Dear Presiding Officer,

At its meeting yesterday morning the Delegated Powers and Law Reform Committee (DPLRC) considered the delegated powers in the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. To inform its consideration the Committee took evidence from the Minister for UK Negotiations on Scotland’s Place in Europe.

The role of the DPLRC in scrutinising the Bill is the same as in relation to all other bills considered by the Committee. That is, to consider the delegated powers in the Bill conferred on the Scottish Ministers. Specifically, its role is to consider whether:

- it is appropriate to confer these powers on the Scottish Ministers;
- the powers are appropriately framed;
- the powers match the policy intention as expressed in the Delegated Powers Memorandum; and
- the powers are subject to an appropriate level of parliamentary scrutiny.

Having taken evidence, the Committee agreed to write to you ahead of the Stage 1 debate to draw the Parliament’s attention to issues arising in relation to particular delegated powers in the Bill.

In the course of the evidence session the Minister agreed to supply the Committee with additional information and this is included as an Annex to this letter.

The official report of the Committee’s evidence session with the Minister can be found at the following address:
Delegated powers

Section 7 – challenges to validity of retained (devolved) EU law

Section 7(1) of the Bill prevents a challenge to retained (devolved) EU law after exit day on the ground that the EU instrument was “invalid” before that date. Section 7(2)(b) and (4) of the Bill allows Ministers to make regulations to dis-apply that rule for particular situations.

The Committee asked the Minister about the circumstances in which this power might be used. The Minister committed to writing to the Committee on this point (see Annex).

The Committee notes that introducing a right of challenge in the way that section 7 does, could create significant outcomes in the courts. The Committee therefore welcomed the Minister’s willingness to listen to suggestions that regulations under this power should be subject to an enhanced affirmative procedure to allow the Parliament an opportunity to review the regulations before they are formally laid for scrutiny.

Section 11(1) – dealing with deficiencies arising from UK withdrawal
Section 11(3)(b) – describing or providing for a kind of deficiency in retained (devolved) EU law

Section 11 of the Bill confers a wide power on the Scottish Ministers to correct failures of “retained (devolved) EU law” to operate effectively and also to correct deficiencies in retained (devolved) EU law. The Committee has already considered evidence in connection with similar powers in the European Union (Withdrawal) Bill. In its report on that Bill, the Committee concluded that “the powers should only be available where Ministers can show that it is necessary to make a change to the statute book, even if they cannot show that the particular alternative chosen is itself necessary”.

The Committee therefore welcomes that this Bill has restricted Ministers’ powers to making changes that are ‘necessary’ rather than ‘appropriate’. It was explained to the Committee that for the purposes of this power the Minister must be satisfied that it is necessary for a particular purpose, i.e. to make provision for the purpose of preventing, remedying or mitigating a failure or other deficiency under section 11. It was described as a “textured test” rather than just an exercise of pure judgment by the Minister and this is welcomed by the Committee.

Section 13(1) – power to make provision corresponding to EU law after exit day

Section 13(1) is described as a “power to make provision corresponding to EU law after exit day”. The Government’s Delegated Powers Memorandum describes the power as giving “Scottish Ministers the ability to ensure that, where appropriate, devolved law in Scotland keeps pace with post-withdrawal developments in EU law”.

This is a very significant power and would potentially allow delegated powers to be used for a wide range of circumstances that may otherwise be considered appropriate to be done by primary legislation.

The Committee queried whether this power was appropriate to the purpose of this particular Bill. The Committee also queried whether there was the same urgent need for such a power and, therefore, whether it was appropriate to include such a power within a bill being treated as an emergency bill.

The Minister explained that this power had been included in the Bill in response to concerns raised by stakeholders and that he had been surprised that a similar power had not been included in the European Union (Withdrawal) Bill. He explained that this power was needed for practical reasons to ensure that, where appropriate, certain areas of law could keep pace with EU law. The Minister suggested that environmental law and food safety law were areas in which there may be a desire to use this power to keep pace with EU law. In his view, this power was appropriate for inclusion in this Bill.

Section 14 – scrutiny of regulations under sections 11, 12 and 13

Section 14 makes provision for the scrutiny procedures to apply to regulations under sections 11, 12 and 13. The Committee was pleased to hear from the Minister that he was willing to listen to suggestions for the criteria to apply to what procedure regulations are subject to, to change.

Section 19 – power to provide for fees and charges

In the Committee’s report on the European Union (Withdrawal) Bill, the Committee expressed concern about the capacity for Ministers to impose taxation measures in regulations under schedule 4 of that Bill. The Committee also raised concerns about the potential for sub-delegation and the scrutiny procedure attached to regulations under schedule 4 of that Bill. Section 19 of this Bill replicates those provisions.

The Committee explored this power with the Minister. While he is of the view that what is in the Bill is appropriate, he advised the Committee that he would be willing to listen to suggestions from the Committee to amend the power. The Committee notes this willingness and may return to consider this power further.

Section 28 – meaning of “exit day”

The Bill allows the Scottish Ministers to set an “exit day” by regulations. The power does not provide any limits on the date that can be fixed. The Committee asked the Minister why the power was not simply expressed in terms of being the day the UK leaves the EU. The Minister indicated that the power would not be used to set a date for exit day that was different to the one for the UK. He advised the Committee he would bring forward an amendment to respond to the issues raised by the Committee. The Committee is pleased to welcome this commitment.
Other matters

In addition to exploring the delegated powers in the Bill, the Committee also asked the Minister and his officials for a legal reasons as to why the Bill had to be subject to the emergency process. The Minister committed to providing that explanation. The Committee has not had the opportunity to consider that response, but it is included in the Annex to this letter to inform parliamentary consideration.

A copy of this letter will also be sent to the Conveners of the Finance and Constitution Committee, Culture, Tourism, Europe and External Relations Committee, Equalities and Human Rights Committee and Environment, Climate Change and Land Reform Committee.

Yours,

Convener of the Delegated Powers and Law Reform Committee
6 March 2018

Dear Graham,

UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL – DELEGATED POWERS

At this morning’s meeting of the Delegated Powers and Law Reform Committee, I committed to writing to you on a number of points which were raised by committee members.

The reasons for seeking the Bill’s passage before the EU (Withdrawal) Bill

I committed to giving further detail of the reasons why the Scottish Government considers it essential for the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill to pass before the EU (Withdrawal) Bill becomes law.

I explained in the Chamber on 1 March 2018, when the Parliament agreed to treat the Bill as an emergency Bill, that there are both principled and practical reasons for this approach.

The first arises from the legislative consent process. Though we continue to seek agreement over the EU (Withdrawal) Bill, if the Scottish Parliament does not consent to that Bill it is important that the UK Government should have sufficient opportunity to make suitable amendments to remove the devolved material and to ensure appropriate interaction with the Continuity Bill.

Secondly, the legislative work required to prepare for withdrawal is recognised as a substantial task. The UK Government is planning for the EU (Withdrawal) Bill to be passed in May so that secondary legislation can start to be made and laid before Parliament shortly thereafter, making full use of the period before the UK is due to leave the EU. We want to be able to co-ordinate those preparations where we can. We would not want the Scottish Parliament to receive less time than the UK Parliament is receiving to consider this programme of legislation. To achieve this it will be necessary for instruments to be put

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forward for scrutiny under the Bill while not taking effect in a way that is incompatible with EU law until the UK leaves the EU. To enable that to happen, just as is the case with the UK Bill, the relevant enabling powers come into force on Royal Assent and can be exercised immediately after that.

Finally, there are more technical reasons which relate to the potential interaction between the two Bills. When the UK leaves the EU, EU law will cease to apply and the EU law constraints on the powers of the Scottish Parliament and Scottish Ministers will cease to have any content. However, it is also the case that the UK Parliament can introduce new constraints on those powers subject to getting the approval of the Scottish Parliament under the Sewel Convention. The UK Bill, as it currently stands, potentially introduces such a constraint in clause 11. Additionally, as mentioned at Committee this morning, paragraph 19(2)(b) of schedule 3 of the UK Bill amends schedule 4 of the Scotland Act 1998. That would protect the Act which the UK Bill would become from modification by the Scottish Parliament. If those provisions were to be enacted in unmodified form, this could then be relevant to the competence and effect of this Bill.

Challenges to the validity of retained (devolved) EU law

My officials also committed to providing the Committee with further background on the rationale for section 7(2), which contains a delegated power allowing categories of challenge to retained (devolved) EU law to be specified in regulations on the basis that, immediately before exit day an EU instrument was invalid.

In Case 314/85, Firma Foto-Froist v Hauptzollamt Lübeck-Ost, the Court of Justice held that national courts could not decide for themselves whether provisions of EU law were invalid. Only the Court of Justice can perform that function. The grounds on which the validity of EU law can currently be challenged include incompatibility with the Charter of Fundamental Rights, or where it is contended that secondary EU law has no basis in the Treaties.

The UK Bill has an equivalent power in paragraph 1(2) of Schedule 1.

In removing the right to challenge retained EU law on the basis that an EU instrument was invalid, it is recognised in our Bill and the UK Bill that it would generally not be appropriate to create a new jurisdiction for the domestic courts in which they are required to, in effect, step into the shoes of the CJEU and consider questions such as whether the relevant EU institution misused its powers or complied with the applicable procedural requirements when making the instrument.

However, it is also recognised that in some circumstances individuals or businesses may be individually affected by an EU instrument. A decision may have been addressed directly to that individual or business and it may be appropriate to allow the validity of the retained EU law that has been incorporated into domestic law to be challenged. In particular, article 6 ECHR may be engaged in some cases. This power will allow the Scottish Ministers to provide for or describe the kinds of challenges that may be made after exit day to retained (devolved) EU law on the grounds that the underlying EU instrument was invalid. This will ensure that, after UK withdrawal, certain instruments that have been incorporated into domestic law by the Bill can still be challenged on the grounds of invalidity. It is expected that specific provision will be needed to set out who any such challenge should be brought against. As such under subsection (4) the regulations can provide (among other things) for...

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the relevant challenge to be brought against a Scottish public authority instead of an EU institution.

If preparation of Scotland’s devolved laws for EU withdrawal ultimately requires to be done under the Continuity Bill, then the Scottish Ministers would seek to make complementary provision in respect of devolved laws in relation to the equivalent provision made under the UK bill.

Yours Sincerely

MICHAEL RUSSELL