

## **Written submission from Alan Page**

### **UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill**

Thank you for the invitation to give evidence on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (LCSB). In the limited time available to consider the Bill and its accompanying documents let me confine myself to three comments.

#### **An effective solution?**

The first concerns whether the Bill as introduced constitutes an effective solution to the challenge the Scottish Parliament will face in preparing Scotland's devolved laws for the effects of EU withdrawal in the event of legislative consent being refused to the European Union (Withdrawal) Bill (EUWB), and the offending provisions then being excised from the EUWB, as the Scottish Government considers would be the constitutionally correct response, leaving the Scottish Parliament with no choice but to make its own provision.

I have considerable doubts over whether the Bill as introduced does constitute an effective solution to the challenge the Scottish Parliament will face. I say that for the simple reason that the Bill does not resolve - indeed cannot resolve - the critical question, which has never had to be addressed in any detail before, of which EU competences are devolved and which are reserved, and hence where the 111 returning EU competences which intersect with the devolution settlement will sit after the UK has left the EU.

If we take EU-derived domestic legislation as an example, the question that will immediately arise is whether it is continued in effect by what is currently clause 2 of the EUWB or by section 2 of the LCSB. If it is continued in effect by LCSB section 2 the Scottish Ministers can act: if it is continued in effect by EUWB clause 2 they cannot.

The LCSB's answer to this question is to say that it is continued in effect by LCSB s 2 if 'it makes provision that is (or would be, if it were contained in an Act of the Scottish Parliament) within the legislative competence of the Scottish Parliament' (LCSB s 2(3)). But that is to simply restate the question in another form, not to resolve it, which in my view can only be done with any degree of legal certainty by legislation. The alternative is litigation, which I assume both governments will be equally keen to avoid.

In the absence of a statutory solution, working out which provisions of EU-derived domestic legislation are continued in effect by which Act will be a far from easy matter, particularly bearing in mind that relatively that relatively little EU-derived domestic legislation takes the form of Acts of the Scottish Parliament or Scottish statutory instruments.

The practical upshot, however, assuming the LCSB reaches the statute book, will be to leave any instrument made in the exercise of the powers it confers vulnerable to challenge on the grounds that it is outside devolved competence (Scotland Act 1998, s 54(2)); and, with the instrument, the relevant provision of the Act itself on the

grounds that it confers power by subordinate legislation to modify the law on reserved matters (Scotland Act 1998, sch 4, para 2).

I do not know whether this is what the Presiding Officer had in mind in making his negative statement when he said that the Parliament cannot anticipate powers it does not possess, but this it seems to me is the central flaw in the LCSB as introduced, and why it is imperative therefore that an agreed way forward be found.

### Section 13

My second comment relates to section 13, which would see the Scottish Ministers given the power to make sure that, where appropriate, the law in devolved areas, keeps pace with developments in EU law after UK withdrawal (Explanatory Notes para 76). No explanation is offered for seeking this power in the policy memorandum accompanied the Bill, but presumably it reflects a desire to stay as close to the EU as possible in those (relatively few) EU policy areas that are within devolved competence; as I explained in the report I prepared for the Parliament's Culture, Tourism, European and External Affairs Committee shortly after the referendum the vast majority of returning competences will fall to Westminster rather than the Scottish Parliament. The desirability or otherwise of that as a policy objective is a matter for the Scottish Parliament, but its corollary is that the Scottish Ministers will be taking powers to implement EU instruments over which the Scottish Parliament will have had no say, a potentially major surrender by the Parliament of its legislative competence, and one which under the Bill as introduced may be extended indefinitely.

### Section 17

My final comment relates to section 17, which seeks to introduce a requirement of Scottish ministerial consent to subordinate legislation made by UK ministers under powers conferred by the EUWB in the devolved areas. As I have said in evidence to the Committee before, it is contrary to the principles on which the devolution settlement is based for powers which the EUWB will see conferred on UK ministers to be exercisable in the devolved areas subject only to a non-binding requirement of consultation with Scottish Ministers – and with no provision for Scottish parliamentary scrutiny of their exercise. The preferable way to remedy that, however, would be by an amendment to the EUWB, as the Scottish and Welsh Governments have proposed, rather by seeking to impose a fetter on powers conferred by a UK Act of Parliament which would be open to challenge as a breach of the principle of intergovernmental immunity.

One again therefore the need for an agreed way forward is underlined.

Alan Page

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