



Rt Hon Ken Macintosh MSP  
Presiding Officer  
The Scottish Parliament  
Edinburgh  
EH99 1SP

16 January 2018

Dear Ken,

As we go into Commons Report stage today and tomorrow, I am writing to provide you with an update on amendments made to the EU Withdrawal Bill (the Bill) at Committee, and to highlight amendments that the Government has tabled for Report stage consideration.

You will be aware of our continuing commitment to improve clause 11 of the Bill; whilst it has not been possible to bring forward an amendment at Commons Report, we have reaffirmed our commitment to amend this provision in the House of Lords and discussions continue between the UK Government and the Devolved Administrations to enable us to do so.

### **Committee stage amendments**

The first of these amendments was tabled by the Government and concerns the explanatory memoranda produced to accompany regulations made using powers under the European Union (Withdrawal) Bill. It places requirements on UK Government Ministers to include information in those memoranda.

The second amendment was tabled by Charles Walker MP, Chair of the Commons Procedure Committee, and amends Schedule 7 of the EU (Withdrawal) Bill. The amendment requires Ministers of the Crown to lay Statutory Instruments which they are proposing to make under the negative procedure under the three principal powers in the Bill (clauses 7(1), 8 and 9) before the Commons for consideration by a committee. You will also wish to note that the Government has tabled consequential amendments relating to these matters ahead of Report stage of the Bill.

These amendments do not place requirements on Scottish Ministers and do not apply to the Scottish Parliament. Nonetheless I have asked my officials to discuss these provisions with your officials and officials from the Scottish Government to ascertain the Scottish Government and Scottish Parliament's views on these and I understand that engagement has already begun. I have attached at Annex A a list of questions we have asked the Scottish Government on these issues. I am interested in any further engagement you would find useful.

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## **Clause 10 amendments**

We have listened to the arguments put forward by the Scottish Government and the Welsh Government on the powers in clause 10 and will be bringing forward two amendments.

The first amendment will change the requirement for the DAs to seek the consent of the UK Government in exercising the deficiencies power to a consult requirement. This is in line with the amendment published by the Scottish and Welsh Governments. The second Government amendment will set out that, where it has been agreed that we will not need a framework through the Order in Council process, the devolved administrations should be able to use the powers in the Bill to modify direct retained EU law.

We recognise the importance of working with the devolved administrations to ensure the Bill works for all parts of the UK and these amendments are evidence of our willingness to make improvements to it. We are of course continuing discussions with the devolved administrations on how we can best manage the task of preparing the statute book for Exit Day and I understand officials had a useful meeting last week. My colleagues and I continue to be grateful for the constructive engagement of the Scottish Government on these issues.

## **Clause 7 amendments**

We have tabled amendments to clause 7 in order to make absolutely clear the scope of the power in this clause, given some of the speculation on ways it could be used. These amendments ensure the correcting power can still make all the changes required to deliver a functioning statute book.

We have tabled amendments which restrict the scope of the power to correct deficiencies in retained EU law by making the list of deficiencies given in clause 7(2) exhaustive rather than illustrative. This means that the correcting power can only be used if the deficiency is in that list.

To ensure the scope of the power matches the range of deficiencies identified there are two further amendments list:

- One, the amendment includes a 'sweeper' provision which will mean that deficiencies not on the list but which are similar are recognised in the same way. For example, where 'Member States public authorities' are referred to the 'sweeper' provision will mean that EEA-EFTA public authorities could also be included.
- Secondly, if the Government wanted to add anything to the deficiencies list then the Government could do so through an affirmative SI requiring the approval of both Houses of the UK Parliament.

These amendments do not place requirements on Scottish Ministers. However, they will ensure that Scottish Ministers can use their powers conferred by clause 10 and Schedule 2 to correct, in devolved domestic law, the same sort of deficiencies as UK Ministers. I have asked my officials to discuss these provisions with Scottish Government officials.

This list of deficiencies applies across the UK. The UK Government believes it is important that there is consistency between jurisdictions in the UK, so additional types of deficiencies will also apply to devolved ministers' powers. We would expect to consult with colleagues in the devolved administrations to ensure they are able to make necessary changes to prepare their statute book for Exit Day.

The UK Government will also carefully consider any suggestions for additional categories of deficiencies from the devolved administrations. We expect to accept any proposals from the devolved administrations that are needed to ensure the devolved ministers are able to make the appropriate changes to prepare their laws for Exit Day.

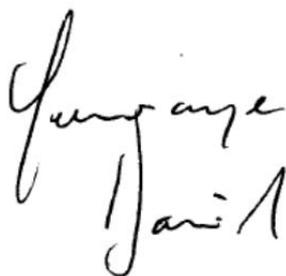
### **Rights of challenge based on the general principles of EU law**

Throughout Committee Stage we listened carefully to the views of MPs across the House, including those who called for greater legal certainty as we leave the EU.

Therefore, we have brought forward amendments to clarify the position regarding rights of challenge under the general principles of EU law. These amendments will, in some cases, allow a legal challenge to be brought for up to three months after Exit Day on the basis of incompatibility with the general principles of EU law.

Any challenge must relate to a cause of action that occurred before Exit Day and may be made against either administrative action or domestic legislation other than Acts of Parliament. The effect of this amendment will allow courts, tribunals and other public authorities to disapply or quash the offending enactment or conduct.

I am writing in similar terms to the Minister for Parliamentary Business in the Scottish Government. A copy of this letter will also be sent to Bruce Crawford, Adam Tomkins and the Scottish Party leaders for information.

A handwritten signature in black ink, appearing to read 'David Mundell', written in a cursive style.

**Rt Hon DAVID MUNDELL MP  
SECRETARY OF STATE FOR SCOTLAND**

## **Annex A – Questions for the Scottish Government**

The UK Government has attempted, where possible, to minimise consequential impacts on the provisions relating to the powers of the devolved administrations when amending or accepting amendments relating to the UK Government in the Bill. Where the construction of the Bill has meant amendments have had consequential impacts on the powers of the devolved administrations, the UK Government has attempted to maintain the same relationship between the provisions relating to the UK Government and those relating to the devolved administrations. This is in line with the approach agreed in discussions held between our two Governments.

The amendments described in the letter above therefore do not, largely, have any effects on the powers the Bill confers on devolved ministers. If colleagues in the devolved administrations would like similar provisions to be made for them in the Bill, this would be possible. If you would like to include these provisions in the Bill, the UK Government would expect to make these changes at committee stage in the House of Lords. We would therefore need your decisions in principle by Second Reading in the House of Lords in order to allow time to work up mutually acceptable drafting.

We expect the Bill to enter the House of Lords this week and Second Reading in the House of Lords is scheduled for 30 and 31 January, with committee stage likely to commence in mid-late February.

This annex sets out a list of questions that would welcome views on in order to assess whether further amendments are appropriate. Officials in DExEU will be happy to discuss any of these in greater depth with you or official colleagues.

### *Explanatory Material*

- Would you like devolved authorities to be statutorily bound to produce explanatory material alongside secondary legislation made under the relevant powers in schedule 2 of the Bill?

*If so:*

- Should it include a requirement to state that in the relevant minister's opinion the legislation does no more than is appropriate?
- Should it include a requirement to explain what effect (if any) the instrument has on equalities legislation?
- Should it include a requirement for the minister to state that they had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Equality Act 2010?
- Should there be a requirement to explain the reasons for the changes, what the relevant law was before exit and the effects of the changes on retained EU law?
- Should this requirement only apply to second legislation made under the powers in schedule 2 parallel to those in clauses 7(1), 8 and 9?

### *Sifting*

- Would you like devolved authorities to be required to submit regulations made under the negative procedure for a committee of the relevant legislature to consider the appropriateness of that negative procedure?

*If so:*

- Which committee in the devolved legislature would be the appropriate committee and should it be named on the face of the legislation?
- Should this only apply to the secondary legislation made under the powers in schedule 2 parallel to those in clauses 7(1), 8 and 9?
- Should the other provisions of relating to a sifting committee (e.g. timing, requirements to lay material explaining choice of procedure, non-binding nature of recommendations) parallel those applying in the UK House of Commons?

### *Joint procedure*

- Currently the sifting procedure and the requirement to produce explanatory material do not apply to SIs made via the joint procedure - do you have any views on this approach?

### *Other outstanding technical matters*

#### *The “made affirmative” procedure*

In the Bill as introduced we included a “made affirmative procedure” which could be used by UK ministers in certain urgent cases where there was not sufficient time to go through the normal draft affirmative procedure before the instrument needed to be in force (see paragraphs 4 and 13 of Schedule 7 to the Bill). This procedure would involve making an instrument which will cease to have effect one month after the instrument is made unless the instrument is debated and approved within one month of being made.

As this was an unusual legislative procedure we did not apply it to the powers conferred on any of the devolved administrations on introduction, but instead sought views from each administration on whether they thought the procedure would be useful and appropriate in the context of their legislature.

- Would you like the “made affirmative” procedure to be available for powers exercised by Scottish Ministers?

#### *Defined terms and the Interpretation and Legislative Reform (Scotland) Act 2010:*

In the Bill as introduced the only amendments we made to the defined terms in the Interpretation and Legislative Reform (Scotland) Act 2010 were to preserve the defined terms from the European Communities Act. However in the Interpretation Act 1978 we introduced several new defined terms related to withdrawal that the UK Government thought would be useful in relation to its future legislation - these

include the following new terms added by para 11(e) of Schedule 8 of the EU (Withdrawal Bill):

- “retained EU law”
- “retained direct EU legislation”
- “retained EU obligation”
- “Exit Day”.

The Interpretation Act was also amended to alter the definition of “enactment” so that going forward its meaning would include retained direct EU legislation.

We did not include these in ILRA on introduction as we thought it was a matter for the Scottish Government as to whether these new definitions should be included and we wrote to offer to include any of these new definitions in ILRA if you thought it would be suitable to include them

- Would you like any of these new defined terms (or the new meaning of “enactment”) to be included in the amendments to ILRA?
- Are there any other issues relating to EU-exit and interpretation legislation that you think it would be useful to address in the European Union (Withdrawal) Bill?