powers by reference to the purpose or aim of securing the reclassification of RSLs to the private sector in the national accounts. Section 8(2)(a) also expressly enables different provision for different purposes. Does the committee wish to ask the Scottish Government for an explanation as to why it has considered it appropriate to draw the scope of the power in sections 8(1) and (2) in that more general way, or whether the power could be drawn more narrowly while at the same time implementing the policy intentions?

Members *indicated agreement.*

The Convener: The delegated powers memorandum indicates that the power in section 8 would be used only for the purpose of providing the ONS with the basis for classifying RSLs as private sector bodies. Does the committee wish to ask the Scottish Government for an explanation as to why it is appropriate that section 8(1) enables the modification of the functions of the regulator that relate to social landlords, which includes local authority landlords and local authorities that provide housing services, in addition to registered social landlords?

Members *indicated agreement.*

The Convener: Should it also be asked how it is anticipated that the power would be used in relation to social landlords apart from registered social landlords?

Members *indicated agreement.*

The Convener: The delegated powers memorandum indicates how, specifically, the Scottish Government intends to use the power in section 9. In the first instance, it intends to specify in regulations that local authorities may nominate only up to a maximum of 24 per cent of the board members of an RSL and may not exercise control over RSLs—for example, through a power to veto changes in an RSL's constitution. The Scottish Government intends to use the power subsequently if other forms of local authority control that amount to public sector control over RSLs come to light, or if the criteria that the ONS applies to determine public sector control change and such changes require the powers of local authorities to be amended further, to ensure that RSLs can continue to be classified to the private sector. However, section 9(1) enables any provisions

"for the purpose of limiting or removing the ability of local authorities to exert influence over registered social landlords through—

(a) appointing or removing officers of registered social landlords,

(b) exercising or controlling voting rights."

Section 9(5)(a) also enables different provisions for different purposes. Similar to the powers in section 8, the powers are not limited by reference to the purpose or aim of securing the reclassification of RSLs to the private sector in the national accounts.

Does the committee wish to ask the Scottish Government for an explanation as to why it is considered appropriate to draw the scope of the powers in section 9 in that more general way, or whether the powers could be drawn more narrowly while at the same time implementing the policy intentions?

Members *indicated agreement.*

The Convener: Should it also be asked why it has been considered not appropriate to set out the initial intentions for the exercise of the power on the face of the bill: that is, that the regulations may specify that local authorities may nominate up to a maximum of 24 per cent of the board members of an RSL and may not exercise forms of control over RSLs, such as the power to veto changes in an RSL's constitution?

Members *indicated agreement.*

13:36

Meeting continued in private until 13:39.

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