

Stuart McMillan MSP
Convener, Delegated Powers and Law Reform
Committee
T1.01
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12th December 2022

Dear Stuart

Retained EU Law (Revocation and Reform) Bill

Thank you for your letter of 30 November 2022. I welcome that the Committee has recognised the significance of the sweeping and unusual delegated powers in the UK Government's Bill, conferred on UK Ministers in devolved areas, and will be taking oral evidence on those powers. I look forward to hearing that evidence and reading the Committee's report in due course.

I note that the Committee has written to the Secretary of State for Business, Energy and Industrial Strategy, Grant Shapps, setting out similar concerns to those I and my officials have expressed with regard to the necessary scrutiny to be afforded to the Scottish Parliament within the Bill. I would welcome the opportunity to see his response and potentially to discuss it with you.

The Scottish Government is absolutely clear that the Bill should be withdrawn entirely by UK Government. This is a view shared by a broad number and range of stakeholders, most recently evidenced in an open letter to Mr Shapps signed by over a dozen organisations including legal and environmental groups, trades union and business leaders. The Bill risks a race-to-the-bottom on deregulation, disrespects the devolution settlement, and risks ending vital protections gained through 47 years of EU membership at the end of 2023. Should we not succeed in seeing the Bill withdrawn, the Scottish Government will do all we can to prevent its worst impacts on devolved matters, to protect standards and, where practicable, to maintain alignment with EU law.

I am pleased to offer responses from the Scottish Government to the nine questions from the Committee in the Annex to this letter. The Committee's questions are pertinent and timely – the Scottish Government has spent considerable effort seeking clarity on many of the same issues - and it is concerning that there does not appear to be a clear plan for implementation

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beyond passing the legislation that the UK Government is willing or able to share with us, or indeed the other devolved governments. Where my responses are somewhat brief this reflects that lack of clarity and certainty. I would be happy to provide more information on any matter the Committee raises if I receive it.

I will also keep Parliament updated on the potential use of Bill powers as matters develop and as I receive more information. It remains my hope that the UK Government will withdraw the Bill, or at least seriously engage with the Scottish Government's constructive suggestions for amendment, and I would welcome the committee's support in this regard.

Yours sincerely ,

ANGUS ROBERTSON

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Annex

1. What, if any, processes the Scottish Government has put in place, or intends to put in place, to identify all the devolved retained EU law (“REUL”) that would be subject to the sunset.

The UK Government is imposing the REUL Bill on the Scottish Government and the Parliament which provides for all devolved REUL to automatically sunset. Therefore it is incumbent on the UK Government to take responsibility to identify all REUL at risk of sunset and to provide the Scottish Government with that information. In that regard the Scottish Government is concerned that the public Retained EU Law Dashboard is not comprehensive. Therefore as a responsible Government we are beginning the work of identifying devolved REUL.

The Scottish Government’s starting point is that devolved REUL should be preserved, as appropriate, so that it does not sunset at the end of 2023. The Scottish Government is seeking to ensure that laws are not lost at the end of 2023 and that we remain, insofar as is possible and appropriate, aligned with EU law. However, due to the way that REUL has been embedded in our legal system since 1972, we consider that it will be very difficult to ensure that we have identified all devolved REUL.

2. What the Scottish Government’s intentions are, and what processes it will put in place in order to decide which pieces of REUL it wishes to preserve and which pieces it does not wish to preserve.

As the Committee is aware the Scottish Government is calling on the UK Government to withdraw the Bill. The Scottish Government does not believe that REUL should be sunset in Scotland or indeed the UK as a whole. The Scottish Government also opposes the underlying deregulatory intent of the legislation. That said, if the Bill passes all REUL will sunset unless active steps are taken to preserve it and Scottish Ministers are not given powers to extend the sunset date for devolved REUL.

Therefore if the Bill passes the Scottish Government intends to use the power in clause 1 of the Bill to stop laws from being lost. The first step as the Committee has identified is identifying devolved REUL which in itself is challenging as per the answer to question 1.

3. What are the timescales for decision-making by the Scottish Government regarding whether to let a piece of REUL fall away, or whether to preserve it.

No preservation or other instruments can be made under the Bill unless and until it has received Royal Assent and is in force, which is expected to be around May 2023. Once this has happened, the Scottish Government would intend to lay secondary legislation to seek to ensure that laws are not lost at the end of 2023.

4. How does the Scottish Government intend to use the powers in clauses 1, 12, 13 and 15.

The Scottish Government considers that these powers demonstrate the unnecessary and unhelpful nature of this Bill when it is providing for powers to maintain or restate EU law. Additionally, we should not be required to adhere to an arbitrary and truncated timetable to do so – the UK Govt’s approach ignores usual processes for lawmaking and also ignores the

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different nature and processes for the Scottish Parliament as compared to Westminster. The Scottish Government considers that any case for reforming devolved REUL is best progressed through the ordinary Scottish Parliament legislative processes, which build in time for consultation with stakeholders and consideration of impact assessments, and which enhance parliamentary scrutiny.

The earlier answers acknowledge that if the Bill passes, the Scottish Government will have to use the clause 1 power to stop devolved REUL from being lost. Should the REUL Bill pass, we will consider what use we might require to or wish to make use of the reform powers in clauses 12, 13 and 15 of the Bill as part of the work being done to stop laws being lost.

5. In the absence of the Scottish Government having the power to extend the sunset, what the procedure would be for the Scottish Government to request that UK Government exercises this power to extend the sunset in relation to specified devolved legislation.

The Scottish Government has already requested that the extension power be conferred on devolved Ministers as we do not consider it appropriate that only UK Ministers have to power to extend the sunset for devolved REUL. A proposed amendment to this effect was not taken up by the UK Government during committee stage in the House of Commons. Nonetheless, the Scottish Government is awaiting a response from the UK Government as to how this request may be dealt with during the Lords stages. If the Bill passes without change, then although the Scottish Government could make a further formal request of the UK Government to extend the sunset in relation to devolved REUL it would be up to UK Ministers to make the decision about extension. This is in my view wholly unacceptable and of course could have consequences for the workload of this Parliament too.

6. How the Scottish Government intends to facilitate scrutiny by the Scottish Parliament of Ministers' plans either to let REUL fall or to preserve it, given that there is no means for either the Scottish or UK Parliament to scrutinise a decision to do nothing and let REUL fall.

The powers in the Bill can only be used if and when the Bill has received Royal Assent and is in force. After that point, the Scottish Government intends to lay secondary legislation to seek to ensure that laws are not lost at the end of 2023. The Bill provides that laws are lost unless Ministers bring forward legislation, without any mechanism for scrutiny of the laws that are going to be lost. This is yet another flaw in the Bill which our proposed amendment in the House of Commons sought to remove, and we will discuss with the Parliament how best to ensure appropriate scrutiny.

7. How the Scottish Government proposes to use the powers in the Bill to alter policy, given that the Bill effectively imposes a regulatory ceiling.

The Scottish Government does not have any current plans to use the powers in the Bill to alter policy but we will continue to assess this as part of the work being done to prevent laws from being lost. Again we reiterate our commitment to remain aligned with EU law insofar as is possible and appropriate.

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8. How the Scottish Government plans to keep stakeholders informed of regulatory changes which affect them.

The Scottish Government acknowledges the knowledge and interest of stakeholders in areas of devolved REUL affecting them and notes their strong concerns about the Bill. Ministers and officials regularly meet with stakeholders across portfolios and these engagements will include hearing stakeholder views on the future of devolved REUL. In this regard it is welcome that the Committee and other scrutiny Committees are taking stakeholder evidence about the REUL Bill.

Ministers have made clear their opposition to the Bill to stakeholders. Should the Bill pass, the Scottish Government will keep stakeholders informed in line with our usual consultation processes, and stakeholder views will inform Ministers' decisions on the future of devolved REUL in different areas. However, given that the Bill provides a very unrealistic deadline of devolved REUL sunseting at the end of 2023 unless preserved, it may well be that standard consultation processes will have to be adapted.

9. What steps the Scottish Government is taking to mitigate against the risk of unintended or undesirable regulatory gaps emerging due to the blanket application of the sunset provision.

The Scottish Government is working at pace to identify devolved REUL and seek to ensure that law is not lost and this work is designed to mitigate against these risks. However, it will be very difficult to identify all devolved REUL given the way in which it has been embedded in the legal system since 1972. The Parliament will be kept updated on this work, given that it will have a role to play in these legislative processes.

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