OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 26 September 2017

Session 5

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DELEGATED POWERS AND LAW REFORM COMMITTEE
26th 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

THE FOLLOWING ALSO PARTICIPATED:

Colin Beattie (Midlothian North and Musselburgh) (SNP) (Committee Substitute)
Kenneth Campbell QC (Faculty of Advocates)
Michael Clancy (Law Society of Scotland)
Charles Mullin (Law Society of Scotland)
Professor Alan Page (University of Dundee)
Professor Stephen Tierney (University of Edinburgh)

CLERK TO THE COMMITTEE

Euan Donald

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 26 September 2017

[The Convener opened the meeting at 09:45]

Decision on Taking Business in Private

The Convener (Graham Simpson): Good morning, everyone. I welcome members to the 26th meeting in 2017 of the Delegated Powers and Law Reform Committee. We have had apologies from David Torrance and Monica Lennon. I welcome Colin Beattie once again.

It is proposed that the committee take items 6, 7 and 8 in private. They are consideration of our approach to the Children and Young People (Information Sharing) (Scotland) Bill; the committee's annual report; and evidence heard on the European Union (Withdrawal) Bill. Does the committee agree to take those items in private?

Members *indicated agreement.*

The Convener: The committee will return to public session for item 9 at 1 pm.

European Union (Withdrawal) Bill

09:45

The Convener: Item 2 concerns the European Union (Withdrawal) Bill. I welcome to our meeting Professor Alan Page, professor of public law at the University of Dundee.

Professor Alan Page (University of Dundee): Good morning.

The Convener: We will go straight to questions. The bill confers wide powers on ministers of the United Kingdom and devolved Governments to correct "retained EU law". Is the broad scope of those powers appropriate and necessary?

Professor Page: As you said in your question, the bill confers broad powers on UK and Scottish ministers. I will approach the question first from the point of view of the powers that it will confer on UK ministers.

The bill will entail a massive increase in the powers that are conferred on UK ministers to make subordinate legislation in the devolved areas in consequence of European Union withdrawal—Brexit. One of the key points to note about that, to which not enough attention has been paid so far, is that, under the Scotland Act 1998—the devolution settlement—the powers of UK ministers to legislate in the devolved areas are very limited, as opposed to those of the UK Parliament. There is no executive equivalent of the sovereignty of the UK Parliament in relation to devolved areas. However, as a consequence of the bill—assuming that it is enacted in its current form—there will be a massive increase in those powers.

For me, that raises two questions: are the powers warranted—that is, are they justified—and are the safeguards to which their exercise is proposed to be subject sufficient? I can see the case for conferring powers on UK ministers to legislate in the devolved areas in consequence of Brexit, but the safeguards are completely insufficient. At the moment, the powers will be subject simply to a non-binding requirement to consult the Scottish ministers, with no provision for Scottish parliamentary scrutiny of, or consent to, that exercise. It would be difficult to come up with a law-making system that is further removed from the one that is envisaged under the devolution settlement.

That is my starting point.

The Convener: Are the powers clearly expressed? For example, is it clear what is meant in clause 7 by the power

"to prevent, remedy or mitigate … Deficiencies"?

What is meant by "retained EU law" and what constitutes a failure in it? Will it be clear whether or not a deficiency arises from the UK's withdrawal from the EU?

Professor Page: That is a question of clarity. I suppose that there is a scope for argument as to how clear the powers are. Clause 7, to which you draw attention, states:

"Deficiencies in retained EU law include (but are not limited to)".

In other words, it is simply illustrative; it is not an exhaustive definition. A

"failure of retained EU law"

could include failure to operate effectively, and there could also be a wide range of other cases where the law does not function appropriately or sensibly. We could talk about how clear that is. Perhaps the thing to which attention ought to be drawn is that the ultimate test is whether or not the minister considers it appropriate to make provision. That is what lawyers refer to as a subjective, as opposed to an objective, test. What matters is the opinion of the minister.

It is worth bearing it in mind—we may come on to this later—that we are talking not about just one minister but about a lot of ministers who may have differing views as to what is or is not appropriate. As you can see, there is scope for differing interpretations of what is or is not appropriate, and there are consequent concerns about what exactly that might entail in terms of UK law making or subordinate law making in the devolved areas or more generally.

The Convener: As you say, it is down to the personal opinion of the ministers, which brings me on to my next question. What are the consequences of any ambiguities in the way in which the powers are expressed, and what might be the implications of those ambiguities?

Professor Page: The principal consequence is simply that it creates scope for argument and dispute as to what is or is not warranted or justified under the legislation—a lack of certainty, if you like.

The Convener: In your view, should all that be cleared up in the bill?

Professor Page: I am not pretending to have a concluded view on any of this, but if there are things that are generally unclear or ambiguous they should of course be clarified and the ambiguities resolved. I am slightly hesitant in saying that, because I am conscious that this discussion is taking place while the legislation is being enacted against the background of a challenge on a scale that is unprecedented outside wartime. It is important not to lose sight of just how big the task is, which raises questions as to whether or not it is in fact doable. It is understandable, therefore, that broad powers should be sought to address the consequences, not knowing what all those consequences are at the moment at which the powers are being sought.

If there are ambiguities and if there is a lack of clarity, we ought to resolve that, but I am slightly concerned about the approach that emphasises—or is at risk of emphasising—simply making changes to the legislation. If we are talking about safeguards, we need to look beyond the letter of the statute as enacted, and think about what other sorts of safeguards we might realistically be looking at in relation to the exercise of those powers. In other words, we should not put all our faith in the way in which the powers are expressed, bearing in mind what I have already said about the subjective test.

The Convener: Should any additional restrictions or limitations apply to the exercise of powers under clauses 7, 8 or 9 and the equivalent powers of the devolved authorities? As drafted, those clauses enable ministers to make such provision as they consider appropriate. Can the limitations be made more objective?

Professor Page: I doubt that you would get away from the subjective approach that I have talked about. I do not think that we will end up with an objective approach. Additional restrictions have been suggested or talked about, which reflect real concerns about the use that might be made of the powers.

The bill is being depicted as a straightforward exercise in getting the statute book into shape as a consequence of Brexit—in other words, as a technical, tidying-up exercise. It is recognised that simply converting EU law into UK law will not work, so there is a need to sort that out. That is being talked about in technical, tidying-up and revision terms

There is a concern, which one might want to address in the legislation, about the possibility of substantive policy changes being made under the guise of technical changes. Rather than just tidying up, changes could be made that might perfectly legitimately be the subject of dispute or that go further than is necessary or appropriate in order to achieve a particular goal. One might talk about revising the bill to make restrictions clear in those regards.

The Convener: My final question, for now, is on schedule 4, which confers wide powers to create or modify fees or charges in connection with EU withdrawal and associated changes to public authority functions. Is the scope of those powers appropriate?

Professor Page: That is not something on which I have a concluded view. I recognise that that issue needs to be addressed. For a long time, I have assumed that we have sought to recover the costs of various public activities from those that are subject to regulation and so on. I assume that that applies in the EU context, although I do not know whether that is the case. Schedule 4 is about making analogous provision post-Brexit. I do not have a view about whether the powers go further than would be appropriate in the circumstances.

The Convener: That is fair enough. We will move on.

Stuart McMillan (Greenock and Inverclyde) (SNP): The bill provides a choice of three legislative routes to exercise the powers of correction—regulations made by UK ministers acting alone, regulations made by a devolved authority acting alone and regulations made jointly by UK ministers and a devolved authority. What challenges arise from those legislative routes?

Professor Page: The key question is working out which route will be used in a particular case.

Of the three possible routes, I would leave to one side the joint exercise of powers. I regard that as a non-starter, if only because it would require scrutiny and approval in two Parliaments. The practical choice comes down to whether corrections will be down to the Scottish ministers in devolved areas or whether they will be down to the UK ministers.

I imagine that we would start with a presumption—this exists in relation to the transposition of EU obligations in the devolved areas—that corrections would be made by the Scottish ministers rather than by the UK ministers. That in turn would bring in Scottish parliamentary scrutiny of the exercise of those powers.

At the same time, one can see a case for making changes and corrections on a UK or Great Britain-wide basis; in other words, the changes would be made by the UK ministers. That happens at present with the transposition of EU obligations. I can see that happening under this bill—we will probably see rather a lot of it—in relation to the correction of deficiencies and retained EU law following, or in anticipation of, Brexit. However, as I said at the outset, where that route is proposed, it would be simply on the basis that it would be done subject to a non-binding requirement to consult the Scottish ministers. That is unsatisfactory. If that is the route that we are to go down, it should be done only with the consent of the Scottish ministers, who would in turn be accountable to the Scottish Parliament for agreeing to the legislation.

I see those as being the two basic routes. I think that we will see a lot of UK or GB correcting legislation, but I think that it should be done with consent and on an agreed basis, rather than on the basis of the UK saying, "We will consult you, but we may forget in the heat of the moment."

10:00

Stuart McMillan: Would it be possible for two legislatures to pass valid but conflicting legislation in exercise of the powers in the bill?

Professor Page: I think not. One of the schedules sets out the analogous powers of the Scottish ministers, and one of the restrictions that are imposed on them in terms of the correction of retained EU law is that they cannot modify it in a way that would be incompatible or inconsistent with a modification that is made by UK ministers. In other words, the expectation is that changes that are made by UK ministers will be conclusive.

Stuart McMillan: You said that you felt that joint scrutiny was a non-starter. If it were to take place, in what circumstances do you imagine that regulations might be made by the UK ministers and the devolved authorities acting jointly?

Professor Page: I am not sure. I know that, under the Welsh devolution settlement, there is much greater provision for joint law making than there is under the Scottish devolution settlement, which gives concurrent powers that can be exercised by either Government. There might be provision for joint law making, but I am not aware of it. I am open to correction on that. There is provision for the joint establishment of public authorities and so on, so I suppose that that would be one possible context, because we are talking about the possibility of setting up public authorities to exercise functions that were formerly exercised at the EU level. Following that thought, you could have the joint exercise of powers to set up a cross-border authority that would assume functions that were previously exercised at the EU level.

Stuart McMillan: There are limitations and restrictions on the correcting powers in schedule 2 that apply to devolved authorities but not to the UK ministers under their equivalent powers. Examples include a more limited power to sub-delegate than is available to the UK ministers and the requirement to obtain the consent of UK ministers in certain circumstances. Are those additional limitations on the Scottish ministers appropriate? What view do you take of the Scottish Government's proposed amendments to remove those restrictions?

Professor Page: There is more than one such restriction, and it might be worth dealing with each separately. You mentioned the restriction on the power to sub-delegate. It is worth recalling that the basis for such a restriction in general, not only in

relation to the Scottish ministers, is essentially that Parliament is giving the Scottish ministers the power to make law in a particular way and expects them to exercise that power and to be accountable to Parliament for that, rather than giving that power to someone else. Those are the grounds on which sub-delegation is regarded as being objectionable. I can see the case for saying that there is a delegation of powers to the Scottish ministers to make correcting legislation and that it is expected that they, and nobody else, will exercise them. That is understandable and is open to explanation on those grounds.

You mentioned other restrictions such as the absence of a power to modify direct EU law. The explanation for that is that the UK Government does not want to have multiple legislatures crawling over the retained EU law statute book, with the possibility of multiple changes being made, which would give rise to legal uncertainty.

It is probably worth keeping it in mind during our discussion that one of the principles of the legislation is that it is intended to provide continuity of laws. If you had four Governments—we have four Governments in the UK, not just one—changing the law, it could be extraordinarily difficult for anyone to work out what the law was. I would hesitate to object to that on the basis that they can do it and we cannot, because of the potential consequence of everyone being able to modify retained EU law.

Stuart McMillan: Do you have a view on the amendments that have been proposed by the Scottish Government?

Professor Page: I can understand the amendments. I cannot lay my hands on them at the moment—did you have any particular amendment in mind?

Stuart McMillan: No, I was speaking in general.

Professor Page: They are entirely sensible for the most part. However, as I have indicated, I can see the reason why exception might be taken to them and why they might not be accepted by the UK Government.

Stuart McMillan: In exercising their powers, devolved authorities may not modify retained direct EU legislation, or make provision inconsistent with a modification of retained direct EU legislation made by UK ministers. Do you foresee any difficulties with those restrictions?

Professor Page: No. We have already talked about those and I have already outlined the rationale.

Stuart McMillan: There is no equivalent for devolved authorities of the power in clause 17 to make consequential or transitional provision. Would it be usual for a UK bill making provision within the Scottish Parliament's legislative competence to confer such a power on the Scottish ministers?

Professor Page: Attention has been drawn to clause 17 and I think that too much has been made of that clause. It is a power to make consequential amendments and is not an unlimited power to start legislating afresh. Its use is consequential on other changes that have been made—in other words, "We have changed X and it will have consequence Y that we need to sort out." It is not a free-standing law-making power. Clause 17 is intended to address tidying up amendments or changes.

There is a case—the name temporarily escapes me—in which Lord Rodger, a former Scottish judge and member of the UK Supreme Court, gives an explanation of consequential powers and says that they are things that one would not expect to see in a separate enactment and therefore can be accepted.

Clearly, there is a risk of misuse of the power—abuse would be to put it too strongly—and that would take us back to the question of safeguards. However, I would not get too worked up about the fact that clause 17 confers that power on the UK Government, rather than the devolved Administrations, for the reasons that we have already talked about.

Stuart McMillan: Would it be necessary for the devolved authorities to have such a power?

Professor Page: For discussion, if you are talking about consequential amendments, I cannot see any problem about those changes being made. It happens all the time in the existing settlement under the Scotland Act 1998 when the Scottish Parliament passes legislation involving changes to other legislation that the Scottish Parliament does not have power to make and the UK Government makes those changes.

Stuart McMillan: Thank you.

Alison Harris (Central Scotland) (Con): Good morning, Professor Page. The bill does not provide any mechanism for Scottish Parliament scrutiny of regulations made by UK ministers alone, irrespective of whether the regulations would be a matter of significance for Scotland or would attract the benefit of the Sewel convention if the matter was included in primary legislation. Does that represent a gap in the Scottish Parliament's ability to scrutinise the exercise of those powers?

Professor Page: This is where we started, and I think that the short answer is yes. It is a massive gap. It is a gap that exists at present, but it will be considerably widened by the bill as drafted.

Alison Harris: How could the gap be filled?

Professor Page: I have been giving that some thought. As I think I have already indicated, I am sceptical of the value of simply amending the legislation and seeking sufficient safeguards by that route. I also have reservations about the effectiveness of parliamentary scrutiny, not necessarily in the Scottish Parliament but certainly in the Westminster Parliament. My general point is that, in the absence of what I will call an effective system of internal control—within the UK Government or the Scottish Government—external control in the form of parliamentary control is likely to be ineffective and patchy at best.

As I see it, the risk with the bill is that there will be multiple law-making bodies in the form of Whitehall departments, which will make the provision that they consider that their minister considers appropriate in consequence of, or in anticipation of, EU withdrawal. I therefore see a pressing need to have in place an effective system for the co-ordination of control of the massive amount of delegated law making that we are going to be looking at.

I would like to see a system whereby there was a high-level committee that was responsible for the co-ordination of control and on which the devolved Administrations would be represented, and which would have oversight of departments' legislative plans for what exactly would be done in the exercise of the powers. It would have oversight of the division of labour between the UK ministers and the Scottish ministers—what would be done on a UK-wide basis and what would be done by Scottish ministers, Welsh ministers and, assuming that the Northern Ireland Assembly is up and running again, their Northern Ireland equivalents—and it would ensure that the kinds of safeguards that we have been talking about in terms of the exercise of powers going no further than is necessary and being appropriate were observed.

I think that such a system would provide an effective check on the exercise of the powers. I would like to see it sitting outside Government rather than within Government but, either way, I would like its deliberations to be made public. It would provide a focal point for parliamentary scrutiny so that what would be checked would be not just the details of individual statutory instruments but how the whole process was working, taking a considered view as to whether the level of parliamentary scrutiny was appropriate, whether it was an appropriate use of the power and so on.

You might say that that is just not realistic, but I think that it makes a lot of sense and gets to the heart of some of the difficulties that we are likely to face with the bill as drafted. I would like to see an effective internal check, coupled with parliamentary scrutiny and so on on top of that.

The Convener: Stuart McMillan has a supplementary question on that point.

10:15

Stuart McMillan: Professor Page, what you have described sounds like a version of the joint ministerial committee process, the effectiveness of which has been questioned. How would you strengthen the arrangements so that genuinely effective scrutiny could take place?

Professor Page: I acknowledge the criticisms that have been made of intergovernmental working as we have experienced it to date, and I certainly would not want to go down a route that simply perpetuated that process. My starting point would be to acknowledge that that process has not been satisfactory, in many cases. What we need is a satisfactory joint working process, so we must ask what such a process would look like.

I do not think that we can rely on leaving it to individual departments and hoping that the Parliament will come along and somehow exercise effective scrutiny over the exercise of powers. I would want a committee of prominent politicians—there would be joint working, as I said, so it would include representatives of the devolved Administrations. Such a committee would be shadowed by officials—you would have your best lawyers on it, who would scrutinise the exercise of powers and think hard about whether it was justified. That would give you some prospect of getting a grip on the exercise of these enormous powers.

Without making concrete proposals on how to improve intergovernmental working, I can say that rather than simply seek to replicate the current arrangements, you would acknowledge that they have fallen short of expectations. You would therefore look for a system that addressed those shortcomings and built confidence—that is critical—in the devolved Administrations that the fears that have been expressed about what might be done in the exercise of the powers were not warranted or justified, because effective checks were in place.

Alison Harris: The UK Government appears to envisage a consultation and agreement with the Scottish Government on the exercise of powers by UK ministers. That is also the position that the Scottish Government takes in its proposed amendments to the bill. The proposed approach does not provide for consultation with or the agreement of the Scottish Parliament. How might the Parliament hold the Governments to account in relation to any such agreement?

Professor Page: Let us leave to one side what I have been saying about an effective system of internal control. If you change the bill so that the powers can be exercised only with the consent of the Scottish ministers, the Scottish ministers will be responsible for the giving or withholding of consent on the part of the Scottish Parliament, so that will provide the starting point for Scottish Parliament scrutiny of a decision about whether something should or should not be done at UK level rather than devolved level.

Separately, if the decision is that it should be done at Scottish level, that is the starting point for Scottish Parliament scrutiny of what is actually proposed, by way of correcting subordinate legislation—assuming that that is what you are talking about.

The Convener: I am conscious of the time, and we have other witnesses to hear from, so we will move on after Alison Harris's next question.

Alison Harris: Is there a role for formal Scottish Parliament consultation on or consent to the exercise of powers by the UK ministers? If so, should that role concern the exercise of powers that relate to matters within the Parliament's legislative competence or that would be within legislative competence notwithstanding the requirement of compatibility with EU law? Alternatively, should the role be wider and include, for example, the exercise of powers in areas of interest and importance to Scotland? How would you define that?

Professor Page: I guess that that is a sort of Sewel question—in that if something was being done by primary legislation it would require the consent of the Scottish Parliament. In theory, one could talk about extending the Sewel convention to subordinate law making. I am not enamoured of that particular route. I would prefer to see a route whereby it is done with the consent of the Scottish ministers and the Scottish ministers are accountable. It is perfectly possible to say that it can be done only with the consent of the Scottish ministers and, if it is an affirmative procedure, with the consent of the Scottish Parliament or subject to rejection by the Scottish Parliament. In other words, the Scottish ministers would be one step in the process but they would not be the end of it, as there would still be a role for the Parliament over and above that of the Scottish ministers.

The Convener: Alison, I am going to allow you another question, because apparently I can be slightly more flexible.

Alison Harris: I have another two actually, but I will make sure that they go quickly .

It may not be practical, in light of the timetable for EU withdrawal and likely volume of instruments, for the Scottish Parliament's consent to be required for all UK instruments that make provision within the Parliament's legislative competence. If workload constricts the Parliament's ability to approach all such instruments as requiring its consent, in relation to what sort of matters should a requirement for consent be prioritised?

Professor Page: I guess that that is a question for the Parliament to think about. You are clearly talking about exercise of powers that are significant—or of major, as opposed to minor, importance.

As you know, there is in the bill provision for parliamentary consent to certain kinds of instruments or instruments that do certain things. It is pretty limited; for the most part the expectation is that instruments will be subject to the negative procedure. I think that you would want to pick out those that were most important, recognising the constraint with which you started your question, which is that time is indeed limited.

Alison Harris: Thank you.

The Convener: I have one more question. The bill provides for an order in council process that enables competences in areas of retained EU law to pass to the devolved authorities by the insertion of new powers in sections 29 and 57 of the Scotland Act 1998. Any orders must be laid subject to the affirmative procedure in the Scottish and UK Parliaments, so there is a formal scrutiny role for the Scottish Parliament. Do you foresee any difficulties with the mechanism that is proposed for the transfer of competences?

Professor Page: No. I think that the mechanism is modelled on section 30 of the Scotland Act 1998, which provides for adjustments of the boundaries between reserved and devolved matters. That is what we are talking about, in a new context. I think that there is no question about the mechanism.

What is an issue is the lifting of the restraint in relation to the Scottish Parliament's power and the Scottish ministers' power to modify retained EU law. The issue is when those powers will be exercised and to what extent, rather than the provision for parliamentary agreement to their exercise.

The Convener: We will move to questions about scrutiny.

Colin Beattie (Midlothian North and Musselburgh) (SNP): First, does the bill contain an appropriate split between matters that require the affirmative procedure and matters in respect of which there is a choice between the affirmative and the negative procedure?

Professor Page: I would say that the bill takes a minimalist approach to the affirmative procedure.

It makes provision for instruments to be subject to the affirmative procedure in a relatively limited number of areas, where it might be expected to be used. The objection is that it pre-empts the question of the level of scrutiny to which instruments should be subject and therefore there ought to be some sort of sifting mechanism. You can go back to my proposal for a committee that would say, “This instrument is of such an order of importance that it should be the subject of the affirmative as opposed to the negative procedure.” In other words, that decision should be not a matter for the Government alone but one on which the Parliament has a say.

Colin Beattie: Leading on from that, save for the mandatory affirmative procedure categories, the Scottish ministers have wide discretion to choose the negative procedure or the affirmative procedure. Is that discretion appropriate? How can ministers be held to account for their choices?

Professor Page: As I indicated, I do not think that it is appropriate. There should be provision for parliamentary input in relation to the scrutiny to which an instrument is subject, but I see that as part of the surrounding machinery of co-ordination, control and oversight that I talked about rather than as something that is necessarily nailed down in the legislation. In other words, we ought not to put our faith simply in the legislation; we ought to take into account the whole surrounding machinery of government—co-ordination, control and scrutiny—and recognise the limitations and weaknesses of parliamentary scrutiny and the need to ensure meaningful scrutiny of those instruments that are most important in this process.

Colin Beattie: Taking into account what you said, can the Scottish Parliament scrutinise the Scottish ministers’ choice of legislative route for correcting deficiencies in retained EU law? How would it best do that? To explain, there is a choice between regulations made by UK ministers alone, regulations made by the Scottish ministers, and regulations made jointly.

Professor Page: As I have said, that is a matter for which the Scottish ministers should be accountable to the Scottish Parliament. That sounds like a very glib, easy thing to say, but the Scottish ministers have not necessarily been accountable for the transposition of EU legislation. In other words, I assume that they have, in some cases, agreed to the transposition of EU directives on a UK-wide basis but kept completely quiet and not said a word about it to the Parliament.

That goes back to my earlier point that we need to be clear about who does what in relation to all this. If something is done on a UK-wide basis, we should ask what the justification is for that. If something is done on a devolved basis, we should ask what scrutiny it should be subject to in this Parliament. There is that prior question; we need to ask not just about scrutiny of the instrument but about scrutiny of the decision about where subordinate legislation is made.

Colin Beattie: You appear to be in favour of strengthened parliamentary scrutiny, but how could a role be created for Parliament to be consulted on regulations that are laid in draft prior to final regulations being laid, and which areas should be prioritised for that?

Professor Page: A sort of super-affirmative procedure?

Colin Beattie: Yes, moving that way.

Professor Page: That has been talked about but, because of the time constraints, there is understandable hesitation about an elaborate, drawn-out parliamentary scrutiny procedure that would in effect involve two stages and take up a lot of time.

If I may go back a step, we are of course talking about Scottish parliamentary scrutiny. Yes, we can build effective scrutiny mechanisms at the level of the Scottish Parliament, but I would also like to see interparliamentary working, so that the Scottish Parliament—this committee—does not just deal on its own with whatever comes down the line to it but there is involvement at UK level, we know what decisions are being made about what is going to be done where, and we have input at that level, too.

Colin Beattie: You have partly touched on my final question, regarding the super-affirmative procedure. If we had that process for some matters, would it lead to other matters receiving very little scrutiny, given the time that is available for legislation to be passed? You hinted at the fact that there is a very tight schedule.

Professor Page: Yes—at the end of the day, there is limited capacity for scrutiny, and there is going to be an extraordinary volume of subordinate law making.

10:30

As we have discussed throughout this session, there is a question around how much is going to be done at which level and, therefore, around the scale of the challenge that will be faced here as opposed to at Westminster. I would like to see parliamentary input at every level so that you are not faced simply with whatever comes your way and you are not continually on the receiving end while having absolutely no influence or control over what is presented to you for scrutiny. That will mean getting involved, being consulted and having a say at an earlier stage in the process.

The Convener: Irrespective of the formal scrutiny procedures that apply, what accompanying information should the UK and Scottish Governments provide in laying regulations under the bill to enable Parliament to prioritise its scrutiny? Should the bill include a requirement to provide specific accompanying information?

Professor Page: Yes—there should be as much information as possible so that you can make sense of the instrument. That should include the background to it; what it is designed to achieve; what the result will be; why it is being done that way; and what sort of scrutiny it is proposed to be subject to. All that information should be required, and the requirement should be policed.

That goes back to my earlier point about the need for an effective system of internal scrutiny—which, I might add, ought to extend to the quality of instruments. You are going to face a big challenge: all the instruments will be drafted in departments by lawyers who may have only limited experience of drafting, and you might end up with instruments of variable quality. There should be as much information as possible; it should not be left to the good intentions of ministers, who may provide only a short note that does not tell you very much at all.

The Convener: That is a good point—the committee often has to correct drafting errors.

You will be relieved to hear that this is my final question. What areas or categories of changes to EU law should Parliament seek to prioritise in its scrutiny?

Professor Page: Where to begin? The devolved areas might be one category. A general point that I have been making, and which perhaps applies to your question, is that, although there has been a great deal of focus on the powers that will or will not be repatriated to Edinburgh, those powers that will be repatriated to London far outweigh in importance those that are supposedly coming the way of the Scottish Parliament. I would not, therefore, close my mind to those other instruments and the possibility that they will have implications for Scotland, notwithstanding that they relate to reserved areas. I would not pursue a rigid approach of saying, "We're interested only in the devolved areas and we have no interest in the other areas." Instruments that relate to reserved areas could end up having massive implications for Scotland.

The Convener: Thank you for your time, Professor Page. I suspend the meeting briefly to allow for a change of witnesses.

10:34

Meeting suspended.

10:35

On resuming—

The Convener: I welcome our next witnesses: Kenneth Campbell, Queen's counsel, is representing the Faculty of Advocates; and Michael Clancy and Charles Mullin are representing the Law Society of Scotland.

Gentlemen, you have had the advantage of hearing our questions, but do not feel that you have to give the same answers as we have been given already. We will go through the questions as before. The questions are directed at anyone who wants to answer them—just attract my attention.

The bill will confer wide powers on United Kingdom and devolved Administration ministers to correct "retained EU law". Is the broad scope of the powers appropriate and necessary?

Charles Mullin (Law Society of Scotland): It is appropriate that there be broad powers for the UK Government, the Scottish Government and the other devolved Administrations in this regard, given the wide range of subject matters that will have to be attended to. What might require attention is the level of parliamentary scrutiny of the exercise of those wide powers, and whether those powers can be further defined in order to tighten them.

Kenneth Campbell QC (Faculty of Advocates): I think that that is right. The committee has already heard the rationale for having broad powers. The key issues of concern are how the powers then come to be exercised and scrutinised. You heard from Professor Page about how the power is formulated in terms of whether exercise of power is "appropriate" rather than "necessary". We might talk more about that later, because it seems to me to be a real issue.

The Convener: Are the powers clearly expressed? For example, is it clear what is meant in clause 7 by the power

"to prevent, remedy or mitigate ... Deficiencies"?

What is meant by "retained EU law" and what will constitute a failure in it? Will it be clear whether or not a deficiency arises from the UK's withdrawal from the EU?

Michael Clancy (Law Society of Scotland): We have already made our comments to the committee on that. I think that they were picked up in the press and other places.

We certainly have concerns about the meanings that can be attributed to phrases such as

"failure of retained EU law to operate effectively".

We are concerned about the use of the word "appropriate" in clause 7(1), and even "deficiency" is a concept that one might quibble with. The approach that we have been taking with regard to the representations that we have made to the Finance and Constitution Committee and to MPs in Westminster is that we should aim to look closely at clause 7 and seek to amend, for example, the use of the word "appropriate" so that the concept of necessity is introduced. That would fit in with the House of Lords Constitution Committee's report, which considered that very point, as well as with the requirement that ministers not only bring forward orders that are clear and understandable, but make some kind of assertion that the order is necessary in their opinion.

The Convener: Does anyone else want to come in?

Kenneth Campbell: I broadly agree with what Michael Clancy has said about the word "appropriate"; I have said that already. I can see why the phrase "operating effectively" might have been chosen: the European Union (Withdrawal) Bill is trying to set a general framework to cover a very wide range of circumstances. That is why most of the evidence that the committee has heard so far accepts the necessity of having broad powers. One can see that that is perhaps the thinking behind the form of words, notwithstanding their slightly unsatisfactory texture. There is some compromise built in and the issue is about scrutiny rather than about the way in which some aspects of clause 7 are articulated.

The Convener: I will come back to Mr Clancy. Replacing the word "appropriate" with the word "necessity"—

Michael Clancy: The word is "necessary".

The Convener: To decide whether something is necessary is to make a judgment, just as to decide whether it is appropriate is a judgment.

Michael Clancy: Indeed.

The Convener: Will we just end up in the same place?

Michael Clancy: There might be rather more objectivity in considering what is necessary than in considering what is appropriate. Your view of what is appropriate, convener, might differ from Stuart McMillan's, and might differ again from the views of Charles Mullin or Kenneth Campbell. However, a view of whether a provision is necessary might have more support by way of evidence.

One must remember that behind the order-making power is the spectre of the potential consequences if the minister gets it wrong. If the minister were to act outside the competence that will be given by the act, it could be discovered in an action for judicial review, which would have consequences for the Government.

Charles Mullin: If the word "necessary" is used, one would have to demonstrate a particular need for the provision as opposed to its being something that one simply wants to do. As Michael Clancy has suggested, that could be supported with evidence of why there is a need that something be done in order to avoid something else that is undesirable.

The Convener: Should any additional restrictions or limitations apply to the exercise of powers under clause 7, 8 or 9 and the equivalent powers of the devolved authorities? As we have discussed, those clauses will enable ministers to make such provisions as they "consider appropriate". Can the limitations be made more objective?

Michael Clancy: We are back to where we started a few moments ago. In considering not only clause 7, but schedule 2, it is worth commenting that devolved authorities, too, are in the position of UK ministers in that they may, by regulations, make such provision as the devolved authority considers appropriate. That reflects that the bill applies not only at UK level, but at devolved level. I hope that the Scottish ministers would be sympathetic to the view that ministerial power ought to be restrained in some way and not given the licence that the bill seeks to give to both UK and Scottish ministers.

Kenneth Campbell: That takes us into the territory of whether the introduction of provisions is a matter of tidying up the statute book, which is how the overarching purpose of the bill has been presented by the UK Government. Undoubtedly there is a need for that in order to make the law work.

However, as the committee is aware, there is also a concern about whether more policy-driven changes might be made. That underlies the evidence-based approach that Michael Clancy suggests if the test were of necessity rather than of appropriateness. Arguably, it is rather more difficult to change the direction of a legal structure under the heading of "necessity"—although that is not to say that it cannot be done—than under "appropriateness", for the reasons that Michael Clancy has articulated.

10:45

The Convener: Schedule 4 will confer wide powers to create or modify fees or charges in connection with EU withdrawal and associated changes to public authority functions. Is the scope of the powers appropriate?

Charles Mullin: The Law Society has not formed any particular views on that schedule.

Kenneth Campbell: The Faculty of Advocates is in the same position on that.

The Convener: Okay. In that case, we will move on to questions from Stuart McMillan.

Stuart McMillan: Good morning, gentlemen.

The bill provides a choice of three legislative routes to exercising the powers of correction: regulations that are made by the UK ministers, regulations that are made by the devolved authorities, and regulations that are made jointly by the UK ministers and the devolved authorities. What challenges do you think that choice of legislative routes will give rise to?

Charles Mullin: There is immediately a question about the possibility of joint exercising of powers by UK and Scottish ministers, because it is not specified in what circumstances and for what purpose powers would be exercised jointly. One could contrast such a broadly stated provision with the provisions of the Scotland Act 1998 in relation to concurrent powers; it is very specific about the circumstances in which there are concurrent powers, which could therefore be exercised by the Scottish ministers or by the UK ministers. There is no such specification as regards the joint exercise of the powers in the bill. That raises the question of what the objective is. Is the provision to deal with a situation in which there might be a need for regulations that stray into reserved and devolved areas of policy? If that is the case, it would be helpful if the bill were to express the purpose of such joint exercise of powers.

Kenneth Campbell: It seems to me to be quite unclear why and when it is envisaged that exercising of joint powers might be required. As Charles Mullin said, the Scotland Act 1998 makes provision for the exercise of powers in that way in certain circumstances, which are clear and relatively limited. It might simply be the case that the provision is an exercise in extreme caution by the drafter, who might have felt that all the possible combinations need to be included. However, it is not at all clear how joint exercising of the powers would be operated practically.

Stuart McMillan: Can you envisage any circumstances in which the joint powers provision could be utilised?

Charles Mullin: As Professor Page indicated, there might be circumstances in which a GB, or UK, approach, whereby all ministers would be involved in putting together a uniform approach to a particular problem, might be desirable. It might be useful in areas in which there are reserved and devolved responsibilities and UK ministers think it appropriate also to involve the Scottish ministers. One can foresee various possibilities, but it would be helpful to find out from the UK Government what is intended by its inclusion of the power.

Stuart McMillan: Have you raised that question directly with the UK Government?

Charles Mullin: The issue has been raised in the Law Society publications that have been submitted to Parliament and to the UK Government.

Michael Clancy: It is worth our while to point out that there are 14 order-making powers under the bill, of which six are subject to affirmative procedure, four are subject to negative procedure, three would attract no procedure and one is for an order in council, which means that the bill includes almost the whole spread of subordinate legislation procedure. The one omission is the super-affirmative procedure. We have argued in our representations on the bill that that procedure should be taken into account, in certain circumstances.

Charles Mullin: Yes. Before Stuart McMillan asks further questions, it is worth while to add that we looked at a House of Lords select committee's suggestion of a triage procedure, whereby a minister would specify exactly what his regulations would do and the relevant Parliament could then assess whether it agreed with the level of scrutiny that was being proposed by the minister. The procedure would allow for regulations to be considered under affirmative procedure rather than negative procedure, when the Parliament considered that to be appropriate. The procedure would also allow statutory instruments that came before Parliament to be amended without having to restart the process, which is not possible at present.

Stuart McMillan: Would it be possible for two legislatures to pass valid but conflicting legislation in exercising the powers under the bill?

Kenneth Campbell: I do not think that it would be possible for this Parliament to pass valid but conflicting measures because a provision in the bill limits devolved authorities, including the Scottish Parliament, from making legislation that is inconsistent with a modification that has been made by a UK minister. I have not been able to find an equivalent measure going the other way. Is that your view, too, Charles?

Charles Mullin: Yes—I agree with that.

Stuart McMillan: The limitations in the bill have been mentioned. Schedule 2 places restrictions on the correcting powers; they apply to the devolved authorities but not to the UK ministers under their equivalent powers. Examples include a more limited power to sub-delegate than is available to UK ministers, and the requirement to obtain UK

ministers' consent in certain circumstances. Are those additional limitations on the Scottish ministers appropriate? What is your view of the Scottish Government's proposed amendments to remove the restrictions?

Michael Clancy: I draw your attention to paragraph 1(4) of schedule 2. One has to question what the rationale is for prohibiting regulations that are made by a devolved authority, so that it

"may not confer a power to legislate".

The exception, which is in the same paragraph, is that a devolved authority can

"make rules of procedure for a court or tribunal".

Therefore, a devolved authority will be allowed to make acts of sederunt, acts of adjournal and procedure rules of tribunals.

The Scottish Government's amendments are a matter for political discussion between the UK and Scottish Governments. It would be inappropriate for the Law Society to seek to influence either party—even though we cannot. We cannot comment on the amendments. Nevertheless, we are thinking hard about the provision not conferring the power to legislate because other bodies and courts may need to make changes to their subsidiary legislation: local authorities and statutory bodies—perhaps even the Law Society of Scotland—might need to make changes. One could envisage that happening because of an as-of-yet unidentified EU regulation. Members can see that a number of organisations in Scotland may benefit from having a power to make further rules.

The Convener: That is interesting. I would like to explore that a bit further. Can you expand on that?

Michael Clancy: I was not prepared to, but now that you have asked me to, I will do my best. I will remember this moment, convener.

Let us say that a local authority has the capacity to make a byelaw on planning or licensing that may result in some change in scope for an item of retained EU law because it affects food hygiene, some aspect of health and safety or something like that. It would strike one as being quite useful were it possible for the local authority to be dealt with by the Scottish Parliament and the Scottish Government in the ordinary course of events—as local authorities ordinarily are, because that is within devolved competence. Other authorities—the Scottish Medicines Consortium, perhaps—may have similar constraints. There are issues around subsidiary law-making power, which is why it might be perfectly happily dealt with by a UK minister issuing an order—that is a fair possibility. Representations could be made to that UK minister, but that would seem to cut across the established structures that we have under devolution.

The Convener: In layman's terms, you are saying that, at the moment, a council—a local authority—could make a byelaw and the matter would be referred to the Scottish ministers, but that will no longer be the case.

Michael Clancy: No. I am not saying that the matter is referred to the Scottish ministers; I am saying that the power to make the byelaw depends on law that is made by the Scottish Parliament, and the Scottish Parliament, as a devolved authority, will not be able to make provision that would give the local authority a law-making power to deal with a matter of retained EU law.

The Convener: Thank you.

Stuart McMillan: In exercising their powers, devolved authorities may not modify retained direct EU legislation or make provision that is inconsistent with a modification of retained direct EU legislation that is made by UK ministers. Do you foresee any difficulties with those restrictions?

Charles Mullin: The UK Government has placed policy restrictions in the bill, as it wishes to retain control over the whole framework of retained EU law and how it is modified. You could see that as a deliberate policy choice by the UK Government in order to put constraints on the Scottish Government and Parliament. However, that seems inevitable from the point of view of the policy that has been implemented. Therefore, where one is going on this is a question of policy.

Kenneth Campbell: That is right. In its wake comes the question of the level of scrutiny and engagement and how the various devolved institutions might have a place in that. We will, no doubt, come on to that.

Michael Clancy: We might juxtapose the provisions of paragraph 3 of schedule 2 with the provisions of paragraph 1, where a devolved authority is given the power to make regulations. Paragraph 3 seems to contradict that. There might be some inconsistency in the terms of the bill in that respect.

Stuart McMillan: There is no equivalent for devolved authorities of the power in clause 17 to make consequential or transitional provision. Would it be usual for a UK bill making provision within the Scottish Parliament's legislative competence to confer such a power on the Scottish ministers?

11:00

Charles Mullin: It would not normally be controversial to devolve the authority to legislate

for those purposes. As you say, clause 17 is restricted to the UK Government. To the extent that consequential provision can be made, it is in the rather limited circumstances of the Scottish ministers making law that is designed to deal with issues that are raised in clause 7.

Kenneth Campbell: I agree broadly with what Charles Mullin has said, but it is important to put it in the context that clause 17 is not an additional free-standing change-the-law provision. It truly is a tidying-up power and, in that sense, it ought not to be controversial that there should be scope for doing that. One can clearly envisage that, if the Scottish ministers exercised the powers that are conferred elsewhere in the bill, consequential tidying-up things might well need to be done.

Stuart McMillan: That is helpful. Thank you.

Alison Harris: The bill does not provide any mechanism for Scottish Parliament scrutiny of the regulations that are made by UK ministers alone, irrespective of whether those regulations are a matter of significance for Scotland or would have attracted the benefit of the Sewel convention had the matter been included in primary legislation. Does that represent a gap in the Parliament's ability to scrutinise the exercise of the powers in the bill?

Charles Mullin: Yes, I suppose that it does in that sense. As Professor Page noted, at the moment we do not have any equivalent of Sewel motions in relation to subordinate legislation, and the issue that you describe would be a continuation of that. The avenues that Professor Page suggested could be explored. There could be different levels of co-ordination, first of all within the UK and Scottish Governments, and then at joint ministerial committee level.

Kenneth Campbell: It is important to get a sense of the way in which co-ordination would need to work on a practical level. It seems likely that there would need to be intergovernmental working, first, at the stage of deciding what needs to be done and then in having a realistic conversation about who is going to take responsibility for dealing with particular issues. Co-ordination is key for two reasons: first, to make it work and, secondly, to work out how the scrutiny can best be exercised.

The Convener: Stuart McMillan has a supplementary question on that point.

Stuart McMillan: I posed a similar question to Professor Page in our earlier session. You will be aware that the Parliament has had discussions regarding intergovernmental working and the JMC process. When the Scotland Bill went through in the previous session of Parliament, that issue played a large part in the discussions. Do you have any suggestions for the type of process that could be introduced? It could be a strengthening of the JMC or some other process.

Michael Clancy: The JMC has been the subject of criticism over the past few months, from parliamentary committees in Westminster and here. The European Union Committee, in its report "Brexit: devolution", made some criticisms of the JMC, as did the House of Lords Constitution Committee. There is a recognition that something is not functioning particularly well. How does one make that better? There have been meetings in the past couple of days between Scottish and UK ministers to re-establish the JMC and put it back on a firmer footing. We will have to watch and see how that process proceeds.

Could one make the JMC stronger? Well, there could be a statutory basis for it, but that might not find favour with ministers. It could involve quite a shift in doing business, and intergovernmental relations might not work particularly well on a statutory basis where a committee has to be created and have functions attached to it that need to be financed.

Between the options of a simple intergovernmental relationship and some form of statutory requirement, there would have to be some kind of middle way. That could mean extending attendance at the joint ministerial committee (European Union negotiations) to those who may be affected by issues that are raised on its agenda.

Alison Harris: The UK Government appears to envisage consultation and agreement with the Scottish Government on the exercise of powers by UK ministers. That is also the position that the Scottish Government takes in its proposed amendments to the bill. However, that does not provide for consultation with, or the agreement of, the Scottish Parliament. How might the Parliament hold the Governments to account in relation to any such agreement?

Charles Mullin: I cannot comment on the Scottish Government's amendments. That is ultimately a political issue for you, as the Parliament, and the Scottish ministers to sort out.

Kenneth Campbell: That is correct—it is a matter for political discussion. There are models for reporting and laying material before the Parliament, which might provide a starting point. I am not sure that I can say much beyond that.

Alison Harris: Is there a role for formal Scottish Parliament consultation on, or consent to, the exercise of powers by UK ministers? If so, should that role concern the exercise of powers that relate to matters within the Parliament's legislative competence, or matters that would be within legislative competence notwithstanding the requirement of compatibility with EU law?

Alternatively, should the role be wider and perhaps cover the exercise of powers in areas that are of interest and importance to Scotland? What do you feel about that?

Michael Clancy: We have suggested a number of times that the consultation exercise should start as soon as possible. There will be an unprecedented period of law reform and policy development over the next 18, 20, 24 or 48 months, depending on whose version of the future one subscribes to.

We know that Government, both in Whitehall and here in Edinburgh, has been working on the orders. It does not come as a great surprise that civil servants are thinking about the transposition and deconstruction of the supranational legal order and its creation within the national legal order. Therefore, why should Government not start to consult now on those draft orders, rather than leaving that process until some time after the bill has been passed? That might be March 2018, when the clock will have ticked even further; Monsieur Barnier's clock perhaps ticks at a different rate from our clocks. As you can see, the time becomes shorter and shorter the longer that we leave the process.

Some relatively uncontroversial orders will be brought forward by UK or Scottish ministers, and those could be consulted on with relative ease. The more tetchy, tricky and controversial orders could be left until later, when there is a more settled view about the policy route. As we have said before, and we would say again: consult now, and do not wait.

Kenneth Campbell: To follow that point a little further, there is the beginning of a road map for that process. The committee will be aware that the Scottish Government Minister for UK Negotiations on Scotland's Place in Europe wrote last week to the convener of the Finance and Constitution Committee with not only the Scottish Government's proposed amendments but the list—the current list, perhaps we should say—of areas in which powers will return from the EU. Work is being done to identify those subject areas. Following on from Michael Clancy's suggestion, with which I agree, it would be possible to get some work under way now to identify key stakeholders in those subject areas and to ascertain the legislative base. In some cases that may not be large, whereas in other cases it may be very large indeed.

Alison Harris: It may not be practical, in light of the timetable for EU withdrawal and the likely volume of instruments, for the Scottish Parliament's consent to be required for all UK instruments that make provision within the Parliament's legislative competence. If workload constricts the Parliament's ability to approach all such instruments in that way, on what sort of matters should a requirement for consent be prioritised? Do you have any thoughts on that?

Charles Mullin: You are quite right to say that the Parliament will have a problem of volume and will therefore have to prioritise what it really wants to look at. The creation of new bodies and associated expenditure, and issues that are raised in the bill that would normally attract the affirmative resolution procedure, could be prioritised. The House of Lords Constitution Committee suggested that that could be broadened to include a considerable degree of scrutiny in respect of issues of

"significant policy interest or principle"

that the Scottish Parliament would see as being of value to it.

As you say, it will be important to be selective with regard to the range of instruments that you look at so that you can scrutinise them effectively without getting bogged down.

Alison Harris: If the bill is not amended to require formal consultation with, or the consent of, the Scottish Parliament in relation to UK regulations that make significant provision with regard to Scotland, what other routes would you suggest should be pursued to influence scrutiny of such regulations?

Michael Clancy: The regulations would, in that case, pass through the UK Parliament. You should be in a position to ensure that concerns that might be raised by institutions and individuals in Scotland should be referred to members of Parliament and peers as the bill and those instruments proceed in their parliamentary passage.

Alison Harris: Those are all my questions, gentlemen.

The Convener: The bill provides for an order in council process that enables competences in areas of retained EU law to pass to the devolved authorities. Any orders must be laid subject to the affirmative procedure in the Scottish and UK Parliaments, so there is a formal scrutiny role for the Scottish Parliament. Do you foresee any difficulties with the mechanism that is proposed for the transfer of competences? I cannot say the word "competences" properly.

Charles Mullin: As Professor Page indicated, that is modelled on the kind of procedure that is followed in respect of section 30 orders under the Scotland Act 1998. That process seems to have worked satisfactorily—I hope that it has from your point of view. You will be doing comparable things as regards the competences of the Scottish Parliament, and that heavy procedure would seem to be appropriate for such important issues.

Michael Clancy: Ordinarily, transfers of powers are done by orders in council. As Charles Mullin mentioned, that is quite usual. If one looks back over the history of the Parliament, one sees that there have been transfers of powers from the earliest days. Everyone knows about section 30 orders, just as everyone knows about article 50 of the EU treaty—those numbers are now graven in our hearts. It is quite an ordinary process. If you read the bill, you will see that the amendments relating to the order in council stem from clause 11, which changes the structure of the competence of the Scottish Parliament and the Scottish ministers. The order in council requires a type A procedure—that is, approval by both Houses of Parliament and the Scottish Parliament.

11:15

Kenneth Campbell: Yes. Structurally, that seems to be the appropriate procedure for doing something like that. The bigger issue is the scope, but that is for a policy discussion. Structurally, that must be the right way in which to do it.

The Convener: Okay.

Colin Beattie: I am looking at the scrutiny procedures. Does the bill contain an appropriate split between matters that require the affirmative procedure and matters for which there is a choice between the affirmative and the negative procedures?

Charles Mullin: The bill highlights the kinds of issues for the affirmative procedure that I imagine will be of importance to the Scottish Parliament and the UK Parliament. As I mentioned, the House of Lords suggested extending the provision to allow wider considerations of principle and policy to require the affirmative procedure, too. There should be discretion to apply that procedure.

Kenneth Campbell: The topics that are listed in schedule 7 as requiring the affirmative procedure are correctly identified. As others have suggested, in certain circumstances that we cannot immediately foresee, there may well be cases where the procedure is appropriate because of their importance. That brings us back to the issue of co-ordination and the need to identify the issues and whose responsibility it is to deal with them; the need to take legislation forward; and the process for identifying what procedure should be adopted in any given case.

Colin Beattie: Let us leave aside the mandatory affirmative procedure categories. Wide discretion seems to be given regarding the choice of negative or affirmative procedure. Is that discretion appropriate? Can ministers be held to account on that choice?

Michael Clancy: I am not sure that the discretion is terribly great. Paragraph 1(2) of schedule 7, which lists topics that require to be dealt with by the affirmative resolution procedure, is followed by paragraph 1(3), which states:

> "Any other statutory instrument containing regulations"

is

> "subject to annulment in pursuance of a resolution of either House of Parliament."

It seems clear that an affirmative resolution is required for the categories that are listed in paragraphs 1(1) and 1(2) of schedule 7 and that the negative resolution procedure is required for orders that are described in paragraph 1(3).

The key is that parliamentary discretion over the type of procedure to which orders should be subject is taken away. There should be some way in which Parliament can have a greater role in determining which procedure should attach to which order. That is where I would go.

Colin Beattie: Are you saying that, far from there being a wide discretion, there is in fact almost no discretion?

Michael Clancy: I am prepared to be corrected, but I do not see a discretion to choose between a negative and an affirmative resolution.

Colin Beattie: That is interesting. How can the Scottish Parliament scrutinise the Scottish ministers' choice of legislative route in correcting deficiencies in retained EU law? By way of explanation, the choice is between regulations that are made by UK ministers alone, regulations that are made by Scottish ministers and regulations that are made jointly.

Charles Mullin: Michael Clancy answered the previous question about the exercise of discretion. Your second question is about how one can hold ministers to account for their choice of whether to exercise powers jointly or exercise them individually. The circumstances in which ministers would exercise joint powers are unclear at present. If the matter were to be clarified and perhaps tightened up, that might provide a more certain basis for ministers to proceed. The two Parliaments would know where ministers were likely to go and why they would go in that direction.

Colin Beattie: Do the witnesses all agree on that point?

Kenneth Campbell: Yes—I have nothing to add.

Michael Clancy: The best way to call ministers to account is to invite them to defend their regulations before this committee and before the lead committees for policy questions.

The Convener: That is a splendid idea.

Colin Beattie: Is there a role for strengthened scrutiny that would enable Parliament to be consulted on regulations that were laid in draft prior to final regulations being laid, for example? If so, which areas should be prioritised?

Michael Clancy: That approach is the super-affirmative procedure, which is within the scope of this committee. That procedure is not structurally in the bill, so the best way to ensure its use would be for amendments to be made to the bill.

Colin Beattie: As the bill stands, is using the super-affirmative procedure possible?

Michael Clancy: No. I have said that the procedure is not within the structure of the bill.

Colin Beattie: Does that mean that using the procedure is not possible?

Michael Clancy: I do not think that it is possible. The committee will be presented with orders in the way in which they are mandated under the bill.

Colin Beattie: That answer makes my next question a bit tricky. Nevertheless, I will ask it.

If we assume that a super-affirmative process was possible—at least for some matters—would that lead to other matters receiving little scrutiny, given the time that is available for legislation to be passed?

Kenneth Campbell: I am afraid that such a situation is inevitable. The volume of work that this committee and possibly other parliamentary committees will be engaged with in the coming months—whether that is 12, 24 or 48 months—will be significant. The UK Government white paper estimates that more than 1,000 legislative instruments will be required, and that may prove to be an underestimate. If that is correct, taking even a proportion of that legislative work to this Parliament—added to other legislative work that the Parliament will be engaged with—makes it inevitable that some areas will receive less scrutiny.

Charles Mullin: Ms Harris raised the issue of prioritising for scrutiny issues that you are interested in. Introducing innovative forms of scrutiny of delegated legislation would require amendment of the bill. The Law Society's submission refers to the suggestions of the House of Lords select committee and others about innovative approaches that might be taken to scrutinising the legislation in which you are really interested. However, there must be time limitations, as Kenneth Campbell indicated.

The Convener: What is the House of Lords publication to which you referred?

Charles Mullin: It was by the House of Lords Select Committee on the Constitution. We can provide the clerk with the reference at the end of the meeting.

The Convener: I believe that we have a link, so we will look at the document. Thank you.

When laying regulations under the bill, what accompanying information should the UK and Scottish Governments provide to enable the Parliament to prioritise its scrutiny effort? Should the bill include a requirement to provide particular accompanying information?

Charles Mullin: With reference to the suggestions by the House of Lords, we suggest that it would be useful for ministers to specify in the explanatory notes to any instrument exactly what the instrument achieves and, if it is intended to amend existing legislation, why it is necessary and whether it makes a policy or purely technical change. That would greatly help Parliament's scrutiny of any such legislation.

Kenneth Campbell: That is absolutely right. The only way in which it will be possible to do the prioritisation about which we spoke will be to have a clear idea of whether an instrument simply deals with what the policy of the bill is supposed to address—namely, moving the legal basis from the EU to domestic law—or whether a more substantive change is being made to the domestic legal order. It should be incumbent on the minister, whether that is a UK minister or a Scottish minister, to identify that.

Charles Mullin: After all, the vast majority of the instruments will deal with purely technical changes that will probably be of no interest to anyone. The key will be identifying the ones in which some policy or substantive provision is being made, which Parliament will want to look at.

The Convener: What areas, or categories of changes to EU law, should the Parliament seek to prioritise in its scrutiny?

Michael Clancy: It is easier to say what you should not prioritise. You should not prioritise the purely technical issues that are of minor importance. It is easier to put them to one side and look at them afterwards.

Matters that fall within the affirmative resolution provisions in schedule 7 to the bill, such as establishing a public body, widening the scope of criminal law or imposing some kind of fee, will be priorities. If we think about widening the scope of a criminal offence or imposing a fee, we might think about fines, but civil penalties might also apply. Although such things are not in the list, you might want to think about prioritising them. Those are the kinds of areas in which the liberty of the subject is at stake or there is some financial implication.

Kenneth Campbell: The affirmative procedure cases will probably be the more controversial or contested areas. Given the discussion that we have had about available time, they would be my suggestion for a starting place.

The Convener: As there are no more questions from members, I end the evidence-taking session. I thank Mr Clancy, Mr Mullin and Mr Campbell for their time and the clarity of their answers. I am glad to have given Mr Clancy his moment to remember.

Michael Clancy: It was one among many.

The Convener: I suspend the meeting briefly to allow the witnesses to leave.

11:29

Meeting suspended.

11:30

On resuming—

Instruments subject to Affirmative Procedure

The Convener: Item 3 is consideration of instruments that are subject to the affirmative procedure.

Colin Beattie: Convener, I would like to declare an interest. I am a registered landlord, and I point members to my entry in the register of members' interests.

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

Scotland Act 1998 (Specification of Devolved Tax) (Wild Fisheries) Order 2017 [Draft]

Private Residential Tenancies (Statutory Terms) (Scotland) Regulations 2017 [Draft]

Private Residential Tenancies (Information for Tenants) (Scotland) Regulations 2017 [Draft]

Public Appointments and Public Bodies etc (Scotland) Act 2003 (Amendment of Specified Authorities) Order 2017 [Draft]

Land Reform (Scotland) Act 2016 (Supplemental Provision) Regulations 2017 [Draft]

Land Reform (Scotland) Act 2016 (Supplementary, Consequential, Transitory and Saving Provisions) Regulations 2017 [Draft]

The Convener: Is the committee content with those instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

Public Water Supplies (Scotland) Amendment Regulations 2017 (SSI 2017/281)

11:32

The Convener: The instrument amends the Public Water Supplies (Scotland) Regulations 2014 (SSI 2014/364) to implement provisions of Commission directive EU 2015/1787, on monitoring requirements for drinking water, and of Council directive 2013/51/Euratom, on radioactive substances in drinking water. There are a few drafting errors in the instrument.

In new schedule 1A, which is to be inserted in the 2014 regulations, paragraph 4(3) of part E, on radioactive substances, provides that, when the indicative dose requires monitoring, the frequency of the monitoring must be determined

"depending on the screening strategy adopted pursuant to Part B of this schedule."

The Scottish Government has confirmed that the reference to part B is an error and that the reference should be to part F.

In the second column of table 1 in part B of new schedule 3, which is to be substituted into the 2014 regulations, headed "Uncertainty of measurement", the value that is given for polycyclic aromatic hydrocarbons is 30. The Scottish Government has confirmed that that is an error and that the value should be 50.

In the fourth column of table 2 in part B of new schedule 3, headed "Limit of detection", the value that is given for oxidisability is 25. The Scottish Government has confirmed that that is an error and that the value should be 10.

It is suggested that the committee could report the instrument under reporting ground (i), as the drafting appears to be defective, as I just outlined. The committee could welcome the Scottish Government's intention to correct the instrument by making and laying an amending instrument at the earliest opportunity. Does the committee agree to report the instrument to the Parliament under reporting ground (i), as the drafting appears to be defective?

Members *indicated agreement.*

The Convener: Does the committee agree to welcome the Scottish Government's intention to correct the instrument by making and laying an amending instrument at the earliest opportunity?

Members *indicated agreement.*

Teachers' Superannuation and Pension Scheme (Additional Voluntary Contributions) (Scotland) Regulations 2017 (SSI 2017/283)

The Convener: Regulation 14(8) contains a superfluous reference to regulation 12(5). The committee could note that the Scottish Government has undertaken to correct that error in the next set of regulations that includes amendments to SSI 2017/283. Does the committee agree to draw the regulations to the Parliament's attention on the general reporting ground, as they contain a minor drafting error?

Members *indicated agreement.*

Individual Learning Account (Scotland) Amendment Regulations 2017 (SSI 2017/288)

The Convener: Regulation 6(7)(d) intends to substitute "Training Account Administrator" for "Learning Account Administrator", which is comparable to several other substitutions in the instrument. However, in error, the provision specifies "A Training Account Administrator" and "A Learning Account Administrator". Does the committee agree to draw the regulations to the Parliament's attention on the general reporting ground, as there is a minor drafting error in regulation 6(7)(d), which amends regulation 4(6) of the Individual Learning Account (Scotland) Regulations 2011 (SSI 2011/107)?

Members *indicated agreement.*

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

M8/M73/M74 Motorways (30mph, 40mph and 50mph Speed Limit) Regulations 2017 (SSI 2017/286)

Notice to Local Authorities (Scotland) Amendment Regulations 2017 (SSI 2017/295)

Private Residential Tenancies (Information for Determining Rents and Fees for Copies of Information) (Scotland) Regulations 2017 (SSI 2017/296)

Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 (SSI 2017/297)

Title Conditions (Scotland) Act 2003 (Rural Housing Bodies) Amendment (No 2) Order 2017 (SSI 2017/301)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments not subject to Parliamentary Procedure

11:36

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

Health (Tobacco, Nicotine etc and Care) (Scotland) Act 2016 (Commencement No 2) Regulations 2017 (SSI 2017/294 (C 22))

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No 4) (Publicity, Remedial and Remediation Orders) 2017 (SSI 2017/298)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

11:37

Meeting continued in private.

13:00

Meeting continued in public.

European Union (Withdrawal) Bill

The Convener: Item 9 is a continuation of our evidence session on the European Union (Withdrawal) Bill. I welcome Professor Stephen Tierney, professor of constitutional theory at the University of Edinburgh. We will go through more or less the same questions that we asked our earlier witnesses, because Professor Tierney may well have a different take on them.

The bill confers wide powers on ministers of the United Kingdom and devolved Governments to correct retained EU law. Is the broad scope of those powers appropriate and necessary?

Professor Stephen Tierney (University of Edinburgh): That is a difficult question. We need to preface the discussion by outlining how extremely extensive the powers set out in clauses 7 to 9 of the bill are. They give ministers delegated powers to correct deficiencies in retained EU law, which is a very broad category in itself, and they also contain broad Henry VIII powers that allow deficiencies to be corrected by amending primary legislation.

Are the powers appropriate and necessary? The UK Government justifies the powers in the delegated powers memorandum that accompanies the bill. It gives three reasons why the powers are necessary. The first is that the Government estimates that there are more than 12,000 EU regulations and more than 6,000 EU directives in force across the EU, so the first reason is simply that in order to address the issue by exit day the Government requires latitude. Secondly, as a matter of practicality, it is not necessary to make all the changes in the bill. The bill could not possibly either remove or transpose all those regulations and directives; that will have to be done after the bill. The third reason is the need for flexibility. We are in the middle of Brexit negotiations at this precise moment. There will also have to be a discussion between the UK Government and the devolved Administrations about how those powers that might be devolved are treated. For all those reasons the third justification for the powers is the need for flexibility.

That is a plausible argument. The UK Government, as a generality in this situation, can plausibly make the argument that, if we are going to have Brexit—and one might think that Brexit is a terrible idea—the regulations and directives have to be dealt with, and it seems that the bill is a way to do it. I will also mention two other caveats. There are limitations on the use of the powers—we can come back to that, but it means that the powers are not unlimited—and they also carry sunset clauses, so they can be used only for a certain period of time.

I think that the powers are excessively broad, and as we drill down into some of the detail we will see that they are excessively broad. In just about any other statute, they would look astonishing but, given the context, it is hard to see another way to do it, although I think that the powers could be more tightly constrained than they are.

The Convener: In what way could they be more tightly constrained?

Professor Tierney: One of the real difficulties is the fact that the powers are themselves contingent upon the most significant provision in the bill, which is the provision that retains EU law. That term is very broad and capacious. What is meant by "retained EU law" is set out in the early clauses of the bill and it is very broad indeed. We do not have to concern ourselves with a lot of the ambiguities in that term. What I am alluding to is the fact that the regulations powers, which are very broad, relate to a term that is itself unclear, and when a term is itself unclear, that invites the powers to be used in a very broad way. That is the first difficulty.

Clause 7 allows regulations to be made

"to prevent, remedy or mitigate—

(a) any failure of retained EU law to operate effectively, or

(b) any other deficiency in retained EU law".

The terms "operate effectively" and "deficiency" are pretty broad. If we give a minister a power to correct any deficiency, in effect making it a subjective test for the minister to determine what "operate effectively" and "deficiency" mean, we are giving a very broad power. On that basis, I think that the powers operate broadly. More limitations could have been built in; the limitations in clause 7(6) are very narrow.

Another issue, which I presume that we will come on to discuss, is the extent to which there will be scrutiny. If we are going to give very broad powers to ministers, are powers also being given to Parliament—or Parliaments—to get time to look at how the powers are being used? It looks as though that will not be the case.

The Convener: You talked about ambiguities. We talked earlier about the vagueness of the language; should it be tightened up?

Professor Tierney: My view of the bill might seem a little paradoxical. When I look at the powers, I can see that they are very, very broad and raise real constitutional concerns. However, when I ask myself how one would go about it in a different way, I find it difficult to come up with a

concrete alternative that would, constitutionally, be better and that would make the process manageable, because we are talking about a very short period of time and a massive body of law that must be dealt with.

Moreover, it is a moveable feast as the UK negotiates with the EU. We do not know what shape proto-agreements will take as the UK moves towards exit day. For example, the UK cannot plan to get rid of a whole swathe of law if that law might be in the remit of a future trade deal and it would make sense to retain it. There might even be commitments to maintain EU law—there is now talk of a fairly lengthy transitional period, when the powers might not be used at all. It is therefore very difficult to see how the skeleton of the bill could be different from what it is.

The Convener: Has your view of the bill changed?

Professor Tierney: My view of the bill has not changed. I think that there are ways in which it can be tightened up, but fundamentally it is very difficult to see how it could be done in a totally different way.

The Convener: So when you first looked at it, you thought, "Whoa."

Professor Tierney: It is not so much that my view of the bill has changed. The bill is deeply constitutionally problematic: the Government is taking to itself very broad powers to change the law through delegated powers, most often through negative procedure and often through Henry VIII powers—all that would be problematic in any other bill. The problem is not so much the bill as the project that the bill is having to serve. The bill is having to serve a massive constitutional change, which has to happen very quickly. The bill is deeply problematic, but that is almost an inevitable consequence of the process that it is serving.

Stuart McMillan: You mentioned the transitional period. If there is to be a transitional period of two years, say, will it be important—or crucial—that all the laws are transposed into UK legislation before the period starts, or will the transitional period provide additional time to transpose the laws into UK law?

Professor Tierney: There would be two different ways of doing it. The transition deal could be accompanied by another piece of legislation that, in effect, continued the effect of EU law. That would be one way of doing it. That would involve going round the provisions of the European Union (Withdrawal) Bill and treating exit as if it were not in fact exit for that period of time, which would presumably be politically problematic for the UK Government.

If that is not the case and exit day is not only formally exit day but also the day on which EU law ceases to apply, the bill would carry on as it were and all the laws that would be kept under it would be retained. In that case, rather than a new piece of legislation being introduced, the delegated powers would simply not need to be used very much, except to carry out a block transfer of EU law into UK law as a going concern for the transition period. That would give parliamentarians and the UK Government much longer to plan for 2021—or whenever the period would end—as opposed to 2019. In that way, the rush that we envisage could be postponed.

There are two ways of doing it: one would be, in effect, not to leave the EU for two years; the other would be to leave the EU only symbolically for two years, in which case there would be an obligation to continue to be bound by EU law. In that scenario, Government ministers would probably come under the sort of constraints that the Scottish institutions come under at the moment—in other words, they would have to act in a way that was not incompatible with EU law. There would need to be some such provision at UK level.

Stuart McMillan: That was helpful. Given that you mentioned the transition deal, I thought that I would ask that question.

The bill provides a choice of three legislative routes to exercising the powers of correction: regulations that are made by the UK ministers, regulations that are made by the devolved Administrations and regulations that are made jointly by the UK ministers and the devolved Administrations. What challenges do you think that having that choice of legislative routes will give rise to?

Professor Tierney: The UK has the general, unlimited plenary powers. The default will be its exercise of those powers in reserved areas—which is what we anticipate—but you are talking about its use of those powers in devolved areas.

I think that having those three routes is a very complicated arrangement. It would depend on whether there were attempts to use the first of those routes and why. If the UK were unilaterally to use delegated powers in devolved areas, there would be political questions to be asked about why that was the case, given that, on devolved matters, there are provisions in the bill for the joint making of delegated powers in devolved areas. That is similar to the section 30 procedure that exists under the Scotland Act 1998.

The first category and the third category are the two on which it will have to be worked out when the UK should act alone and when it should act in collaboration with the devolved Administrations. I imagine that the default would be to try to work co-

operatively—under the principles of the devolution settlement, that ought to be the case.

The middle category is an interesting one. I assume that that is a reference to the powers that, under clause 10, the Scottish Parliament will continue to have to make delegated legislation in areas where it already has that power. We have been asking about that issue. As I understand it, the Scottish Parliament—or the Scottish Government—will acquire the power to continue to act in areas of EU law that are devolved at the moment and will be able to use the delegated powers in the bill to change EU law that is firmly within devolved competence for the purpose of correcting deficiencies and so on. I think that that is the least problematic aspect; more problematic would be the UK doing stuff unilaterally in devolved areas and how that would marry up with the shared delegated power making.

13:15

Stuart McMillan: When I posed that question to one of the earlier panels, they said that they would leave joint scrutiny aside. They consider it to be a non-starter, so it is interesting to hear your take on it.

Professor Tierney: In practice, that might be the case. The bill anticipates that the joint powers will mostly be used for the transfer of powers. To put it crudely, the bill envisages the UK transposing all EU law in devolved and reserved areas back into the UK box and then, by way of joint order making, gradually re-devolving it. That is what it envisages the joint powers typically being used for, so yes, one anticipates that the task of repatriating law will be done fairly unilaterally.

Stuart McMillan: Would it be possible for two legislatures to pass valid but conflicting legislation in exercising the powers in the bill?

Professor Tierney: That is a very interesting question. This has always been a concern of mine from a practical point of view. The Scottish Parliament has competence in EU areas, so far as they are devolved. The bill guarantees that that will continue. The bill attempts to get around the potential problem by removing competence in retained EU law. It depends how broadly that is read, but that is a potentially very broad provision that restricts the power of devolved administrations to modify retained EU law. That seems to prevent the risk—or the opportunity, depending on how one approaches it—that you raise. That seems to be the purpose of the bill. I imagine that a court dealing with a competence dispute would probably read that as the purpose of sections 10 and 11.

Stuart McMillan: There are limitations and restrictions on the correcting powers in schedule 2 that apply to devolved authorities but not to the UK ministers under their equivalent powers. Examples include a more limited power to sub-delegate than is available to UK ministers, and the requirement to obtain the consent of UK ministers in certain circumstances. Are those additional limitations on the Scottish ministers appropriate? What view do you take of the Scottish Government's proposed amendments to remove those restrictions?

Professor Tierney: They are not hugely significant. One understands the UK's approach here. I am aware that this is a delicate area, and I am not defending the overall approach of the bill, but it is what it is, and the UK Government has decided to do this by whole-scale transposition. That said, the bill could be more sensitive to devolution, and you allude to examples where there does not seem to be a pressing need for those sorts of fairly minor limitations. My sense is that they are probably unnecessary.

An overall theme that is far more important than the technicality of a lot of these provisions is the absolute need for healthy intergovernmental relations. I have talked about this before and people have said, "Well, it's a truism." Of course it is a truism, but it ought not to be forgotten. I say that because some of the more minor provisions that raise the hackles of people who feel that they are outside the spirit of devolved settlements are not conducive to reaching intergovernmental agreement on the bigger issues that really matter. I do not think that those minor provisions are particularly necessary, and they perhaps show an excessive lack of trust in devolved Administrations, which is not healthy.

Stuart McMillan: IGR will come up later.

In exercising their powers, devolved authorities may not modify retained direct EU legislation or make provision inconsistent with any modification of retained direct EU legislation that is made by UK ministers. Do you foresee any difficulties with such restrictions?

Professor Tierney: That is the general gist of the bill. There is a body of retained EU law, which contains many sub-elements. In essence, that is either EU law that directly affects us, which is Brussels law that we will bring in, or EU law that has been made into UK law. All that is going to be given the status of retained EU law. The bill's approach is that the devolved Administrations cannot amend that until it is sifted and what ought to be devolved is parcelled out.

Other approaches to the bill could have been used. I can see that way as a problem of principle, from a devolved perspective—I get that. It poses an invasion to devolution, as it is not congruent to

our principles for devolution over nearly two decades. However, the approach that has been taken could potentially be corrected through the commitment in the Government's explanatory notes to seek a rapid devolution of the powers. If that is done fully and consistently with existing devolved powers and a full commitment to parcel out the powers in line with the devolution settlement, the problem of principle can partly be overcome. That is how the bill stands and what will matter is how that position—and the powers related to it—plays out in practice.

Stuart McMillan: There is no equivalent for devolved authorities of the power in clause 17 to make consequential or transitional provision. Would it be usual for a UK bill that is making provision within the Scottish Parliament's legislative competence to confer such a power on Scottish ministers?

Professor Tierney: That might well be the case. One difficulty with the delegated powers in the bill is that there is power layered on power layered on power. By the time that we get to the consequential provision, we almost wonder why it is there; the other powers are so extensive that you wonder, "What on earth can be left that you have not already provided a power to do?" The provision seems to be a final catch-all power. Clause 10 and its relation to schedule 2 should be read as an all-encompassing power with regard to the power of the devolved authorities to do anything in relation to retained EU law that they can currently handle within devolved competence. My take on the exception that is built into clause 10 is that that would include transitional and consequential provisions. You might seek clarification with the bill team or the UK Parliament on whether, in so far as the Scottish Parliament still has powers in relation to retained EU law, those powers encompass consequential and transitional provisions. There is no reason in principle why they ought not to.

Alison Harris: Good afternoon, Professor Tierney. The bill does not provide any mechanism for Scottish Parliament scrutiny of regulations made by UK ministers alone, irrespective of whether the regulations are a matter of significance for Scotland or would have attracted the benefit of the Sewel convention had the matter been included in primary legislation. Does that present a gap in the Parliament's ability to scrutinise the exercise of the bill's powers?

Professor Tierney: Scrutiny is a crucial issue. I spoke about the general problem of principle to which Stuart McMillan alluded—a block is moved to the UK and then redistributed—and how that can be corrected in a devolution-sensitive way. One of the crucial questions will be how closely the powers are scrutinised, particularly where—as you said—regulations are being made exclusively at UK level in areas that will affect devolved matters. I know that this Parliament and this committee are thinking carefully about how scrutiny moves forward. It really is a potential lacuna.

Alison Harris: Do you have any thoughts on how we could fill that gap?

Professor Tierney: One big problem is that so much of the regulation process will be undertaken through negative procedure. The position that you highlight is constitutionally problematic, because the legislation will affect this Parliament but the process will be undertaken at Westminster. The practical problem is that it will happen very quickly: the legislation will be laid before Westminster and passed in a 21-day period unless there is the capacity in Parliament to look at it quickly. We simply do not know what sort of volume we are talking about, but it seems likely that it will be massive.

The issue of principle is itself problematic. Would there be a practical problem if the UK Parliament were to use the powers in a devolved area to modify retained EU law, presumably to bring matters into the purview of the retained EU law? After all, it would, even after those powers had been used, still be part of the vast body of law that would be subject to discussions about subsequent devolution of those areas. The problem of principle is significant, but it is not the end of the story.

With regard to what this Parliament could do, you need to think about the extent to which you have the resources to look at draft legislation in another chamber. It would be entirely constitutionally appropriate for this Parliament to look at that legislation, even if it cannot directly influence it.

Another option—I do not know how far it could go—would be interparliamentary co-operation, which seems to be an important theme as things move forward.

Alison Harris: Is there a role for formal Scottish Parliament consultation on, or consent to, the exercise of powers by UK ministers? If so, should that role concern the exercise of powers that relate to matters within the Parliament's legislative competence, or which would be within legislative competence notwithstanding the requirement of compatibility with EU law? Alternatively, should the role be wider and perhaps cover the exercise of powers in areas that are of interest and importance to Scotland? How would you define that?

Professor Tierney: You have rightly said that Sewel does not apply to delegated legislation, and we are now seeing just how big a deficit there is in

terms of interparliamentary relations. It is not inconceivable, however, that new conventions could develop. That is how conventions emerge, although sometimes they are invented by politicians—Sewel was an invention to some extent.

In the explanatory notes and the delegated powers memorandum, the UK Government talks a great deal about the need for, and its commitment to, consent, without mentioning Sewel in relation to delegated powers. If it is serious about that, it is not inconceivable that practices could develop—and practices can become conventions—covering exactly the kind of avenues that you are talking about. The devolved Administrations could certainly press for that on the basis of constitutional principle. We do not have the right to veto the delegated legislation; if we passed a motion here, it would not fit within the Sewel convention. We understand all that, but let us talk about the idea of other conventions emerging.

13:30

If we are seriously moving forward with Brexit, we are looking for a common approach across the UK, we are trying to build common frameworks, and we are trying to do this by consent, so let us think about avenues through which a semi-formal form of consent is required by the Scottish Parliament chamber and the other chambers for the use of delegated powers that are foursquare in devolved areas. That is a perfectly legitimate constitutional move to try to make.

Colin Beattie: Returning to scrutiny, does the bill have an appropriate split between matters that require the affirmative procedure and matters where there is a choice between the affirmative and the negative procedures?

Professor Tierney: To put it bluntly, no, it does not. The convener asked if I had changed my mind about the bill, and I think that you get worn down after a while. I still find it constitutionally problematic—there is no doubt about that. One really problematic area is the very limited range of matters for which affirmative procedure is expressly required. Given the vast swathes of policy areas that are involved, one would have expected a far broader use of affirmative procedure.

Once again, the other argument is simply the practical one that when you are talking about these many, many thousands of regulations and directives, it is very hard to see where the time could come from to lay each of them before Parliament for active affirmative consideration.

I know that that sounds a bit ambiguous. I do not think that the bill has an appropriate approach; on the other hand, I do not see how else it could be done. In a sense, the problem goes back to the project, not to the bill.

Colin Beattie: Does the bill give wide discretion over the choice of negative or affirmative procedure? If it does, is that discretion appropriate? How can ministers be held to account in respect of that choice?

Professor Tierney: Given that so little is set out as definitely requiring the use of the affirmative procedure, it is very open to ministers to decide on their approach. My sense is that if you give ministers a choice, they will use the negative procedure.

The other element that you have to build in is that there is a third scrutiny procedure: the made affirmative procedure, which is in effect a no scrutiny procedure that the minister can activate in a case of urgency. That is an innovation in the bill. It is an opportunity for ministers to make delegated legislation in pressing circumstances, which would become law without parliamentary scrutiny of any kind. Safeguards are built in to the procedure—the legislation would require to be reassessed within a month, and so on—but it is left entirely to the discretion of a minister to determine whether the circumstances are sufficiently urgent to require that procedure.

The bill vests enormous trust in ministers. It also vests enormous trust in the robustness of the ability of the UK Parliament in particular, but also other Parliaments, to follow very closely what ministers do with this stuff.

Colin Beattie: You have partially answered the question that I am about to ask but I will ask it anyway. Is there a role for strengthened scrutiny—for example, to enable Parliament to be consulted on regulations that are laid in draft prior to final regulations being laid? If so, which areas should be prioritised?

Professor Tierney: To some extent, that depends on what the powers are going to be used for. As I read it, the Government has committed itself to not use those powers to make significant policy changes. The idea is that the powers are just to correct deficiencies to make legislation fit for purpose in the act of bringing it into UK law.

Before the bill was even introduced, various Scottish and Westminster parliamentary committees put forward recommendations for heightened scrutiny procedures of the kind that you have talked about. Various innovations were recommended with provisions analogous to schedule 7 to the Scotland Act 1998, which lists delegated power-making procedures that involve the joint agreement of this Parliament and the UK Parliament—for example, the provisions in the Legislative and Regulatory Reform Act 2006 that set out extensive super-affirmative procedures. As

I read it, the Government's response is simply that there is not the time; we have to get the legislation done and such a procedure is not feasible because it would take too long.

A stronger suit to play would be to hold the Government to the promise that big policy will not be done with those powers; if big policy is to be made, primary legislation will be needed. The withdrawal bill will not be the only bill. It is the first, but there will be other bills in discrete areas of EU competence law. This Parliament's time might be better spent targeting primary legislation on big matters of policy when full Westminster scrutiny and the Sewel convention will apply.

Colin Beattie: You have touched briefly on the super-affirmative process. Is that specifically allowed under the bill?

Professor Tierney: That procedure is not provided for in the bill. I find it funny and slightly odd that a Government can put forward a bill that tells Parliament how to scrutinise legislation. It has always been my view that Parliament might as well say to the parliamentary draftsmen, "Thank you very much; it is good of you to tell us how to do our job, but in fact, this is how we are going to scrutinise this."

It is for people here to liaise with your parliamentary equivalents at Westminster on what kinds of procedures you want to see in the bill. If the Government drafts a bill, of course it will minimise the extent of its scrutiny. If there is a feasible argument that the super-affirmative procedure should apply in relation to matters that hit the devolved areas such as those that Ms Harris spoke about, the argument should be made through one Parliament talking to another and saying what amendments you want to be made to the bill.

The Convener: What areas, or categories of changes to EU law, should this Parliament seek to prioritise in its scrutiny?

Professor Tierney: The priorities are areas that affect devolved matters—or is that just a given? The crucial stuff that we all know about—environment, agriculture, fisheries and so on—is very important. Having said that, the UK could be outside the EU just as devolved legislation is coming into force—the Scotland Act 2016 and the Wales Act 2017 are new—and a trite and obvious point is that we are in the middle of a lot of changes. We have not worked out the boundaries of the devolved reserved competence of the 2016 act, which includes shared powers between Scotland and the UK in many areas, from welfare to transport police to other areas of transport. Many reserved matters will impact on Scotland in ways in which they would not have done five years ago.

This Parliament should not just focus on traditional areas of devolved competence, but maybe think that although a reserved matter has gone back to Westminster, the UK could use a power in a way that affects things that are now at the margins of devolved reserved competence, such as welfare, transport or taxation. There will be new areas to look at in the light of the Scotland Act 2016 that have not yet been fully thought through.

The Convener: As members do not have any other questions, I thank Professor Tierney for his time. The discussion has probably felt like a whistle-stop tour, but we have covered a lot of ground.

Professor Tierney: It has been a pleasure. Thank you.

Meeting closed at 13:40.

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