OFFICIAL REPORT
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Finance and Constitution Committee

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FINANCE AND CONSTITUTION COMMITTEE
8th Meeting 2018, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Neil Bibby (West Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
*Ash Denham (Edinburgh Eastern) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Emma Harper (South Scotland) (SNP)
*Patrick Harvie (Glasgow) (Green)
*James Kelly (Glasgow) (Lab)
*Ivan McKee (Glasgow Provan) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jenny Brough (Scottish Government)
Michael Clancy (Law Society of Scotland)
Alison Coull (Scottish Government)
Graham Fisher (Scottish Government)
Dr Kirsty Hughes (Scottish Centre on European Relations)
Luke McBratney (Scottish Government)
Professor Aileen McHarg (University of Strathclyde)
Professor Alan Page (University of Dundee)
Michael Russell (Minister for UK Negotiations on Scotland’s Place in Europe)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Finance and Constitution Committee

Wednesday 7 March 2018

[The Convener opened the meeting at 09:30]

UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill: Stage 1

The Convener (Bruce Crawford): Good morning and welcome to the eighth meeting in 2018 of the Finance and Constitution Committee. I remind members to switch their mobile phones to a mode that will not disturb proceedings.

The only business on our agenda today is evidence on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, which was introduced last week. We will hear from two panels of witnesses this morning. The first panel consists of Michael Clancy, director of law reform at the Law Society of Scotland; Dr Kirsty Hughes, director of the Scottish Centre on European Relations; Professor Aileen McHarg from the University of Strathclyde; and Professor Alan Page, professor of public law at the University of Dundee. I welcome you all to the committee.

Professor McHarg, you say in your written submission that the bill falls within the competence of the Scottish Parliament. For the benefit of the *Official Report*, will you explain to the committee how you arrived at that view?

Professor Aileen McHarg (University of Strathclyde): The dispute as to competence between the Lord Advocate and the Presiding Officer—the Welsh Presiding Officer takes the same view as the Lord Advocate—boils down to the question as to whether it is competent for the Parliament to anticipate the possibility of deviating from European Union law while the constraint under section 29(2)(d) of the Scotland Act 1998, which contains the obligation to legislate compatibly with EU law, remains on the statute book. The Presiding Officer takes the view that it is not competent on the basis that it would anticipate an expansion of competence, but the Lord Advocate and the Welsh Presiding Officer take the view that, because any effect of the bill is postponed until such time as we will no longer be bound to comply with EU law, the bill's provisions would not be exercising a competence in advance but would rather be taking necessary measures to ensure an orderly withdrawal from the EU.

My submission was made jointly with my colleague Dr Chris McCorkindale, and we took the view that the bill is within competence. On the point about how to interpret the Scotland Act 1998, we recognise that there is room for disagreement at the point where we make a judgment about whether a bill is within competence and whether the postponed effect is relevant. That depends on how we approach interpretation. If we were to approach it literally, we might well say that postponed effect does not save the bill, but if we interpret the Scotland Act 1998 in light of its context and purpose, there is a case for saying that the postponed effect does make a difference.

What is the purpose of the requirement that the Parliament legislates compatibly with EU law? What is the context in which that provision was enacted? The context is one of continuing membership of the EU and the purpose is to ensure that the Scottish Parliament does not breach the United Kingdom's obligations under EU law. On that point, the issue is arguable.

We found the tipping point to be in the Lord Advocate's argument that it is not contrary to EU law to make provision for withdrawal, on the basis that article 50 of the Treaty on European Union provides a mechanism for withdrawing from the EU and that mechanism anticipates a staged, orderly withdrawal. Therefore, as part of that process, making adjustments to domestic law in anticipation of the day after we leave the EU is compatible with EU law. In Parliament last week, the Lord Advocate made the point that, if it was incompatible with EU law to anticipate leaving the EU, the European Union (Withdrawal) Bill itself would be contrary to EU law.

Professor Alan Page (University of Dundee): I find it difficult not to regard the issue of whether the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill is compatible with EU law as a nice argument but one that is a red herring. People have found it convenient to latch on to it, but it does not take us much further forward with regard to the issue between the two Governments.

From the outset, my view has been that, if Parliament has the power to give effect to EU law within devolved competence, which it undoubtedly does, I cannot see any possible objection to Parliament providing for that law within devolved competence to continue to have effect when the UK leaves the EU, nor can I see any difficulty about Scottish ministers taking power to adjust that law so that it continues to function properly once the UK has left the EU. That is the easy bit of the issue. The difficult bit is to work out what is within devolved competence and what is reserved.

That is what the argument has been about from the very beginning in relation to this matter.

The Convener: As no other witness wants to say anything at this point, I will bring in Ash Denham.

Ash Denham (Edinburgh Eastern) (SNP): Thank you, convener. I am interested in the difference of opinion between the Presiding Officers of the National Assembly for Wales and the Scottish Parliament. How have we ended up in a position where two Presiding Officers of devolved legislatures have completely different views on the issue?

Professor McHarg: The devolution settlements have differences, of course, and there may be differences between the bills—I have not seen the Welsh bill yet. However, I do not think that those are the reasons why their views differ. The reason why they differ is that, when a minister or a Presiding Officer makes a competence statement, they are not saying that they are absolutely, 100 per cent certain that the bill is within competence or, conversely, that it is beyond competence. They are making judgments in areas in which there is genuine uncertainty—as there is on the temporal question, because it has not been addressed by the courts. We have had relatively few cases decided by the courts. Where there is no definitive answer, there is obviously scope to view the balance of arguments differently and take different views.

A competence statement means, "On the balance of arguments, I think that the bill is within competence" or, "On the balance of arguments, I think that the bill is beyond competence". It is perfectly understandable that two Presiding Officers might reach different conclusions on the vires of a bill.

Professor Page: Lord Hope said—rather dismissively—that the Presiding Officer had just an opinion, with the final decision resting with the UK Supreme Court. He was talking as a member of it at that time. It is an opinion that is arrived at in the Presiding Officer's professional judgment on the basis of the advice that they receive, but it is not definitive or conclusive.

Ash Denham: Thank you.

Adam Tomkins (Glasgow) (Con): I completely agree with Professor Page. The focus in the statements by the Presiding Officer and the Lord Advocate last week on the narrow question of EU competence is one important part of the question of the competence of the bill, but that focus misses an equally or perhaps even more important part, which is to do with the division between reserved and devolved powers. What are your opinions on that issue? I put that question particularly to the lawyers, including Michael Clancy. For example, how is it within the competence of this Parliament to legislate for a different exit day from that which is provided for in the withdrawal bill? Legislating for international relations, including relations with the European Union, is clearly reserved to the UK Parliament.

Michael Clancy (Law Society of Scotland): We have made it quite clear in our submission to the committee that that is a bone of contention between the two bills. In essence, because the European Union (Withdrawal) Bill in the UK Parliament has already been amended to identify 29 March 2019 at 11 pm as the exit day, one might wonder why the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill has a provision that allows for Scottish ministers to ordain exit day according to section 28 of the bill.

That presents us with a difficulty because, for one thing, under the withdrawal bill, UK ministers can change the exit day. The date of 29 March 2019 was chosen because it is two years after the notification, as required under article 50, of the UK's intention to withdraw. Under article 50, it is on that date that the treaties will cease to have effect, subject to any agreement that is made. There is therefore a particular difficulty if we are going to be thinking about a moving target. I am not saying that there will be a moving target but, in any event, it is fair to say that there is a significant risk of a lack of clarity if there is an ordained date under the withdrawal bill yet, under section 28 of the continuity bill, Scottish ministers were to ordain another day by regulations, on the assumption that the bill passes and gets royal assent.

Professor McHarg: We have to think about what function the term "exit day" performs in the bill. It does not perform the function of saying when the UK will cease to be a member of the EU, nor does it perform the function of saying when EU law will cease to apply. It is a provision for the operation of the continuity provisions in the bill and it is a provision that governs the length of time for which the ministerial powers will apply. It could have been called something else, in which case the issue would not have arisen about whether it relates to our relationship with the EU. Clearly it cannot, because that would be outwith competence.

We have to read those words in the context of the statute and consider their purpose. We also have to read the bill in the light of the competence constraints on the Parliament, and the courts are, of course, directed to read the legislation as narrowly as possible to keep it within competence.

Professor Page: I was going to add to that, "where conflicting interpretations are possible". If no conflicting interpretation is possible, section 1(1) does not come into play. The question was a good one.

Adam Tomkins: Would you like to offer an answer to it?

Professor Page: I am attracted by the answer, "Yes, I agree."

Dr Kirsty Hughes (Scottish Centre on European Relations): I want to make a general comment about the reserved-devolved constitutional stand-off. It is clear that Brexit, and the process of Brexit, is in general disrupting or even undermining our constitutional settlement. I am not talking only about the issue that is under discussion today. There has been much discussion, as there needs to be, about the situation in Ireland and Northern Ireland, and about the Good Friday agreement. Just as the devolution settlement was drawn up in the context of EU membership, so was the Good Friday agreement. We are in exceptional territory politically as well as legally.

I will be happy to say more about this if that would be helpful, but it is quite hard to conceive of any Brexit that does not put those constitutional challenges in front of us. There may be one, but it will certainly not happen given the path that the UK Government is currently on, and arguably it will not happen given the Brexit policies of the Opposition parties at Westminster or other parties. That is also worth saying at this point as regards the broader context.

09:45

Adam Tomkins: Can I offer the panel one other example to chew over? There is provision in section 6 of the continuity bill that concerns the on-going status in Scots law, post-Brexit, of the principle of the supremacy of EU law. Is the panel satisfied that that provision is within the Parliament's legislative competence as regards devolved and reserved matters?

Professor Page: You said that it was one to chew over, and I am certainly happy to do so.

Adam Tomkins: We have not got much time for chewing, I am afraid, Professor Page.

Michael Clancy: I go back to the point about exit day. Aileen McHarg is quite correct in that it is, notionally, a day on which the provisions of this bill would come into effect. However, we have a commencement provision for that. The explanatory notes relating to exit day, at paragraph 119 on page 18, say that

> "Section 28 allows the Scottish Ministers to appoint 'exit day', the day on which a number of provisions and powers in the Bill will come into effect. The day appointed will be the day on which the UK ceases to be a member of the EU."

Therefore if the EUWB date of 29 March 2019 holds, we already know what the date of leaving will be and the bill should reflect that. However, what is in the continuity bill may be predicated on a belief in the Scottish Government that the date of 29 March will not be the date of exit.

Adam Tomkins: It is worth noting that that is what the explanatory notes say, but it is not what the bill provides in section 28.

Michael Clancy: Yes.

The Convener: I should say, for completeness, that the clerk has just handed me a note from yesterday's Delegated Powers and Law Reform Committee meeting, at which the minister said that he would consider lodging an amendment to the bill to match up with the UK exit day, so there is obviously a recognition that there is an issue there and he is prepared to consider it.

Professor McHarg: I think that the provision on the supremacy of EU law is within devolved competence. We are talking about affecting only matters that are within devolved competence. I assume that Adam Tomkins's concern is about potentially changing the hierarchy of laws so that EU law would override previous UK legislation. However, of course, this Parliament can do anything that it likes to previous UK legislation that falls within devolved areas, so that must include the ability to subject it to the supremacy of EU law.

Adam Tomkins: Professor McHarg, do you consider that this Parliament has that competence now? We are not talking about whether it would have it after exit day but about whether it has it now, because it is now that we are being asked to make this law.

Professor McHarg: That goes back to the point that I started at, which is that the temporal question of when competence takes place is arguable. If there is no potential inconsistency with EU law, that temporal question becomes redundant. However, assuming that, at some point, it can legislate on this matter—whether it be now or post-Brexit, which, of course, depends on how the withdrawal bill is enacted—I think that there would be no objection, in principle, to this Parliament providing that EU law takes supremacy over legislation from whichever Parliament enacted as of exit day.

Adam Tomkins: I have just one final supplementary question on the basis of what you have just said, which was fascinating. What authority would you cite in favour of the proposition that the temporal point is redundant in those circumstances?

Professor McHarg: It is redundant in the circumstance that there is no breach of EU law: it is simply that. I would not cite any authority—simply logic. If there is no breach of EU law,

section 29(2)(d) of the Scotland Act 1998 does not bite.

Adam Tomkins: Thanks.

The Convener: Patrick, I hope that we have not missed the moment for your supplementary.

Patrick Harvie (Glasgow) (Green): It was just a very minor point following up on the questions that Ash Denham raised about the different judgments that have been made about the competence of the Scottish and Welsh bills. I am aware that some people have reacted to the events of the past week or so as though the opinions given by the Presiding Officer and the Lord Advocate are somehow definitive rulings.

Panel members have said that there is space for disagreement and that different approaches can be taken to those questions and I want to be clear about that. Is it fair to say that there is no single approach to those questions and the balance of the arguments that could lead to the conclusion both that the Welsh bill is competent in Wales and that the Scottish bill is not competent here? Is it the use of fundamentally different approaches that gives rise to those conclusions or judgments, or is there any way of reaching both of those conclusions consistently?

Professor Page: I find what has been said both by the Presiding Officer and by the Lord Advocate to be unsatisfactory. In their written submission, Professor McHarg and Dr McCorkindale made the point that having those judgments moves the quality of debate in this institution on, in the sense that Parliament and the MSPs—you, in committees—can talk about the issues, but I am not sure that you actually have anything with which to debate effectively the question of legislative competence. I only glanced at the Welsh Presiding Officer's opinion, but I have to say that I thought that it was fuller, more comprehensive and more closely argued than what I saw from either the Lord Advocate or the Presiding Officer of this Parliament. I do not know whether that answers your question.

Patrick Harvie: Neither do I.

Professor McHarg: To try and answer Mr Harvie's question, I say that it is potentially the case that different conclusions could validly be reached and could be endorsed by the courts, because there are two different devolution settlements. The terms of the Government of Wales Act 2006 and of the Scotland Act 1998 are different. For the time being, they take a fundamentally different approach to the division of competence. There may be differences of detail in the two bills that make a difference, but I do not think that those are what the differing opinions that have been given by the two Presiding Officers turn on. I think that their differences turn simply on differing approaches being taken to an issue that has not been definitively settled.

James Kelly (Glasgow) (Lab): We are in uncharted territory, in the sense that we have a difference of opinion from the Lord Advocate and the Presiding Officer, which puts MSPs in a difficult position. Bearing that in mind, as well as the public interest in the matter, what does the panel think of the Law Society of Scotland's suggestion that both the Presiding Officer and the Lord Advocate should publish their legal advice in full?

Michael Clancy: I agree with that suggestion.

James Kelly: Now that you have kicked off, can you expand on your reasoning for that?

Michael Clancy: Characteristically, law officers do not show their working, as it were, when giving advice. The Presiding Officer is supported by an extremely skilled and able team of lawyers in the office of the solicitor to the Scottish Parliament, and he will have received the best advice that they could provide. The Lord Advocate is also supported by an extremely skilled and well-qualified set of lawyers in the Crown Office, and he too will have received the best advice that they can provide. The Law Society has taken the view not to comment on the competence issue, because it is ultimately a matter for the Supreme Court to decide, if the bill passes and if it is referred there.

Our view of asking both the Lord Advocate and the Presiding Officer to explain their thinking is based on the idea that there should be an element of transparency about the question and that we should be able to see the rationale that led to the statements by Mr Swinney and by Mr Macintosh. I know that it would be an extraordinary set of circumstances in which law officers—or, I would expect, Presiding Officers—would provide their advice, but these are extraordinary circumstances.

I can think of only two examples in the past where law officers have disclosed the advice that they have provided. The first involved Lord Hardie when he was Lord Advocate and was in connection with the bill that became the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, which was the first bill enacted and published by the Scottish Parliament. There is a point in the *Official Report* where Lord Hardie gives in the Parliament chamber the background to his advice on the bill. The other example that I can remember is when Lord Goldsmith gave some idea of the advice that he had given in connection with the Iraq war.

Professor Page: I said previously in answer to a question that I thought that both the Presiding Officer's statement and the Lord Advocate's statement were incomplete. I am therefore

sympathetic to the suggestion that has been made about explanations. Normally, if the Presiding Officer says that a bill is outwith competence, that is a very good reason for the Parliament simply declining to consider the bill any further and that is what has happened to date with every member's bill in respect of which a negative statement has been made. That is not happening with the continuity bill; the decision is to go on and consider it, notwithstanding the Presiding Officer's advice. However, I think that it is entirely within the legitimate expectations of members of the Scottish Parliament that they should have a full view of the basis on which the differing views have been taken, which they do not have at the moment.

James Kelly: Does any other panel member want to comment on that? No.

Given that the bill, if passed, could be challenged in the courts, what can the Parliament do during its process of consideration and scrutiny of the bill to minimise the risk of any legal challenge?

Professor Page: The Parliament will want to satisfy itself fully that the bill is within competence and the only way in which it can do that is by interrogating the statements that have been made more fully than has hitherto been the case.

James Kelly: Does any other panel member have a comment on that? No.

The Convener: Ivan McKee has a supplementary question.

Ivan McKee (Glasgow Provan) (SNP): Good morning, panel. I have a short supplementary question to clarify for me and perhaps others Adam Tomkins's point about the dates. As far as I can see, the intent is clear in the continuity bill that the exit date that it refers to is the same as the date that is referred to in the withdrawal bill. I assume that the date is referred to in the continuity bill in the way that it is because there may or may not be a change to the date in the withdrawal bill and, however small that likelihood is, that has to be provided for so that the legislation is coherent. If there is a perceived issue there, is it not just a technical drafting issue? How should that be handled in the wording of the continuity bill to ensure that there is no scope for making the argument that Adam Tomkins has made, which is that the continuity bill is stepping outside the devolved remit by suggesting that the Scottish Parliament has some say in when the exit date is?

Professor Page: I think that that is right, but it also illustrates one of the difficulties with proceeding in this way. How do we make sure that complementary bills match up with each other? If a bill is passed by this Parliament and a bill is passed by the Westminster Parliament, how is that done? The intention here is to cater for the possibility that the exit date that is set in the withdrawal bill is changed. This Parliament can then change the date in this bill.

10:00

Ivan McKee: I am not a lawyer, but I assume that this is not the first time that a piece of legislation has referred to something in a different piece of legislation.

Professor Page: That is not quite what I was referring to. I am referring to the underlying strategy of having complementary bills—a UK withdrawal bill and a Scottish continuity bill. On the face of it, that is a perfectly defensible idea. Why should you not do that? One question that you might like to ask, though, is, why, in that case, there have been so few such bills. How many bills can you identify that have been complementary bills? One reason why there have been so few is that it is extraordinarily difficult to get the legislatures to engage properly so that they produce the same result. There are two different legislatures legislating and no guarantee that what comes out at the end will match up.

The Convener: Yes, but we have never been in circumstances like these before.

Professor Page: You were, back in 2002.

Ivan McKee: Again, I am not a lawyer, so I am treading carefully here, but is that situation not the case now with respect to EU law, when national legislatures pass laws that refer to EU law?

Professor Page: There is no problem with the EU—

Professor McHarg: Sequencing is the problem. When it comes to the implementation of EU law, there is a completed text, so legislatures know what it is that they are implementing.

Ivan McKee: Right, so this shows that they are both—

Professor McHarg: The trouble is that, in this case, both bills are going through their parliamentary passages. We know that the legal continuity bill has been written to closely mirror the withdrawal bill to try to ensure that it works, and that means that it retains some elements of the withdrawal bill that have been criticised. It is perfectly possible that, as the withdrawal bill continues to go through the House of Lords, those elements are changed, in which case the legal continuity bill will cease to work in parallel with the withdrawal bill. Alternatively, this Parliament might make changes to the legal continuity bill that introduce new differences between it and the withdrawal bill. The fact that they are being done in parallel causes the problem with trying to maintain coherence.

Michael Clancy: Mr McKee asked whether the issue in relation to section 28 was just a technical one. It would be possible to leave out

"such day as the Scottish Ministers may by regulations appoint"

and insert

"29 March 2019 at 11:00 p.m.",

because clause 14(1) of the EUWB says

"'exit day" means . . . 29 March 2019 at 11.00 p.m.".

However, even that bill makes provision for that date to be changed. Clause 14(5) states:

"A Minister of the Crown may . . . amend the definition of 'exit day' in subsection (1) to ensure that the day and time . . . in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom".

That is in order to take account of any further negotiations.

Ivan McKee: Can that not just be referred to in the continuity bill?

Michael Clancy: You could do that—you could refer to clause 14, which will become section 16 if the EUWB passes—but clearly the Scottish Government has taken the view that it wants the bill to be as comprehensive as it can make it.

Building on Aileen McHarg's point about these two bills working in parallel, I have been sitting through the process in the House of Commons and the House of Lords, and it is absolutely the case that a significant number of amendments are being proposed by members in both those houses. To give you an idea of what is envisaged, there are 80 groups of amendments still to go for passage of the EUWB, which has been allocated 10 days—working on 11—in the House of Lords and five days at the report stage. That corresponds to 10 days at stage 2 and five days at stage 3. Although the Law Society may have proposed a significant number of the amendments in those groups, members are free to propose amendments as they see fit. As Lord Keen has said, the UK Government is in listening mode and, therefore, one expects that there will be amendments at report stage. If there are no Government amendments at the report stage, I expect that the members who are proposing amendments at the moment will seek to force them on to the bill.

If one is a Scottish minister, one has to be fleet of foot because, by the end of the process, the withdrawal bill could end up as quite a different measure from how it appears at the moment. It is not just the withdrawal bill, because the Trade Bill that is currently in the House of Commons makes amendments to the withdrawal bill. I could go on but I will not.

Ivan McKee: With regard to the specifics of tying up the dates, it sounds as though there is a technical solution that could work.

The Convener: I am sorry, Ivan, but it was supposed to be a supplementary question and it has gone a fair bit beyond that. There are other members who want to ask about the competence issue, but we have moved into the detail.

Neil Bibby (West Scotland) (Lab): My question on competence has been covered.

The Convener: We move on to the necessity issue.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): I want to ask the witnesses for a comment or two on the timing for the Scottish Government bill. Clearly, there is one view that there is an urgency attached to it and that we need to do it now, but there are alternative views that the process does not need to be so urgent or that we do not need the bill at all. What are the advantages or otherwise of the bill being introduced now, and what would be the risks of leaving it to the last minute or not introducing it at all?

Professor McHarg: The reason for treating the continuity bill as an emergency bill is to ensure that it is enacted before the withdrawal bill is enacted. There are two different reasons for that, depending on what happens with the withdrawal bill.

The Scottish and Welsh Governments' assumption is that, if the devolved legislatures do not grant consent to the withdrawal bill, the provisions of the bill that affect devolved competence will be withdrawn and there will be gaps in relation to continuity provisions for devolved areas and ministerial powers to correct deficiencies. If there is a gap, the possibility arises of invoking the exception to the Sewel or legislative consent convention, which says that consent is normally required. We do not really know what "normally" means, but it is reasonable to say that one situation in which it would be legitimate to dispense with consent is in circumstances of necessity. For example, last November the UK Parliament passed a budget bill for Northern Ireland because it was necessary that that legislation be enacted and the absence of the Northern Ireland Assembly meant that devolved consent could not be given. In a situation in which there is a possibility of a legal gap being left for devolved competence in Scotland and Wales, there is the risk that the UK Government could say that the absence of consent from the devolved Parliaments has to be ignored.

The alternative arises if the withdrawal bill goes ahead in its current form, because that would place restrictions on devolved competence in a

number of different ways. If clause 11 is enacted in its current form, that would prevent this Parliament from legislating in the future on retaining EU law. As was pointed out yesterday at the Delegated Powers and Law Reform Committee, schedule 3 of the withdrawal bill would amend schedule 4 of the Scotland Act 1998 and add the withdrawal act, as it would be, to the list of enactments that are protected from amendment by this Parliament. The Scottish Parliament would not be able to go its own way on continuity because that would all be covered by the withdrawal bill. The necessity and urgency are tactical.

Dr Hughes: There is an urgency on both the issue of continuity and the Brexit talks in general. We are moving towards the target of a full withdrawal agreement, including an outline framework on the future relationship, by autumn 2019 and perhaps it is pertinent to think of what the EU chief negotiator Michel Barnier said recently when the European Commission introduced its draft withdrawal agreement text, which was that now is the time for texts rather than for more speeches.

I do not know whether you want to come on to this in the detailed discussion, but we have not yet talked much about the common frameworks, whether there is consultation or agreement and how those frameworks would run, which are highly problematic questions. If we are going to establish common UK frameworks in some areas of agriculture and fisheries at the same time as we are negotiating a new relationship with the EU in those areas, there will also be a sequencing issue. The UK Government is extremely late in coming to any position on that future relationship. We are expecting the EU draft trade guidelines this morning, or perhaps lunch time. We are in an extraordinary political and legal process of negotiation that is not entirely consistent in terms of policy positions and therefore democratic accountability. I do not anticipate that the outcome of the process will be that Scotland and the Scottish Parliament will have a say in trade policy in the way that Wallonia does, for example, but there are interactive questions between the common frameworks and future UK positions. There is a broader urgency, which also speaks to the urgency of the continuity bill.

We could still be facing no deal territory, but if there is a deal, a withdrawal agreement and implementation bill will be introduced in the autumn. That may also cut across some of the two withdrawal bills, just to add to the complications that we have already been discussing. Transition arrangements—assuming that there are such arrangements—will be part of the withdrawal agreement, which is not likely to impact on the actual EU exit date per se, but will have an impact on timing and sequencing.

Michael Clancy: I have a quick remark about the need for proper scrutiny. There is a tension between emergency legislation, which restricts time, and the opportunity for scrutiny. The balance between speed and scrutiny can be problematic. We need to be very careful, given that in effect there is a period of three weeks to pass the bill; by any stretch of the imagination it is a significant bill with many moving parts, all of which could cause difficulties in the future.

I asked my colleague Nicola Whiteford to look at how many emergency bills had been passed by the Parliament since its inception and she found that eight such bills have been passed. The average time between introduction and enactment of emergency bills has been about eight days—that was the case in the very first emergency bill, which I mentioned earlier. Each emergency bill was focused on a single issue. That is why we must be cautious about applying an emergency procedure to such a significant measure.

The Convener: We understand that, but the Parliament has already decided that that is what it what it wants to do. Willie Coffey's question was about the sequencing of events elsewhere and whether that meant that the continuity bill was reasonable at this stage. Have I got that right, Willie?

Willie Coffey: Yes. I was asking about the significance of dealing with the continuity bill now, as opposed to waiting until around exit day or not doing it at all. What are your views on that?

10:15

Professor Page: It is about putting pressure on the UK Government and saying, "We are deadly serious about this issue", with a view to either having the withdrawal bill amended as the Scottish Government would like to see it amended or, in the event that the provisions to which objection is taken are not excised from the bill, filling the gap that is left—the legal continuity bill would, at least in theory, fill that gap. Which of those things, if any, is going to happen is impossible to predict at the moment.

Murdo Fraser (Mid Scotland and Fife) (Con): Given that we are taking evidence from the Law Society of Scotland, I remind members that I am a member of the society, although I am not currently practising.

On timing, I want to pick up on a couple of points that Michael Clancy made in his exchange with Ivan McKee on the interplay between the legal continuity bill and the EUWB at Westminster. The Scottish Government has said that the legal continuity bill is emergency legislation and it wants it on the statute book before the EUWB completes its parliamentary passage. From what you were

saying, Mr Clancy, is there an inherent risk in that approach? The EUWB is likely to be subject to significant change. How can we complete the passage of the continuity bill and make it truly complementary to the EUWB, if the EUWB might be subject to further change?

Michael Clancy: It might be subject to further change; that is up to the UK Parliament. Amendments that are passed in the Lords might, through the process of ping-pong between the House of Lords and the House of Commons, be rejected by the House of Commons and not make it into the final bill that is put forward for royal assent. There is an inherent doubt in that.

In the process that is currently going on, there are six days of committee stage and five days of report stage, which in effect will take until after Easter. By the time the ping-pong is done, we will be into May or even June. At each stage, there will be the possibility of amendment. There is a risk that there will have to be some amendment to the legal continuity bill as a result of what happens to the EUWB.

I take the point that the Parliament has agreed that there should be emergency legislation. I was not trying to argue that the legal continuity bill should not be considered as emergency legislation; I was simply making the point that speed and scrutiny are two things and the fact that there might have to be some amendment to the legal continuity bill is yet another issue to be considered.

Professor McHarg: On the impact of amendments to the withdrawal bill, I think that we have to distinguish between two different scenarios. There is the scenario in which a lack of symmetry between the two bills—there already is a lack of symmetry, in some respects—is a problem, in so far as it causes complexity.

There might be a different scenario, in which amendments to the withdrawal bill cause problems of effectiveness or workability. Those changes would be more problematic. Changes might be made to the withdrawal bill that render the approach that is taken in the continuity bill unworkable—as opposed to amendments that increase the complexity that arises from there being different approaches in devolved and reserved areas. The latter kind of complexity is a problem in itself, but to my mind it is things that are done that will mean that the continuity bill simply will not work that are more serious.

Murdo Fraser: Mr Clancy's point was that the Scottish Parliament might complete the passage of the continuity bill but that, with subsequent changes to the withdrawal bill, we might subsequently have to revisit that legislation. Do you have a view on that?

Professor McHarg: There are regulation-making powers are there not? Mr Clancy, am I right in thinking that there is equivalence to the powers in clause 17 of the withdrawal bill? There are certainly some regulation-making powers. Section 34—

Michael Clancy: Yes, section 34 of the legal continuity bill says:

> "Schedule 2 contains consequential, transitional, transitory and saving provisions."

We would have to look at the issues a bit more closely in order to give a definitive opinion, but I think that it would be possible to change some aspects by virtue of regulations. However, as Professor McHarg has pointed out, if an amendment to the EUWB creates a significant change that causes a knock-on effect for the legal continuity bill, that creates an enormous difficulty for the functioning of the measure. There are also the time issues that affect this bill. If it is passed in this Parliament, it will then be sent to the law officers, who might take a different view about its future.

The Convener: I am not saying that anyone on this committee supports this position, but is the inevitable conclusion of that argument not that ministers should take more powers for regulation in order to deal with that potential situation, which would leave less time for scrutiny?

Michael Clancy: It would leave less time for scrutiny.

The Convener: But that flexibility would allow ministers to sort things out if the problem that has been described were to emerge, would it not?

Michael Clancy: Yes.

Murdo Fraser: I read the Law Society's submission last night. It highlights a large number of areas of concern in relation to which you believe that the bill requires amendment. The introduction says:

> "the Scottish Government should be permissive with suggestions to improve or clarify the bill as it passes through the Parliament."

Clearly, your view is that the bill requires substantial amendment in order to be fit for purpose and to be good law.

Michael Clancy: In some respects.

Murdo Fraser: Under the emergency legislation procedure, the deadline for lodging amendments is this Friday. Does that give the Parliament time to create good law and ensure that the bill gets the proper scrutiny that it requires from all of those who might be interested in it? Is that sufficient time for amendments to be properly drafted, lodged and considered?

Michael Clancy: I have drafted some amendments, and I think that other people who have been thinking about amending the bill will have been doing that since the bill was introduced. I have every confidence that the Parliament will rise to the occasion and that members will give the bill the proper scrutiny that it requires and amend the bill if it needs amendment.

Neil Bibby: Here at stage 1, we are discussing the necessity for the legislation and the principle of legislating on this issue. The reason for legislating is that there is no agreement on the withdrawal bill. However, the Parliament and the public do not know what the areas of disagreement are between the UK Government and the Scottish Government—reportedly, there are 25 of them. Yesterday, at the Delegated Powers and Law Reform Committee, Michael Russell said that he could not publish those areas because he did not have agreement from the UK Government. Do you think that that is an acceptable and sustainable position? Do you agree that the Parliament and the public should know at this point what the areas of disagreement are, given that they are the reason for this legislation being introduced?

Professor Page: I would agree with that. That follows on from what has been said previously in relation to opinions of the law officers and the Presiding Officer. There is a massive imbalance or asymmetry of knowledge surrounding this process. An intergovernmental negotiation has been conducted behind closed doors and there have been various statements in the press that may or may not be well founded.

I have said previously that, as an outsider, it is impossible to know what is going on. I wonder to what extent members of this Parliament are better informed. We started with 111 EU powers that intersected with the devolution settlement. Where have we got to in relation to that? What are the 25 outstanding ones? That is what the argument is about. It is not satisfactory, but it suits the minister to say, “I can’t say because I need to get agreement from the others,” and, “Oh, yes, Friday is the date for amendments”; and the final comment might be “Sadly, I couldn’t get it to you in time.” None of that is good enough.

Professor McHarg: As a general point, the intergovernmental negotiation of amendments to bills affects the normal legislative process quite significantly. If amendments are agreed to and therefore made to the withdrawal bill, I imagine that the UK Government will be extremely resistant to any attempt to amend them as the bill completes its passage through the UK Parliament. I agree that this is not a desirable situation to be in. I would like to know more about what is going on. However, it is not surprising in the context of intergovernmental negotiations. This is what happens: they sideline Parliaments and empower executives.

Dr Hughes: I agree with what Alan Page said. I think that transparency is highly desirable and democratic. As people have said this morning, in the quite extraordinary circumstances that Brexit is creating and in this particular constitutional stand-off, transparency is certainly desirable. I do not mean to keep referencing the approach of team Barnier, but what they have done since last summer has involved an extraordinary degree of transparency in publishing negotiating documents and positions. That has been enormously helpful for both sides in understanding this extremely difficult and, in my view, damaging process.

Michael Clancy: From the very beginning we have advocated that there should be a whole-of-governance process that should include not only the UK Government and the devolved Administrations but civic society generally. I can say only that Kirsty Hughes is absolutely correct, because the website that the European Commission has set up for its task force on article 50 negotiations allows us to see all the documents in quick order, although some of them are rather more truculent than others—if we look at an agenda of a meeting, we might see that it is not exactly what we would understand to be a full agenda. It is very important that there should be as much transparency as possible, which is unfortunately not the case at the moment.

Adam Tomkins: I think that the question that I wanted to ask in this section of our discussion has already been covered by Professor McHarg. It was a question about the extent to which all this talk about exceptional circumstances, abnormal circumstances and so on means that, in effect, the Sewel convention no longer applies to the passage of the withdrawal bill, because the Sewel convention applies only in normal circumstances. However, I think that Professor McHarg has already covered that. Thank you.

Professor McHarg: I do not think that that is exactly what I said, but nice try.

Adam Tomkins: In that case, would you like to clarify it for the record? The question is to what extent the members of the panel think that the Sewel convention continues to apply to the withdrawal bill, given that the minister said last week, when he moved the motion, that the continuity bill should be fast tracked because

“this is a ‘novel’ situation. In normal times, such a bill would follow a normal timetable, but these are not normal times.”—[*Official Report*, 1 March 2018; c 29.]

In my view, that seems to be a concession by the Scottish National Party that the Sewel convention no longer applies to the withdrawal bill.

10:30

Professor McHarg: It depends on how we understand "normal". As Adam Tomkins will know, conventions are normative statements and are not descriptive statements. Descriptively, we are of course in abnormal times, but that does not necessarily mean that, as a normative statement of a constitutional rule, the "normally" exception to the Sewel convention can be invoked.

There is little discussion and little experience of what that "normally" exception means under the Sewel convention, but in my view it can either be invoked in circumstances of necessity—which may arise if there is a potential gap on the statute book in relation to the continuity of EU law in devolved areas, although we are not there yet—or in circumstances where a devolved legislature is clearly attempting to abuse its powers. In Harry Calvert's work on the constitution of Northern Ireland, which I am sure you are familiar with, he talks about the legitimacy of overriding the predecessor of the Sewel convention in circumstances where the Northern Irish Parliament was abusing its powers, in the context of discriminating against the Catholic minority. You can make an argument for reading the "normally" exception in those two circumstances, but it is important to say that "normally" is a normative statement, not a descriptive one, so the fact that we are in unusual times does not necessarily, by itself, justify overriding devolved consent.

Professor Page: I assume that the convention continues to apply, if only because the possibility has not been ruled out that this Parliament will consent to the European Union (Withdrawal) Bill. We have not reached a definitive conclusion on that yet, or at least that is my understanding, so I think that it continues to apply for the moment.

James Kelly: I have a question on timing. Bearing in mind the Scottish Government's argument for treating the bill as emergency legislation, it needs to be passed before the withdrawal bill is passed at Westminster. I know that there are some disagreements about that, but if we accept that for the minute, and note that we have already agreed to process the bill as an emergency bill—bearing in mind the points that have been made about the importance of scrutiny and the fact that, as Michael Clancy has said, it will be at least May or June before the withdrawal bill is passed at Westminster—is there not a case, within the confines of still treating the continuity bill as an emergency bill, for at least extending the timetable into April, to allow more transparency and scrutiny, and to give MSPs proper time to consider the significant issues that are at stake?

Professor McHarg: You would have to bear in mind the four-week period between the Parliament passing the bill at stage 3 and its gaining royal assent. I cannot comment in detail on how the parliamentary timetable works, but that four-week period has to be taken into account.

James Kelly: Is there not a similar process at Westminster?

Professor McHarg: No.

Michael Clancy: No. Once a bill has passed both houses of the UK Parliament it goes on to receive royal assent without the need for any four-week lying period during which law officers check it or may have a view on it. That is a significant distinction between the ways in which UK legislation and Scottish legislation work.

James Kelly: Bearing that in mind, and building on your earlier answer, can you give an indication as to what you think the timetable would be for the passing of the withdrawal bill at Westminster?

Michael Clancy: I think that I had indicated that there would be 10 days for the committee stage—we are already at day 4, so there are six days left—before going on to five days for the report stage. That takes us through the Easter period and well into April, and then in May there is a recess, so things might have to be done quickly. The ping-pong between the houses is the essential issue here, and that can be a long ping-pong or a short ping-pong.

How that would work is that members of the House of Commons would seek to make amendments to the bill, which may or may not be agreed to by the House of Lords. They could take a little while to get through; one estimate is that the EUWB might be law by the end of June.

Ivan McKee: Are you saying that, although it could be the end of June, it could be a lot earlier if things go smoothly?

Michael Clancy: Yes.

Ivan McKee: What is the panel's reflection on the discussion between the Scottish and UK Governments? We have heard that it has come down to whether one word should be "consent" or "consult". That is probably a simplistic way to put it, but that line has traction. It might sound in the public realm as if the Governments are very close and coming closer together, but in reality the issue is much more fundamental and substantial because it comes down to the devolution settlement and which Government has authority to legislate in particular spheres. Do you agree that, if that fault line remains, that means there is a fundamental distance between the two parties?

Professor Page: There certainly is a difference between "consent" and "consult"—there is no question about that. However, going back to what we said earlier about the complete lack of transparency surrounding the process, we know

that what has been described as a "considerable offer" has been made by the UK Government and rejected by the Scottish Government, but we do not know what that offer is: we have not seen it or any form of words. As we said earlier, apart from recognising that there is still a fundamental disagreement, it is very difficult to get any sense of the source of the disagreement, what exactly it is about or where it lies.

Ivan McKee: If that distinction remains and the parties have not agreed on which of those two words to use, is that really the fundamental issue?

Professor Page: The bottom line is that the Scottish Government insists—and has insisted from the outset—that any common frameworks or those powers that are governed by common frameworks should be a matter for agreement between the two Governments or between the two legislatures. That is the "agree" part of your formula, and that is clearly different from the UK Government saying, "This is what we are going to do. We will consult you about it, listen to what you say and then go ahead anyway."

Dr Hughes: There is obviously a big difference between "consent" and "consult". If that discussion was opened up as Professor Page has said, to have a serious and substantive discussion of how common frameworks and the decision-making process would work, that would be more illuminating and more democratic. It does not necessarily have to be a stand-off between saying, "We are going to consult through the existing joint ministerial committee structures," and saying, "You are demanding a veto and we are not going to give it to you."

We would have to look at intermediate procedures. Professor Michael Keating made that point in a blog that he wrote some time back. The single market at the EU level has developed complex procedures for how to agree common EU frameworks, including qualified majority voting. However, it would be a completely new constitutional step for something like that to be established in the UK, so I am not particularly suggesting that. I am trying to show that there are gradations, which would be quite complex and constitutionally challenging to set up. It seems that we are, instead, in the realms of a rapid and messy compromise—or no compromise—that is being debated largely behind closed doors. The issue is not only the distinction between two words but the potential to consider what arrangements there could be to draw some graduated line between them.

Professor McHarg: I think that Mike Russell said last week that the UK Government will publish its amended text next week. It will be easier to comment once we have seen that, although it remains to be seen whether that happens.

Emma Harper (South Scotland) (SNP): Good morning, everybody. It is interesting that you bring up the point about agreement versus consultation, Professor Page. That is important.

I am interested in the parliamentary scrutiny under the continuity bill compared to that under the withdrawal bill. Does the continuity bill go further in allowing parliamentary scrutiny of subordinate legislation? Will we have a greater ability to scrutinise if it progresses?

Professor McHarg: The answer to that is yes. There are two ways in which the scrutiny provisions are better than they are for devolved issues under the withdrawal bill.

In the first place, the legal continuity bill provides for a super-affirmative procedure for some types of regulation. That would require that regulations be laid in draft for 60 days rather than 40 days and that there be mandatory consultation with the Parliament and other interested parties. Therefore, there is a heightened scrutiny provision.

The other way in which scrutiny is improved is that the explanatory statement requirements, which were added to the withdrawal bill in the House of Commons but, under that bill, apply only to UK ministers, are applied in the continuity bill to devolved ministers.

Those are the two improvements in scrutiny provisions. There are also changes to the scope of the powers. They are subject to a necessity test, at least in part, and there are more substantive constraints that place limits on how the provisions can be used.

Professor Page: Bear in mind the fact that the withdrawal bill says nothing about the scrutiny that should be applied to the exercise of powers by the Scottish ministers. In effect, it leaves that question to the Scottish Parliament. I am not aware that anything has been said about what the Scottish ministers propose in the event that they end up exercising powers under the withdrawal bill rather than under the continuity bill. However, one would expect what is proposed in the continuity bill to apply to the exercise of powers under the withdrawal bill if that is the position in which we end up. In other words, this is the first sight that we have had of the kinds of scrutiny that might be applied regardless of which bill the powers are exercised under.

Michael Clancy: I will pick up on the point that Aileen McHarg made about the regulation-making power. It is improved in part, but let us look at section 11 of the continuity bill, which talks about dealing with deficiencies in devolved EU law when it is transposed—deficiencies such as mentioning EU agencies.

If ministers consider that there is a failure or deficiency and that it is necessary to make provision,

"they may by regulations make such provision as they consider appropriate for that purpose."

However, if

"it is necessary to make provision for the purpose of preventing"

the deficiency or failure, it must be the case that the Scottish ministers make such provision as is necessary for that purpose. The issue of necessity has to flow through to both aspects. We talked about that when we considered the EUWB. The same point arises for ministers of the Crown under clause 7 and for the Scottish ministers under schedule 2 of that bill. The issue is still to be picked up on.

Professor Page: I disagree with that. We are agreed on question number 1 and that it can be necessary to make changes, but what changes are appropriate? It would be perfectly possible to separate those two things.

Michael Clancy: I take the point, but it is also a discretion for the Scottish ministers to make the necessary arrangements, and that might need to be considered.

10:45

The Convener: Okay. We are not in a debate, so we will move on.

Emma Harper: I am just trying to be clear that the continuity bill will have an advantage in that it will allow further scrutiny of secondary legislation, whereas the withdrawal bill does not have that provision.

Professor McHarg: Yes, but it will also create additional delegated powers. There is an entirely new delegated power in terms of keeping pace with post-exit developments in EU law. That is something to bear in mind. The powers that have been taken across from the withdrawal bill are narrower, but that is balanced by the entirely new power.

Professor Page: A criticism of the withdrawal bill is that it involves a massive arrogation of powers enabling ministers to make laws at the expense of Parliament, which is justified by the scale of the challenge that is faced. Exactly the same criticism can be made of the continuity bill in relation to the powers that are being taken by the Scottish ministers to deal with the challenge.

Patrick Harvie: I have a question.

The Convener: I will come to you in a moment, Patrick, but I must bring in Alexander Burnett first, because he has not had an opportunity to ask his question yet.

Alexander Burnett (Aberdeenshire West) (Con): My brief question is on cost and is probably for the minister. Does the panel have any views on the cost of the legislation and whether there is any precedent for a bill to be passed in the absence of such detail?

Professor Page: No.

Alexander Burnett: You are shaking your heads. Does that mean that there is no precedent?

Professor McHarg: No—I have no view on that.

Alexander Burnett: What about Dr Hughes?

Dr Hughes: I do not have a view on that.

Alexander Burnett: It was a brief question.

Patrick Harvie: I have some questions on scrutiny under the powers that will be created by the bill. We can make a comparison with the withdrawal bill and we can judge the bill on its own terms, asking whether we can improve what is proposed.

Would it be reasonable to suggest that, as well as specifying particular types of regulation that ought to be subject to the affirmative rather than the negative procedure or the super-affirmative rather than the negative procedure, there ought to be some kind of sifting mechanism for Parliament to require Scottish ministers to publish a draft of an instrument and for Parliament to decide whether a measure needs to be bumped up from negative to affirmative or from affirmative to super-affirmative?

Professor Page: Yes.

Michael Clancy: Yes.

Professor McHarg: Yes.

Patrick Harvie: Would that be best done by a specific sifting committee, or should the job be given to subject committees of this Parliament? Would the process be any different from simply lodging a motion to annul a negative instrument, thereby requiring greater discussion of the instrument?

Professor Page: What is crucial—this was referred to yesterday—is the scale and timing of the subordinate law-making programme that allows us to know what is being talked about and roughly when. Possibility number 1 is to have a committee that is responsible for looking at that programme and saying which instruments deserve a heightened degree of scrutiny, possibly in consultation with subject committees. Another possibility is to leave it all to subject committees.

However, I suggest that a dedicated committee would be the right way to go about it.

Michael Clancy: Yes, it would probably be best to have a dedicated committee that would be focused on the instruments. The instruments will have a different character from the ordinary instruments that members will come across in other contexts.

From the very beginning of the process, we have been talking about the important issue of proper consultation on the draft orders, and time is now getting very short. For UK ministers to wait until the EUWB becomes law before starting consultation on draft orders is a waste of time, because departments are drawing up draft orders even as we speak. I would address the same point to the Scottish ministers to ensure that there is proper consultation on the draft orders as soon as possible.

Patrick Harvie: Is that regardless of what happens with this bill or with the withdrawal bill?

Michael Clancy: Yes.

Dr Hughes: Can I make an additional point? It follows on from what has just been said and applies to both the withdrawal bill and the continuity bill.

As a number of the Westminster select committees have said, simply transposing EU law will not work very well in many cases, not least in the environmental area, unless we have the appropriate regulatory structures and agencies as well. There are major timing questions around how to establish those and decide how they will function during the transition period. If there is a deal, there will, we presume, be a transition period, but that is currently being debated as lasting until December 2020, which is a very short time.

Patrick Harvie: I have a couple of other points on scrutiny. In section 31, the power is created for ministers to introduce regulations under urgent cases without prior approval by Parliament—an instrument would subsequently be laid before Parliament, which would be required to pass a resolution. Is that adequate, or is there a case for giving Parliament an emergency brake on that power, to suspend it if we feel that it has been misused? Should we instead perhaps require a time limit between the making of an order and its being laid before Parliament, which I do not think is included at the moment?

Michael Clancy: The Law Society has criticised the analogous provision in the EUWB, because it will give ministers a significant amount of power. It would be useful to discover what would be considered to be an "urgent case". The provision in section 31(2) is for cases when

> "Ministers consider that, by reason of urgency, it is necessary to make the regulations without"

their "being subject to" affirmative procedure. What are the parameters of that "urgency"?

The Convener: It could perhaps be because of an unexpected change to the withdrawal bill.

Michael Clancy: That might be a reason, convener. That is very perceptive of you: you might suggest it as an amendment. However, once we start describing "urgency", it would become a matter of what has not been included in the list.

Patrick Harvie: Another area of concern is section 17, which gives Scottish ministers the ability to consent to regulations that are made by the UK Government. Should that consent power lie with Scottish ministers or with the Scottish Parliament?

Professor Page: I have already said in my written submission that I think that that power, or that attempt to fetter the powers that would be granted by the withdrawal bill to UK ministers, is open to objection. We need merely to imagine the converse situation, in which an amendment to the withdrawal bill is passed that says that all the powers that the continuity bill proposes to confer on Scottish ministers should be subject to the agreement of UK ministers. How would this Parliament react to that? I think that those powers should be subject to the consent of the Scottish ministers—and in some cases the Parliament, as well. However, as I said, I think that the way to achieve that is by amendment of the withdrawal bill, rather than by trying to use the vehicle of the continuity bill.

Patrick Harvie: If the continuity bill is passed by the Scottish Parliament and it includes provision for consenting UK-made regulations that touch on devolved areas, is there a reason why that consent should be given by ministers alone, without the consent of the Scottish Parliament?

Professor Page: That would vary from case to case. One can imagine cases in which you would want parliamentary consent, as opposed to ministerial consent alone. I do not see why not.

Patrick Harvie: I cannot think of any cases for which ministerial consent alone would be enough. Can you?

The Convener: I am sure that the minister will be able to speak to that.

Professor Page: I am not going to object to heightened scrutiny.

Patrick Harvie: Okay. Unless anyone else wants to comment on that, I will move on to questions on EU principles.

The Convener: Before you do that, I think that Neil Bibby has a question on the detail.

Neil Bibby: My question is on the power in section 13 to use secondary legislation to incorporate new EU law, on which we have touched. Professor Page's submission states that an approach in which ministers take such a power is

"a potentially major surrender by the Parliament of its legislative competence, and one which under the Bill as introduced may be extended indefinitely."

I am concerned by that comment. What do you mean by

"major surrender by the Parliament"?

Professor Page: The approach would simply leave to ministers the discretion to decide which EU instruments to give effect to in Scotland. At that point, Scotland and the UK will no longer be a member of the European Union. Frankly, I would be astonished if we were to surrender—I chose the word "surrender" deliberately—the competence of this Parliament not just to Scottish ministers but to institutions in whose deliberations we would have absolutely no voice. If we are going to do that, the matter should be properly discussed, argued and decided. That is my objection to—or, rather, my surprise about the provision.

Neil Bibby: Thank you. The Government has said that there are similarities between the continuity bill and the withdrawal bill. The approach might concern people who are concerned about parliamentary scrutiny and legal certainty.

What are the other witnesses' views on the appropriateness of the power in section 13? Could the section be interpreted as a power grab by the Scottish ministers? Why should the period when the power can be exercised be extended after five years, as is proposed?

Professor McHarg: The obvious analogy to draw is with the power in section 2(2) of the European Communities Act 1972, which gives ministers the power to implement EU obligations by secondary legislation. As Alan Page said, that approach will be much harder to justify if we are not a member of the EU. If the provision is simply a way of allowing ministers more easily to implement changes that they think are desirable, it is quite hard to justify. However, if we get into a situation in which, as a consequence of whatever deal we negotiate for withdrawal, we actually have to keep pace with developments in EU law in certain areas, some kind of keeping-pace power will be much more justifiable.

As with much of this stuff, it really depends on the post-Brexit constitutional landscape and the relationship with the EU. What those look like will affect the justifiability of the power.

Dr Hughes: The provision provides for rather a bizarre situation. Let us consider the European Economic Area. Norway has been called a "fax democracy", and its own review of the operation of the EEA said that there is a major democratic deficit. As Professor Page has said, at least in the EEA there is some ability to comment on EU law, although it is really rather minor compared with the ability of an EU member state, in that regard.

On the other hand, Scotland would not be obliged—depending on what the final Brexit deal says—to implement EU law, so I suppose that doing so would be optional and one could pick and choose. However, why should the Scottish Government and not the Scottish Parliament decide that?

As I said, at the moment we are heading for a free trade agreement, with perhaps a Canada-style deal. What would happen if Westminster were to vote for a comprehensive customs union with the EU? Would that cover agriculture and fisheries? What if we were to add the single market to that? That would transform the context of this debate. At best, it is a rather curious or, at worst, a strange power to give to the Scottish Government but not to Parliament.

11:00

The Convener: Is that sortable? The situation might be unusual, but if such circumstances were to arise, the Government might say that it had to agree with Parliament on the legislative process to be used. It would then have to agree with Parliament whether secondary or primary legislation would be required for the change.

Michael Clancy: The provision allows for the Scottish ministers, by regulations, to make—

The Convener: I am suggesting that if that provision were to be amended—

Michael Clancy: If the provision were amended, I would advance—in response to Mr Harvie and Mr Bibby—that Parliament would have to have the central role. If, in the future, once the UK has left the EU, the Scottish ministers wish to adopt provisions in EU regulations and other aspects of EU law, the appropriate way to do that would be to have regard to the EU legislation and then to introduce Scottish legislation that matches it in the appropriate respects, provided that that is within devolved competences. That could be done today—let us say with the EU Succession Regulation (EU 650/2012), to which the UK has not opted in. We could create law in Scotland that looks like the succession regulation. That would be where I would park the matter.

The Convener: Does Professor Page want to say any more on that?

Professor Page: No. I think that there is consensus that the provision is a thoroughly bad idea.

The Convener: Fair enough. Patrick Harvie has a question on a different subject. If I have got things right, this will be the final question, unless there are any supplementaries.

Patrick Harvie: The start of section 5 of the continuity bill sets out that

“The general principles of EU law and the Charter of Fundamental Rights are part of Scots law on or after exit day”.

That is one of the areas of difference between the continuity bill and the withdrawal bill.

We have seen significant debate at Westminster about the extent to which the withdrawal bill is acceptable and, in particular, the extent to which some of the environmental principles of EU law should be specified and set out, in relation to matters such as the polluter pays principle, the precautionary principle and issues of animal welfare and sentience. Is the approach in the continuity bill clear and adequate in saying merely that the general principles and the charter will apply? Does it need to—or is there a case for it to do so—go into more detail about what the principles are and how they should apply?

Professor McHarg: The starting point is to highlight that the important difference between the two bills is probably not about direct incorporation of the charter of fundamental rights, because there is an argument that the rights that are contained in the charter—in so far as they are justiciable—are incorporated by the withdrawal bill anyway. It is—arguably, at least—really a question of accessibility rather than of substance.

However, there is a very important difference between the bills in relation to section 5(2), which for Scotland and devolved matters would retain “a right of action” based on

“failure to comply with ... the general principles ... or the Charter”

of fundamental rights. That is missing from the withdrawal bill: that is, to my mind, the much more significant issue. Without a right to bring actions based on charter rights, the charter’s being incorporated will not make a huge amount of difference.

Patrick Harvie: In relation to the principles of EU law, section 5(3) says that section 5(1)

“applies in relation to a general principle of EU law only if it was recognised as a general principle of EU law by the European Court in a case decided before exit day”.

Is it the case that some things are so widely regarded as being general principles of EU law that they have never been brought in a case? Do we need to specify what we mean by those principles, or can we rely on that definition to have full effect?

Professor McHarg: Subsidiarity?

Professor Page: In response to Patrick Harvie’s initial question, I was sympathetic to the idea that there is a case for elaborating on or explaining what we mean by the general principles. On the question that he has just asked, it is highly unlikely that there are general principles that have not been recognised in judgments of the Court of Justice of the European Union.

Michael Clancy: In our submission, the Law Society says that we believe that it would be helpful if the Government were to set out which general principles are to be retained in Scots law. We enumerated fundamental principles including proportionality, subsidiarity and so on. However, I agree with Alan Page that it is unlikely that there is a general principle of which we are not aware.

Professor Page: Patrick Harvie’s first question went further, in that he talked about principles of environmental law and so on, which will need to be separately provided for: I do not think that they would be covered by the idea of the general principles of EU law.

Patrick Harvie: Finally, there is a flipside to the argument. Michael Clancy just mentioned subsidiarity. Even though we might say that that principle has never been applied as rigorously or as clearly as was intended, I would still regard it as a loss if we did not have it recognised at some level. However, does it make any sense for it to be recognised in Scotland but not at UK level? Does subsidiarity mean anything if it does not apply throughout the UK? How could it apply at only one level of government?

Professor McHarg: Well, we have more than one level of government in Scotland—

Patrick Harvie: Just about.

Professor McHarg: Subsidiarity could be invoked by local authorities to protect their spheres of competence. I do not know whether it has been used in that way. At EU level, it is about the relationship between EU law and member states. The principle is that decisions should be taken at the lowest appropriate level, so it is potentially more broadly applicable, but that would probably require some creativity on the part of our courts after Brexit.

Patrick Harvie: Thank you.

The Convener: Thank you very much. That concludes this session, which has been very good

and has covered a lot of ground. I am very grateful to our witnesses for coming along at short notice.

I suspend the meeting for about 10 minutes, to allow for a change in witnesses, after which we will hear from the minister.

11:07

Meeting suspended.

11:17

On resuming—

The Convener: For our second evidence session today on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, we are joined by Michael Russell, the Minister for UK Negotiations on Scotland's Place in Europe. He will be supported by a range of officials: Alison Coull, Graham Fisher, Luke McBratney and Jenny Brough. I will not read out what they all do as I am trying to save some time. Nevertheless, I welcome them to the meeting.

Mr Russell, I invite you to make an opening statement.

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): I really have no statement to make. I think that everyone knows my position on the bill by now; I am quite happy to respond to any questions that members have.

The Convener: We will cover three main areas: competence; the necessity of the bill; and the detail of the bill.

Can you explain why, in the light of the Presiding Officer's statement on legislative competence, it remains the Scottish Government's view that the bill is within competence?

Michael Russell: I will invite my colleagues to go into some of the legal detail if you wish, but I thought that the previous panel—which I watched with great interest—expressed the issues very well. There is a genuine difference of opinion—in an atmosphere of respect—between the view of the Presiding Officer and the view of the Lord Advocate. The Lord Advocate has indicated what the Scottish Government's view is, as is his function and as he is entitled to do under the ministerial code. There is also a range of other views. The Welsh Presiding Officer has a view on the bill that has been presented to the Welsh Assembly, and I heard the members of your previous panel give differing views.

Those who framed the Scotland Act 1998 anticipated this circumstance. Although the circumstance is unique, it was not unanticipated that there could come a time when there was a difference of opinion between the Government and the Presiding Officer. Indeed, there has been academic study of the matter: in 2017, McCorkindale and Hiebert considered the issue in a very interesting paper in the *Edinburgh Law Review*.

In circumstances in which there is a disagreement—as there is at the moment—the Government is permitted and entitled to bring in its bill, which is what has been done. The debate will no doubt continue. Unsurprisingly, I side entirely with the advice that the Government has had from the Lord Advocate—I think that some of that was well explained by others today. Professor Tomkins has taken a different view, and is supporting the view of the Presiding Officer. We move forward on that basis.

In terms of the central issue of compatibility with EU law and the necessity that is laid upon us, it is, in a logical sense—I was struck by Professor McHarg's appeal to common sense—difficult to understand how we could fail to legislate in this way, up to and including on the afternoon of 29 March 2019. Failing to do so would place us in an unreasonable position, but that is the implication of those who set themselves against our position on the particular issue of competence.

The debate is a genuine one, and it will continue. Obviously, it will have to be conducted between lawyers, experts, laymen such as myself and others.

Ash Denham: Earlier this morning, we spoke about the incompatibility argument. The Lord Advocate advanced that argument last week, when he said that, if the Scottish continuity bill is incompatible with EU law—because it contemplates a post-Brexit scenario and departure from EU law—the same would apply to the UK's withdrawal bill. However, if you watched the earlier session, you will have seen Professor Page say that he thought that the issue hinges on the question whether the Scottish Parliament has the power to enact the continuity bill. He said that, if it does, the bill is within competence. What is your view on that?

Michael Russell: I believe that the Scottish Parliament has the power to enact the legislation, and that is where I stand.

Professor McHarg, I believe, drew attention to another telling point that the Lord Advocate made. Provision is made for the orderly withdrawal from the EU of a member and, therefore, actions that are taken to facilitate that orderly withdrawal cannot be contrary to EU law, because provision is made for those circumstances. As one of the legislatures of these islands, we are in that position.

However, there are differences of opinion on that matter, and my weighing in again to repeat the opinion of the Lord Advocate and the advice that I have had from him does not take us very far. There will continue to be a difference of opinion on the matter right through this process, and we will have to live with that.

The situation was allowed for in the Scotland Act 1998. That is an extremely important point. The people who framed the 1998 act clearly anticipated that it was a possibility, which means that we are, essentially, operating with a rule book. We are doing what we are allowed to do. At the end of the day, there might or might not—again, there will be a difference of opinion on this—be a reference to the Supreme Court. I hope that that does not happen but I would also say that I did not want to be in this position. I made that clear last week in the chamber and I make it clear again today. I would rather not be in this position, but this is the position that we are in and, therefore, we accept it.

Ash Denham: We are in this position because the UK Government has still failed to move that extra bit forward. If it did so, it is obvious that the Scottish Government would consider withdrawing the continuity bill. In *The Times* yesterday, a UK Government spokesperson said that they did not think that the UK Government would move in that regard. How likely do you think it is that it will do so?

Michael Russell: Fortunately, I do not undertake my negotiations on the basis of what *The Times, The Scotsman* or *The Herald* publishes on its front pages. If I did so, I would be blown by every wind that blows.

Our position is clear. On Sunday, I said in a television interview—I was in Colintraive, speaking through a blizzard—that, no matter the circumstances, I would continue to negotiate, and that the basis of that negotiation would involve respecting the devolved settlement, which requires our consent in terms of the frameworks. The words "consent" and "agreement" are important. That remains my position. Tomorrow afternoon, Mark Drakeford and I will be at the joint ministerial committee (European Union negotiations), and we hope to bring further ideas and thoughts to bear on the issues. We will continue to have that conversation.

Adam Tomkins: Did you hear what Professor Page had to say about the issue of competence and compatibility with EU law being, in his words, something of a "red herring". Do you want to reflect on that?

Michael Russell: I heard what Professor Page said. I want to reflect on it, but probably not instantly, as I want to study what he said. We take into serious consideration the views of experts in this field, and your views, too. Your exchange with the Lord Advocate last week was significant, and we understand how significant the issue is. I do not know whether either of my legal colleagues would like to reflect on what Professor Page said, but we will certainly consider it. I heard his views.

Adam Tomkins: I want to press you on two specifics. We all understand that acting compatibly with EU law is not the only constraint on our legislative competence. We are also required to act only within devolved competence and not to trespass on reserved functions, as provided for in schedules 4 and 5 to the Scotland Act 1998.

A couple of specifics in the continuity bill have been raised as examples of provisions that appear, at least on one reading, to trespass on reserved functions. The provision in the bill that enables Scottish ministers to set a different day from 29 March 2019 as exit day is one example, and the whole of section 6, which provides for limitations to the on-going status of the principle of the supremacy of EU law in Scots law after exit day, appears to be another. They are examples of provisions in the bill that trespass on reserved competence and, therefore, it is incompetent for this Parliament to pass them.

I asked the Lord Advocate about that last week, but he declined to answer with any level of specificity. Are you or your officials prepared to walk me through the reasons why, in the Scottish Government's view, those provisions, and others like them, are within and not outwith competence?

Michael Russell: Let me deal with the overall question and then I will deal with the specific items. I will ask Alison Coull to talk about section 6, which she is better qualified to do than I am.

The overall principle is that we do not believe that the bill relates to reserved matters—that is our clear position. For example, an objection has been raised that the bill relates to reserved matters and international relations, including relations with the EU, but it does not. It is about domestic law. The international relations reservation contains an express exception concerning the implementation in domestic law of international obligations under EU law. That is what the bill does: it is designed to deal with the implementation in devolved areas of the UK Government's decision to leave the EU. The purpose of the bill is to make provision within the legislative competence of the Scottish Parliament that is consequential to the decision of the UK to withdraw, so our view is that it is within competence.

On the specifics that you raised, I very much feel that we are damned if we do and damned if we don't when it comes to exit day. It was a huge issue in the passage of the withdrawal bill through

the House of Commons. There was strong pressure to put the date itself into the bill, so the date was put in, and then a group of people from the other side of the argument swept in and said that it should not be there.

The compromise in the provision—it might have been Michael Clancy who quoted it in evidence to the committee—is that it gives the date, but it also gives ministers the power to amend the date. I am more than willing to look at an amendment that does exactly the same sort of thing, as I confirmed to the Delegated Powers and Law Reform Committee. The convener referred to that earlier. It is not our intention—indeed, we do not believe that we have the ability—to set a different date. We are not in that business. I do not believe that the bill is outwith competence but, if it is possible to improve it in that way, we will do so.

Adam Tomkins: The ability to move the date is a function that is reserved to ministers of the Crown.

Michael Russell: We recognise that reservation quite easily because we are not endeavouring in the bill to make a power to set a date, including a different date. We accept that that date will be set by the UK Government. We come down to a dispute on the head of a pin as to whether the date could be changed. I recognise that the date will be set by UK ministers and that we will not set it. We are not endeavouring to shove it into the bill somewhere—oops, we said 2029, rather than 2019. That is not what we are into. I give you my assurance on that. We will endeavour to bring an amendment.

Perhaps Alison Coull would address the competence of section 6.

Alison Coull (Scottish Government): I will briefly cover exit day, too. Our position, which the Lord Advocate perhaps addressed, is that we are required to act compatibly with EU law and, in exercising the power in relation to exit day, we would need to do so in a way that fitted in with the exit day that exists under the treaties. Currently, that is 29 March 2019. As the minister said, we are looking at whether we can make the position clearer.

11:30

On the supremacy of EU law, our position is that that is part and parcel of the approach of bringing the whole range of EU law into domestic law as part of the preparations for exit. Like the general principles, the charter and the incorporation and saving of retained EU law, it is one of the EU law concepts that we have to deal with, and we have to say what our position is. We are seeking to do the same as the UK Government is seeking to do in its bill, which is to say that, basically, the supremacy of EU law applies in the same way as it currently does to the law that we bring across.

Adam Tomkins: I understand the policy intention, but I still do not understand how the Scottish Government considers that this Parliament legislating on that is compatible with the provision in schedule 5 to the Scotland Act 1998 that reserves "international relations", including relations between the UK and the EU and its institutions. The Court of Justice is one of those institutions. The doctrine of supremacy relates directly to the relationship between UK legal systems and that EU institution. In your view, how can the provision not trespass on that reserved function? That is what I do not understand.

Michael Russell: I ask Luke McBratney to address that issue to see whether we can provide additional information that will assist.

Luke McBratney (Scottish Government): It is important to look at what section 6 would do, were it to be enacted. Although it is about the supremacy of EU law, it would no longer be about the relationship between EU law as part of the supranational legal order and our domestic law, because the UK would have ceased to be a member state of the EU.

As the Lord Advocate made clear, the continuity bill can take effect only after the UK withdraws and, after withdrawal, section 6 will become a set of principles about what the former principle of supremacy will mean, in the context of Scots law, to us as part of the UK, which will be a country that used to be a member state.

Adam Tomkins: I understand the position, but I think that there is a grave issue around whether the provision is competent.

Michael Russell: We will have to agree to differ on that. We believe that the arguments that we have put forward mean that it is competent, and the Lord Advocate contends that it is competent. I am quite happy to consider further questions on that issue—in writing, for example—to see whether we can answer them for you.

Adam Tomkins: Thank you.

James Kelly: As you outlined, minister, there are different positions on legal competence. There is a view from the Presiding Officer and a view from the Lord Advocate, which is supportive of the Government. As you said, there is the potential for us to end up in the courts, which would be regrettable and which none of us wants. You also said that discussions are on-going between legal officers, and the hope is that we can get some legal resolution.

However, that puts members in a difficult position because we are in uncharted territory.

Unfortunately, the debate on competence has become part of the consideration of the bill. I perfectly understand that it is not the Government's normal policy to publish legal advice, but would you take on board the view of the Law Society of Scotland that, given the public interest, there is a case for both the Presiding Officer and the Lord Advocate publishing their legal advice in order to inform these discussions?

Michael Russell: I heard the Law Society's evidence and I understand its view. However, we have already taken an exceptional step, as permitted by the ministerial code, with the Lord Advocate indicating the reasons why the Government—and I stress that I am talking about the Government—has taken the action that it has taken and why we believe that the bill is within competence. Indeed, he went further in going to the chamber and answering questions from members on those matters. That is an exceptional step to take.

The Government's view is not that we should move into completely uncharted waters and set what we think would be a difficult and dangerous precedent by publishing or giving further legal advice. Therefore, it is not our intention so to do.

I understand where the Law Society is and I understand where you are, but we do not believe that there would be benefit in publishing such advice. That is where we stand.

James Kelly: Do you accept that MSPs are in a difficult position here? Part of the debate has become about whether the legislation is legally competent. From Scottish Labour's perspective, we understand why you are bringing the bill forward, and we support that in principle. However, we are in a difficult position with regard to the legal advice. It is important for MSPs across the chamber to have as great an understanding as possible of the two different positions.

Michael Russell: We have indicated clearly, in publication, in statements and again this morning, why the Scottish Government believes that the bill is competent, and we have given legal reasons to indicate why we believe that. The Presiding Officer has published his statement. There was no limit to his statement: he was able to publish as much or as little as he wished to. He has said in his published statement why he believes that the bill is not competent. We have heard distinguished scholars give their opinions on the matter this morning. With the greatest respect, the matter will never be definitive. There is a difference of opinion on the matter. It could be definitive only if it was tested in the courts. The Lord Advocate has indicated that, if the view that he has taken was defective, so too would be the position in relation to the UK bill.

With the greatest respect—and I am not trying to be difficult—I cannot give you any comfort on that at all. The Lord Advocate has taken exceptional steps. The Presiding Officer has published a lengthier statement than I believe he has ever published before. There are other contributors to this. That is where we are.

The Convener: How do I want to express this? There is disagreement currently, and I suspect that, even if the Lord Advocate, the Scottish Government and the Presiding Officer published in full what their legal advice was, that disagreement would still exist.

Michael Russell: I agree.

The Convener: We might have more text to read, but it would not change the context in which MSPs have to make their decision.

Michael Russell: I suspect that, if the archangel Gabriel were to come down and define what legal advice he would give, there would still be a dispute about it. I do not think that publishing the legal advice would produce the clarity that people wish for.

Adam Tomkins: I agree with you about that, minister. Legal advice to Governments should be published only in very exceptional circumstances. Nevertheless, there is a possible alternative. You said that you could not offer any comfort to Mr Kelly, but I wonder whether you will consider this. The Lord Advocate could refer the competence of the bill directly to the Supreme Court, because he is a law officer who is able to do that under the terms of the Scotland Act 1998. His equivalent, the Counsel General for Wales, has done that with a Welsh statute that was referred by the Government of Wales to the Supreme Court in order to test its vires. If the Scottish Government is so confident about the Lord Advocate's legal advice, will it refer the competence of the bill directly to the Supreme Court?

Michael Russell: I cannot make a commitment one way or the other, although I think that what you suggest is highly unlikely to happen. One reason for that is that we are confident in the advice that we have had from the Lord Advocate that the bill is entirely within competence, so we do not believe that the bill needs to be tested in that way. You would not expect me to give such a commitment at this meeting, and I think that it is highly unlikely to happen, but I have heard what you have said and, no doubt, the Lord Advocate has heard it, too.

Neil Bibby: It has been said that legal advice should be published only in very exceptional circumstances. However, the ministerial code makes provision for that if ministers believe that it is in the public interest, and the Law Society has said that it believes it is. Have you received any

legal advice from anyone other than the Lord Advocate?

Michael Russell: I am not at liberty to give that information. Ministers do not talk about the legal advice that they are given. I and other ministers regularly give that answer around this table.

I do not think that we should become totally hooked on this question. The Lord Advocate has taken the steps that he is entitled to take in exceptional circumstances, which are laid out in the ministerial code. Because we recognise the exceptional nature of the circumstances, that is what has happened. Moreover, he has made himself available for questioning in the chamber on the issue, which is absolutely unique. That is a considerable contribution to understanding the situation. Still, I agree with the convener that the publication of any amount of legal advice is unlikely to change things.

Neil Bibby: You said that you are not at liberty to say, but the ministerial code states that, in exceptional circumstances, legal advice can be published if ministers believe it to be in the public interest.

Michael Russell: I am not in a position to say, and I will not be giving any information on that, because I believe that I am bound by the ministerial code.

The Convener: We will leave the issue of competence and move on to the area of necessity.

Willie Coffey: Minister, I ask you to make a comment or two about the overall timing of the Scottish bill. There is a view that the matter is urgent and that time is moving fast and is running out. However, there is another view that we perhaps do not need to legislate until later on, until the last minute or at all. Will you outline the Scottish Government's view of the advantages of introducing the bill now and the risks if we do not act now?

Michael Russell: In a moment, I will ask Graham Fisher to come in, because that question was asked yesterday at the Delegated Powers and Law Reform Committee and he provided a written explanation. I think that all members are to receive it. It was sent to the convener of the Delegated Powers and Law Reform Committee, who undertook to circulate it, but I do not know whether it has been circulated yet.

The Convener: The committee received it not long ago, so it is about to be circulated.

Michael Russell: I will ask Graham Fisher to give the legal detail, but suffice it to say that we understand that we require the bill to be passed and receive royal assent before the UK bill is passed and receives royal assent.

Michael Clancy laid out the timetable to which the UK Government is operating. It is worth saying that that timetable has slipped and continues to slip. The original deadline for the UK bill was the end of last year, but there were difficulties with it in the House of Commons. The House of Lords timetable is for 10 days at the committee stage. It is on day 4 and we understand that the timetable is already slipping, so it might take longer. There is then a report stage to be had. We do not believe that the UK bill is likely to be ready for royal assent until some time in early May at the earliest.

That is the timescale. Scottish bills require to have a month's lying time—as I suppose we might call it in old parlance—once they are passed, during which time, as Professor Tomkins indicated, there could be a challenge to the bill. If we add the period of royal assent and work back from that, it appears that this is the last possible moment to introduce the bill.

We have held off. We restrained ourselves very much by saying that we wanted to get a resolution through negotiation. Alongside our Welsh colleagues, we have brought legislation to the respective chambers at the very last moment at which we felt that we could do so. That is where we are.

Were we to lodge a legislative consent motion—the procedure is slightly different in Wales and Scotland—that would have to be done before the last amending stage of the UK bill, which is the report stage in the House of Lords. Therefore, that would require to be done some time in the second half of April and certainly after Easter.

Graham Fisher might want to indicate the issues. It is probably important to quote from the letter.

Graham Fisher (Scottish Government): It is partly a marginal issue but, further to the issues that the minister just outlined and to which he spoke before, on the need to amend the withdrawal bill in the event that the Parliament refuses a legislative consent motion and in view of the practical legislative work to prepare for Brexit that will follow on and will need some settled position between the two bills, there are some more technical reasons buried in the detail of the withdrawal bill that relate to the potential interaction of the two bills.

Paragraph 19(2)(b) in schedule 3 to the withdrawal bill will amend the Scotland Act 1998 and will make the withdrawal bill, if it passes into law, a protected enactment under the 1998 act so that it cannot be amended or modified by an act of the Scottish Parliament. That may come to have some bearing on the continuity bill's operation. Along with the timing issues that were adverted to by the minister and the witnesses from whom the

committee heard earlier this morning, that is one of the reasons for the urgency and the pace at which the bill is being dealt with.

Willie Coffey: If the LCM was refused and we did not have the continuity bill, where would that leave us?

Michael Russell: It would depend on whether the constitutional conventions were being observed. As Professor Tomkins said, there is a question about the use of the words "normal" and "normally". However, normally, the sections of the bill to which we could not consent would be removed from the bill. That would create considerable difficulties and is a strong reason for having something to take their place in order not to have a legislative cliff edge. That intention is positive. We have said regularly to stakeholders across Scotland, particularly businesses, that we do not want to see a legislative cliff edge but want to put something in place to prevent that from happening.

11:45

Adam Tomkins: Last week, Tavish Scott asked that question of the Lord Advocate and the Lord Advocate politely declined to answer it on the basis that he considered it to be speculative. However, given that we are considering the general principles of legislation and need to look forward, I hope that you will not rest on that but will give a substantive answer, minister.

My question is a direct follow-up to Willie Coffey's question. If the devolution provisions—for want of a better term—of the withdrawal bill are removed because Holyrood or Cardiff Bay declines to give consent, if the continuity bill is enacted by the Scottish Parliament and if—I know that this is my third if—it is challenged in the Supreme Court and the Supreme Court strikes it down, is it not the case that Scotland would have no legal ability whatsoever to correct its statute book to make it meaningful and ready for exit day?

Michael Russell: I know that the Lord Advocate did not want to speculate, but speculation is the stuff of politics—if you are a politician, you are more willing to speculate. I do not think that that can happen chronologically; the lacuna is in the question.

I will outline the timescales involved. There is a very helpful chart that we can provide to the committee, which shows the timescales of the passage of the bills.

The UK bill is likely to be passed and gain royal assent in the middle of May, roughly speaking. Let us assume that the bill is passed as it currently stands, there is no legislative consent and the UK Government does not remove those provisions. As you indicated, Mr Tomkins, that is a possibility, because there could be an argument that these are not normal times and so on, and the bill could remain intact. Even if the provisions were removed and the bill was passed, one of two things would happen. If the continuity bill were to be challenged in the courts—I hope that it will not be—and it was found to be competent, then it would be in place. If the continuity bill were found to be incompetent, I would be highly surprised if the UK Government did not say to itself that it had to have something in place.

However, the chances of that scenario happening are infinitesimally small. It is much more likely that the continuity bill will be passed and will sit happily with the withdrawal bill; that, at an earlier stage, we will reach agreement on the UK bill; or that the UK bill will be passed unchanged, in which case the constitutional crisis will deepen. The set of circumstances that Mr Tomkins describes is almost impossible to envisage happening. I would never say that it is impossible—never say never—but I think it is very unlikely.

Murdo Fraser: We had a discussion with our earlier witnesses about the need for the continuity bill to be complementary to the withdrawal bill. That is where timing becomes important, because the Scottish Government wants to see the continuity bill proceed as emergency legislation and Parliament has agreed to that; therefore, it will be completed and on the statute book before completion of the withdrawal bill. The withdrawal bill is subject to change at later stages, which could mean that we will end up with a lack of complementarity. Could the rush to legislate lead to bad law and gaps in our legislation?

Michael Russell: I do not believe so. With respect, I suggest that we are not rushing to legislate but are legislating out of necessity, as I have indicated.

The reality of the situation can be found in two possible approaches. First, this is not where we want to be. We are still endeavouring to reach an agreement with the UK Government on the overall UK bill. That agreement may still be reached and, if it is, the question will not arise. Secondly, we would wish to be able to study carefully any ambiguities that arise and find ways in which to correct them. That is not an impossibility. It has happened in other legislative circumstances, and we would study those carefully.

In the legal continuity bill, we have made some changes that we hope will improve the process; we do not think that it will be, by any means, impossible to operate under the two bills. Such an approach has happened quite often in European legislation, with careful decisions having to be

made about what lies in one area and what lies in another. We will be prepared for that situation.

I have never maintained that this is the ideal situation, but I am confident that, with thought and care, the situation can be taken care of and there will be no incompatibility. A great deal of work has gone into ensuring that the bills complement each other, so that there is a workable solution. We think that we have found that workable solution. However, I stress again that the bill is not our first option.

Murdo Fraser: If subsequent amendment is required, will it be done by regulation or by another piece of primary legislation?

Michael Russell: I am not saying that amendment will be required, but, if amendment were required, that would be a matter for full, frank and open exchange with the entire Parliament. I do not anticipate that that situation will happen; I anticipate that we will find an orderly and proper way in which to conduct business through the two bills, dealing with people who make such judgments every day. Alison Coull might add to that, because she is one of those people whose judgment we trust in these matters.

Alison Coull: As the minister said, there is a timing issue. At the moment, the legal continuity bill is complementary to the UK bill, albeit with some different choices.

There is a risk, which Murdo Fraser identified, that the UK bill will be amended after the legal continuity bill has been passed. I think that there is a relatively small risk of that causing the sorts of problem that you suggested might arise, simply because most of the amendments that are being discussed relate to things on which we have already made a different choice—that is where some of the pressure comes from.

On what we would do if such an issue arose, we have ancillary powers under the bill. They might not work in all cases, but they provide a potential mechanism for sorting out small rubs that subsequent amendments to the UK bill might create.

Michael Russell: Does Luke McBratney want to comment?

Luke McBratney: It is important to note that, although there has been considerable disagreement between the UK and Scottish Governments over a lot of things, there has been absolute unity of purpose since the beginning—it was set out in December 2016, in “Scotland’s Place in Europe”—from both Governments in recognising the need for a task to be done to avoid a cliff edge. In relation to the anticipated use of the withdrawal bill, there has already been discussion and arrangement at official level on how co-operation between the two Governments might work. The two Governments share the ambition of avoiding the cliff edge; the dispute so far has been about precisely how to go about doing that.

Michael Russell: That is an important point. I had my first discussion about a withdrawal bill with Ben Gummer, who was then a Cabinet Office minister in the previous Administration. I think that that was some time in December 2016.

We do not want the UK to leave the EU—no one can be in any doubt about my position on Brexit—but we have recognised the need to have a set of laws that avoid chaos and confusion. That remains our view. We are still trying to avoid chaos and confusion, and we will continue to do so.

Murdo Fraser: Professor McHarg, who was on the previous panel, said that the urgency is “tactical”. Is it not the case that this is more about politics than it is about the law? Is it more about your negotiating position in relation to the UK Government than about improving the law of Scotland?

Michael Russell: No. I indicated in my answer to Mr Coffey, Graham Fisher indicated in his earlier answer and I indicated in the letter that has been circulated to you the legal reasons why the sequencing must take place as it is taking place.

The Convener: Quite a few members want to come in.

Ivan McKee: I thank the minister and his officials for coming to talk to us.

I asked the previous panel where we are with the political negotiations and, more fundamentally, what lies behind them. We talk about the difference between “consent” and “consult” and about how much ground the Scottish and UK Governments have given on frameworks and so on, and we can talk about the legalese, but the reality at the core is whether the Scottish Parliament keeps the powers that it has or loses the ability to legislate in areas in which it rightly legislates under the devolution settlement.

Can you tell us where we are with the discussions with the UK Government? Will you also reflect on the fundamental principle and the reality of there not being much give and take when it comes to that principle?

Michael Russell: I sometimes feel like someone in Palmerston’s description of the people who understood the Schleswig-Holstein question: one had gone mad, one had died and the other had forgotten it. This set of things is very, very complicated; I ask you to allow me to be as general as I can, because everybody would fall asleep were I to go into the extraordinary and excruciating detail.

The heart of the issue is how a bill that requires legislative consent is prepared. Officials in both Administrations would usually have regular contact to make sure that the bill would be operable with regard to legislative consent, but that has not applied in the case of this bill. I have said that I had a conversation, probably in December 2016, with the then Cabinet Office minister who was responsible for the bill, Ben Gummer—the person with responsibility kept changing between him and David Davis. It was proposed that Ben Gummer would discuss with ministers and officials what the bill was to look like, but that did not happen.

In January 2017 at the JMC plenary in Cardiff, I raised the bill with the Prime Minister and said that an early indication of content and timescale would be helpful. The bill had been discussed—members will remember that the so-called great repeal bill had been announced at the Tory party conference in 2016. The bill was clearly in preparation—we had been told that—and at that stage the intention was to introduce it in May. In January and February, we said that the issue was getting close to the wire and that we needed to see the bill and have a conversation about it. In April, the general election was called, so no bill could be introduced at that time, although the commitment continued. The election took place on 8 June and shortly thereafter it was indicated to our officials in discussions that the bill was likely to be published in early July. We did not see any details until the last day of June or the first day of July, when our officials were shown a copy of the bill. It was immediately obvious that we could not agree to the bill as drafted, primarily because of clause 11, which takes to Westminster all the intersection of powers between European competence and devolved competence, with a process in which Westminster can or cannot divvy them up or pass them out.

I went to London on, I think, 3 July and spoke to David Davis at some length. I indicated the situation and we entered into a process of discussion. The Welsh Government was in exactly the same position. Later in July, at a meeting in Cardiff between the law officers, ministers and officials, we agreed to start work on amendments, because we wished to be constructive. Little progress was made on amendments until November, when the Prime Minister and the First Minister met, despite our joint amendments being published in September when we made it clear that we objected to withdrawal but were dealing with the technicalities.

Around November, there was an indication that there would be changes, given the strength of views across Scottish civic society, which included concerns from the Conservative Party in Scotland, the Welsh Assembly—members of which were unanimous—and others who were involved. In early December at a meeting in St Andrew's house, Damian Green and David Mundell gave a commitment to John Swinney and me that there would be amendments, and that was confirmed by the JMC. However, there was not much progress; no amendments were tabled in the House of Commons. There was a commitment to do so at report stage, but that did not happen. We began to see movement only in February. Damian Green stopped being First Secretary, David Lidington came in with a learning period, and there was an acceptance that, rather than the approach of taking the whole lot of powers, there would be a smaller group—in essence, clause 11 would be turned on its head.

The progress was very welcome, but the basic issue of consent by the devolved Administrations to anything that happens to their powers has still not been agreed. We have had detailed deep dives, as they are called, into areas of possible frameworks—we have always said that we can agree on the principle of frameworks—but the issue of consent or agreement, which is central to respect for the devolved settlement, has still not been agreed.

I am sorry that that answer took so long, but we are now up to date. There is another meeting tomorrow.

12:00

The Convener: That was one of your short answers.

Michael Russell: For which I am renowned.

James Kelly: It is becoming clear that there is a complexity to the bill and that there are going to be at least proposals for amendments. We heard that from the Law Society of Scotland this morning, and there was discussion in the previous evidence session about sections 13 and 17. Bearing in mind the timetable for amendments, which is that they must be lodged by Friday and will be considered on Tuesday, the complexity of the bill and the potential volume of amendments, is there not a danger that scrutiny will be compromised because of the pace that we are moving at, that the end product will not be as good as it could be and that that will potentially give some exposure to a legal challenge?

Michael Russell: We are between a rock and a hard place. Of course one would want there to be as much scrutiny as was physically possible during that period. I am very grateful to the imagination and flexibility of the Parliamentary Bureau, parliamentary staff and the Presiding Officer for devising a way in which we can have a chamber discussion next Tuesday about possible amendments and then the proper process for amendments. I offer my apologies to this

committee for the fact that it will be required to meet in the evening, but I know that the convener will ensure that pizza and other things are available to you all.

Members: Oh!

The Convener: Forgive me, but, if anything, it will be Stephens bridies.

Michael Russell: I indicated to Mr Coffey and Graham Fisher indicated in a letter to the committee that there is a necessity to consider the bill within a timescale. We are more than willing to respond to amendments and are more than willing to be receptive to things. For example, on the discussion of the issue of the exit date, I think that we can just accept that we are going to find an amendment; if it is acceptable, I do not think that it will take an awful lot of effort and debate to agree to it. Perhaps we will restrict ourselves to the things that will require substantial debate. However, I am afraid that there is no other comfort that I can offer Mr Kelly. As I said, the legal reason that Graham Fisher has given and the reasons that we have indicated mean that we have to observe the timescale that we have.

Luke McBratney: It is also relevant to the committee's consideration that the continuity bill already reflects a number of the recommendations made during scrutiny of the withdrawal bill in this Parliament and in Westminster. To that extent, the different policy choices in the continuity bill already deal with the criticisms of the withdrawal bill. A good example is the inclusion of a test of necessity before the main powers in the bill can be used. The form of the test of necessity that we have gone for was first raised in a report by the House of Lords Delegated Powers and Regulatory Reform Committee. Both the Delegated Powers and Law Reform Committee of the Scottish Parliament and this committee recommended in their interim reports on the withdrawal bill that it should include such a test. That test is now in the continuity bill.

Michael Russell: That was the subject of substantial discussion at the Delegated Powers and Law Reform Committee yesterday. The *Official Report*—and, I am sure, a summary of it by the Scottish Parliament information centre—will indicate the changes that have been made.

James Kelly: Obviously, that is good legal practice, but the counter to that is that, as we have discussed, the withdrawal bill still has some way to go in terms of progress, and there is a danger of inconsistency between the end product of that and the end product of the continuity bill.

Michael Russell: We have indicated how we believe that that will be dealt with.

The Convener: Neil, do you have a question on this area?

Neil Bibby: Yes. We are at stage 1 and we are discussing the principle of legislating. The areas of disagreement with the UK Government are what is driving the continuity bill—they are the reason for introducing it. It has been suggested that there are 25 areas of disagreement. Given the timescales, the Parliament and the public need to know what those areas are. You said at the Delegated Powers and Law Reform Committee yesterday that you could not publish those areas of disagreement but that you hoped that they would be published before stage 2. The continuity bill is obviously a piece of legislation that could have potentially significant consequences, but we have a truncated process for it. I do not think that we have the luxury of being able to wait. Why do you think that it is acceptable for the areas of disagreement to be published ahead of stage 2 but not at stage 1?

Michael Russell: Neil Findlay asked me the same question yesterday and, with respect, I will give you the same answer. I cannot unilaterally decide to publish it. I have already spoken to my Welsh counterpart and I will speak to him again today. I know that he has no objections to that publication. I will raise it at the meeting tomorrow, and officials have been asked to ensure that it will be raised.

I hope that we will then be able to publish the entire list of 111 areas and indicate what progress has been made on each of them. Nothing has been agreed, because nothing is agreed in such discussions until everything is agreed. However, progress has been made, and there are issues of importance.

I would stress, as I stressed to Mr Findlay, that this is also about principle. It is not simply about particular powers; it is about ensuring that, whatever powers this Parliament has, they cannot be taken away or hijacked by another Parliament without the consent of this Parliament. That has been well put by the Welsh. Carwyn Jones, the First Minister of Wales, has made it very clear that he cannot go to the National Assembly of Wales and say, "These are powers that I have traded away because they have simply been asked for." I am sure that our First Minister could not do that either.

We should not lose sight of that issue of principle, but we will also try to provide as much detail as possible. Members will have had a note from me last night on some of the issues in the bill. It is my intention to keep informing members before each stage, as I was asked to do again by the Labour Party, and I will provide anything I possibly can. I want to ensure that the issue is agreed tomorrow, and I will endeavour to do so.

The Convener: I want to press you on a point. With regard to that principle, are you saying that whether it is 111 powers, 25 powers or one power, if it is not done by consent and agreement, the Scottish Government will have issues with it?

Michael Russell: Yes—as would the Welsh Government. We have both made that clear.

Neil Bibby: I think that we should know what progress has been made by the Scottish and UK Governments in their negotiations. The expert panel that we heard from earlier agreed that the public and the Parliament should know what progress is being made and what agreements have been made.

You said that you could not tell us that because you did not have permission from the UK Government, but presumably you did not have permission from the UK Government for introducing the continuity bill.

Michael Russell: I think that if the list is in the joint ownership of the three Governments as a result of work that has been done, it would be utterly wrong of me to say something ex cathedra. I have taken a position that, for example, if I am given the UK Government analyses, I will publish them. The UK Government knows that and therefore it has not given them to me. I do not think that I can ex cathedra say anything else, but I am endeavouring to ensure that they are published. I will continue to do so and I hope that I will have a result out of that.

The Convener: We now move into areas of detail.

Emma Harper: I will ask the same question that I asked the previous panel, which was whether there is an improvement in terms of parliamentary scrutiny of secondary legislation in the continuity bill compared with the withdrawal bill. The Law Society's submission recommended

"that the Scottish Government immediately commence a programme of consultation on the draft subordinate legislation which will be needed under the bill."

Alan Page and Aileen McHarg answered that the ability to scrutinise secondary legislation would be better with the continuity bill.

Michael Russell: I will ask Alison Coull to respond on that, but let me make a point on what the DPLR Committee asked for. In its report on the UK withdrawal bill, the committee recommended that

"the powers should only be available where Ministers can show that it is necessary to make a change to the statute book".

We made that change in sections 11 and 12.

The committee recommended that

"UK Ministers should only be able to legislate in devolved areas with the consent of the devolved administration."

We made that change in section 17.

The committee recommended that an explanatory statement should accompany each instrument. We made that change in section 16.

The committee asked the Government to consider whether the Scottish ministers should be able to use a made affirmative or an urgent procedure for their instruments. We made that change. It also asked us to consider whether Scottish ministers should have ancillary powers. We made that change. We responded very positively to ideas about changing scrutiny.

Yesterday, in evidence to the DPLR Committee, I said that if members wish to see changes to the criteria in the bill for ensuring that a procedure is super-affirmative or affirmative, I am willing to consider changes to those criteria. We have to have a criteria-based system for making that decision. We cannot do it in a random way; we have to decide clearly why an instrument is super-affirmative, why another is affirmative and why others are negative. If I remember correctly, the super-affirmative procedure is to do with a new power or a new body. What is the third criterion? Luke McBratney is always very good on the third one when I get to that stage.

Luke McBratney: The enhanced affirmative procedure is available where a regulation is to establish a new Scottish public authority, give a function to a newly established Scottish public authority or remove a current EU function without replacing it.

Michael Russell: That was absolutely perfectly done.

There are criteria there. If another criterion seem sensible, we will consider adding it. I am very keen that we have clarity of criteria applied in these circumstances.

Alison Coull: We have committed to consult as widely as we possibly can, including on draft instruments. The point was made that we should be starting that consultation now. I have a bit of difficulty with that, to be honest, because we do not actually know what the destination is. It would be very difficult to draft instruments to deal with the position. The UK Government has not published any draft instruments and has not started any consultations. We have done a lot of work to identify where there are EU references that will need to change, but we quickly run into deciding what is the choice that we are making. At this point, it is almost impossible to know what that choice would be, because we do not have the withdrawal agreement and we do not have agreement.

Luke McBratney: The continuity bill, unlike the withdrawal bill, contains a statutory requirement for consultation in certain circumstances. When the enhanced procedure applies—when one of the three criteria that the minister indicated is met—the Scottish ministers must consult on the proposal before laying the regulations and must provide a copy of the consultation to the Scottish Parliament at that point. The Scottish Parliament then gets 60 days, rather than 40 days, to scrutinise the regulations. When the regulations are laid, the Scottish ministers must include in the explanatory material a report on that consultation, an indication of the consultation responses that they received and an indication of any changes that they made as a result of that consultation. Unlike in the withdrawal bill, a statutory process for consultation is built into the continuity bill.

Michael Russell: I will give you an example that I think will illustrate the point and help to set it at rest—it also indicates the work that we are doing. I have met on several occasions the health sector, and the pharmaceutical sector in particular. We know that there is a strong desire to continue with the European Medicines Agency. We know that the UK Government has now indicated that it wants to do that. We also know that that has never been done in circumstances where a country is outside the EEA. It would be very difficult for us to consult on a draft instrument on that, but we are in regular dialogue with the sector about what it wants and how it wants it to be done.

Patrick Harvie: I want to continue this theme of scrutiny. I recognise that people have argued for specific criteria and for laying out in the bill where a negative, affirmative or super-affirmative procedure would be used. Is it reasonable—and is the Government open to the argument—that an additional criterion ought to be parliamentary will and that some mechanism for sifting through the Government's draft instruments ought to come to Parliament, either to a single committee or to subject committees, for Parliament to decide whether a particular measure ought to be escalated up the ladder of scrutiny procedures?

Michael Russell: We are not absolutely resistant to the idea of a sifting committee. The difficulty would be that, given that this is a very pressured process, it would add to the process. You would not have to deal with the ones that are already dealt with under the super-affirmative process because they could not be put up the ladder. The issue lies in the affirmative area and in the negative area. I would want it to be criteria based. If an additional criterion was to be parliamentary will, I would want to see how that was defined and how it would operate.

I am not absolutely resistant to that in any way. I want there to be as much scrutiny as there can possibly be. The criteria-based system placed in the bill is very helpful because it guides everybody as to what the situation should be. Perhaps instead of a sifting committee there should be a procedure for objecting on the grounds of criteria not being met or whatever, and for making decisions. I am nervous about putting in another process that will hold things up even further, given the nature of all this.

12:15

Patrick Harvie: I absolutely take the point about the pressure of time, and as you have argued in other contexts, there is no perfect way through the constitutional crisis that Brexit represents. However, it is in the Government's interests to ensure that the instruments that it brings forward are capable of gaining parliamentary support. If one way of doing that is to ensure that, for example, Parliament is satisfied that there has been enough consultation, that will be in the interests of seeing the thing through efficiently and to an agreeable outcome.

Michael Russell: I am speculating aloud here, which is probably a bad idea, but I wonder whether there is a role for a process of objecting to the Parliamentary Bureau so that such matters are handled as part of the business. I am very happy to discuss that.

Patrick Harvie: You are open to exploring this area.

Michael Russell: Absolutely.

Patrick Harvie: I want to ask about two other areas. First, section 31 relates to the situation of urgent cases requiring regulations or orders to be introduced prior to parliamentary approval. In what situations might such an urgent case arise?

I am told that, according to Scottish Government guidance, Scottish statutory instruments must be laid before the Scottish Parliament as soon as practicable after making. In practice, that means that SSIs are generally laid on the second working day after making, which allows the required 24 hours for SSI registration. Separate to that, our standing orders say that if SSIs are not received within three days, the DPLR Committee is required to determine whether an instrument should be drawn to the Parliament's attention

> "on the grounds ... that there appears to have been unjustifiable delay".

Do you intend to stick with that timing and the expectation that instruments will be laid that quickly? If so, should the bill not set that out as a requirement?

Michael Russell: Given that it already exists as a requirement, I do not think that it is necessary to

restate it. However, I make the commitment that that would be my intention.

I ask Luke McBratney to answer the wider question about SSIs.

Luke McBratney: The need for the urgent procedure arises principally because of the deadline that everybody is working to. Unless something dramatic happens, the UK will leave the European Union on 29 March 2019, and the principle-fixing powers will expire two years after that. Everyone accepts that, by then, some changes will need to be made to keep the laws effectively functioning, but the precise scenario under which the UK will leave the EU is still not clear with regard to either the ultimate relationship between the EU and the UK or the terms of any transitional deal, and that might not become clear until quite late in the process.

The urgent procedure was taken by the UK Government in the withdrawal bill, and the Delegated Powers and Law Reform Committee recommended that the Scottish Government consider whether it should have a similar procedure in the Scottish Parliament. The procedure has been taken in anticipation of situations in which something might need to come to the Parliament very quickly, either because the change required has become clear only at the last minute or because substantial lead-in preparation is required—for example, to ensure that a public body is set up in time to assume functions on exit day.

The minister and the accompanying documents to the bill give the commitment that the procedure will be used only when absolutely necessary. Under it, regulations must be laid before the Scottish Parliament as soon as practicable after they are made. The minister has already said that, as far as we are concerned, that means the existing requirement for them to be laid, as is normal, within two sitting days, and they will cease to have effect unless the Parliament approves them within 28 sitting days of their being made. In every single case where an instrument is made under the urgent procedure, the Parliament will be involved in the decision on whether it remains in force.

Patrick Harvie: I accept the basic argument that there might be circumstances in which the power is necessary. At the same time, however, it is a very significant step to give ministers the ability to change the law and then ask for parliamentary approval afterwards. Is there anything under the bill as it stands that would prevent that from happening, say, during a parliamentary recess, which would mean a significant delay before Parliament had the opportunity to make the decision?

Michael Russell: No, there is not. That is an important point, and I think that we should reflect on it.

I said yesterday and I say again today quite clearly that the power is there because a backstop and safeguard is required. It is certainly not our intention to use it and we hope not to do so. However, you make an important point about the parliamentary recess.

Luke McBratney: In the situation that Mr Harvie describes, the procedural requirement about 28 sitting days would kick in when the Parliament returned from recess.

Michael Russell: We will look at that now, as a matter of urgency.

Patrick Harvie: Thank you.

I have one more question about parliamentary scrutiny. Section 17 gives Scottish ministers the power to give or refuse consent for regulations made by UK ministers that touch on devolved areas. Again, will you give examples of the kind of regulation that we are talking about and why that consent should be given by the Scottish ministers rather than by the Scottish Parliament?

Michael Russell: Yes. The process that we are engaged in through the UK withdrawal bill gives ministers such powers, subject to parliamentary scrutiny. That is precisely what we are saying in the legal continuity bill. We are extending the simple principle that it is for this Parliament to decide what happens in devolved areas. Ministers' actions are subject to scrutiny and, of course, control by the Parliament. The proposed approach simply regularises the position; we do not want UK ministers to be able to do things without any supervision, of any description at all, which is the position that we were facing. The solution is to say that UK ministers can do something, but what they do will not have legal effect. Of course, the Scottish ministers are subject to scrutiny on the powers, whereas UK ministers were not.

Patrick Harvie: What would be the mechanism by which Scottish ministers would seek the Parliament's approval for the giving or withholding of consent in such circumstances?

Luke McBratney: Section 17 is, at least in part, a response to this committee's recommendations in its interim report on the withdrawal bill. In paragraph 129 and the following paragraphs, the committee made clear that it would support the proposal that the Scottish and Welsh ministers' consent should be required for instruments made in the situations that we are talking about. In paragraph 131, the committee said:

> "The Committee also emphasises the need for parliamentary scrutiny of Scottish Ministers' proposals prior to consent being given to UK Ministers."

The Scottish Government and the parliamentary authorities are currently in discussion about how that might work under the withdrawal bill, and the Scottish Government expects that any agreement that is reached will be equally applicable to provisions in the Scottish legal continuity bill in relation to Scottish ministers' consent to UK regulations.

Patrick Harvie: That is welcome reassurance, but I am still wondering whether the Government is open to giving that reassurance some substance in the bill.

Michael Russell: Yes, but I think that we are close to seeing the outcome of the discussion with the Parliament about what the procedure should be. Remember that the provision says to UK ministers, "You can't do this", but that does not mean that we have done it. We would still have to do something, to have the equivalent effect, and that would be subject to scrutiny.

Patrick Harvie: I want to come on to the EU principles—

The Convener: Let us sort out the details of the bill. We will come back to the principles if there is time.

Alexander Burnett: Minister, thank you for the update that you provided and for saying that you intend to provide an update in advance of each stage of the bill.

We have not been updated on the financial cost of the bill or the required secondary legislation. In paragraph 16 of the financial memorandum, the Scottish Government commits

"to sharing with the Scottish Parliament information about the anticipated level of legislation required ... and the financial implications".

Can you update us on that and say what updates we can expect before the bill reaches its final stage?

Michael Russell: The costs that will be incurred are, of course, the result of the UK's decisions, not of our decisions. We must ensure that we can draw on the resource that the UK is making available to meet the additional costs of Brexit. I think that there was a £3 billion allocation in the budget, so we are looking to see how we can access that. If additional costs are incurred—I expect that they will be—we expect the costs of Brexit to be borne by the UK Government and funding to be made available to us.

The financial memorandum makes it clear that there are considerable areas of uncertainty in the matter because of the lack of certainty from the UK Government, but we will continue to work to pin that down. We will provide information on that as we are able to do so; we have provided some in the financial memorandum and will go on doing so.

Jenny Brough might want to make points about finance.

Jenny Brough (Scottish Government): No—what the minister says is exactly the case. At present, the bill is a framework that provides for continuity of law, but we do not yet know what end state we are preparing for. Undoubtedly, some regulations that will be made under the bill will have financial implications. We have committed to providing more information on that, but at this point, as we have said in the financial memorandum, we simply do not know the scale and content of the secondary legislation that will be needed. We will continue to look at that.

Michael Russell: We are, of course, happy to continue to keep members updated. If members who have influence with the UK Government can ensure that it unties the purse strings to ensure that some of the money that it has allocated for Brexit comes to Scotland, that will be welcome. The bill makes particular provisions that we are required to make on the detail of expenditure, but they are, in essence, backstop provisions.

Alexander Burnett: Are you saying that we should not, by the bill's final stages, expect a clear indication of costs?

Michael Russell: The UK Government has given no clear indication of the costs of its withdrawal bill; the costs that we will incur will flow from its costs, so we will be able to give such an indication only when the UK Government has given one. My position is no different from what it would have been if we did not have a continuity bill, because the UK Government has not indicated the costs.

The Convener: Neil, do you still want to ask about section 13?

Neil Bibby: Yes. Section 13 will introduce a ministerial power to incorporate new EU law. As you will, I think, have heard, I asked the panel of expert witnesses for their views on that. Professor Page said that the power is "a thoroughly bad idea". In his written evidence, he also said that it would be a

"major surrender by the Parliament".

That concerns me greatly. Does it concern you and will you reflect on the evidence from the expert panel?

Michael Russell: It would concern me if that were true, but I do not believe that it is. I am surprised by that reaction for two reasons. First, there was a widespread expectation that, when the UK's withdrawal bill was introduced, those powers would be in it for simple technical reasons.

They would not be exercised outwith the supervision of any Parliament—they would absolutely be exercised under parliamentary scrutiny—but there are technical reasons why we want continuity of law. I will give you a couple of them.

One of the reasons might apply to whatever solution is found north and south in Ireland. We might, for example, find that Northern Ireland operates regulatory alignment with the EU on agriculture. If we were to put in place arrangements with Northern Ireland, we would have to have regulatory alignment of certain agricultural issues ourselves. The continuity bill would merely allow us to do that. We thought that that power would exist throughout the UK. The provision says that there will, in certain circumstances, be technical reasons why we need to incorporate new EU law.

It is also possible that we would want to ensure that the regulations that would follow from our signing up to the European Medicines Agency, if we were to do that, would continue to operate. The regulations would be dynamic: if our drugs were being approved by the agency and we were to allow the regulations to atrophy in any way, we would not be part of the process and our drugs could not be approved. One of the great fallacies of the leave movement was that a dynamic UK-only medicines approval agency would somehow produce remarkable results. It turns out, as pharmaceutical companies could have told us from day 1, that that will not happen because the UK is only 3 per cent of the market and the companies would go for that approval only after getting approval from everybody else—the EU and the US.

The measure is largely technical. It will also lapse—unless Parliament decides that it should not. There are policy areas such as food standards and some areas of environmental standards in which we would be required to incorporate new EU law. Let me use an example from my constituency. If we are to continue to sell live shellfish in Europe, we will have to continue to observe food regulations, otherwise we will not be able to do it.

Far from section 13 being as described, it is a technical measure. It is subject to parliamentary scrutiny and control and it is sunsetted. In the circumstances, it is a thoroughly reasonable thing to do. The provision also exists in the Welsh bill. I do not recognise the description, and I do not think that it is the innovation that people think it is.

12:30

Murdo Fraser: In its evidence, the Law Society raised a number of concerns about the detail of the bill. Time does not permit me to go through them all, but I want to mention section 5, which states:

> "The general principles of EU law and the Charter of Fundamental Rights are part of Scots law on or after exit day",

subject to various qualifications that are contained in various subsections. However, the bill does not specify what those general principles or fundamental rights are. Are you able to tell us what the Scottish Government believes them to be?

Michael Russell: In the explanatory notes, examples are given of what the general principles are. All of us, when considering legislation in committees, have been in the position in which the more specific we are in laying out general principles, the more likely we are to leave something out or to include something else. The general principles are understood—perhaps Luke McBratney should make the case.

It is possible—this relates to the question that Patrick Harvie asked about environmental principles—to give more examples, if that would be helpful, but it is impossible to define absolutely every single general principle in the legislation, because that would be dangerous.

Luke McBratney: The European charter of fundamental rights is an instrument and it is incorporated in the bill. I do not think that there will be any difficulty in working out which aspects of the charter will continue to apply, given the tests in section 5. On the general principles, we have taken the same approach as that which has been taken in the withdrawal bill—reference to the general principles is sufficient, and questions that arise about what is meant by a general principle, or whether a general principle applies, will continue to be questions for the courts to resolve, as is the case at the moment.

Paragraphs 30 to 32 in the explanatory notes give more detail about what the Scottish Government understands the general principles to be, and how their incorporation under section 5 would work. As the minister indicated, we are content to consider whether we can expand that explanatory material over the next two weeks.

Patrick Harvie: The minister said that he will give more consideration to whether the explanatory material needs to be expanded over the next two weeks. Would it be expanded in a policy statement or by amendments to the continuity bill?

Michael Russell: We are taking the same approach as that which has been taken in the UK bill on the matter, because of the difficulty of defining everything. The point that I am making is that the explanatory notes contain items, and it

might be useful for them to contain other items. For example, I listened to your exchange on environmental principles. I am very sympathetic to those points, and I would like to mention those principles in the explanatory notes, so that there is no doubt that we believe them to be included in the general principles. That would be useful. However, if we try to name every single principle, we will run into considerable problems.

Patrick Harvie: There has been significant debate at Westminster about the withdrawal bill and the extent to which environmental principles, such as precaution and the polluter pays principle, as well as animal welfare and animal sentience, should be included either in that legislation or elsewhere. To what extent do you feel that that argument is relevant to the continuity bill, and needs to be addressed?

Michael Russell: The argument needs to be addressed, but it cannot be addressed by adding a very long list to the bill. It can, and should, be addressed by illustrating what the principles are and including some of them in the bill. I am happy to have that debate.

Patrick Harvie: The other question that I put to the previous panel was about section 5(3), which states:

> "Subsection (1) applies in relation to a general principle ... only if it was recognised as a general principle of EU law by the European Court in a case decided before exit day".

Is it enough to say that it needs to be a principle that was recognised in a "case decided", or is it the case that there might be general principles that are recognised but not referred to in a specific case?

Michael Russell: I heard the panel's response to that too, and I have to say that I agree with it. I do not think that it is possible to have in cases general principles that are not established as such, or that have not yet been recognised as such. It is a necessary definition that has to be applied.

Patrick Harvie: Thank you.

Adam Tomkins: I am baffled by that set of answers, including that last one to Patrick Harvie. How your answer to Patrick Harvie's question is compatible with section 13 of the bill, I do not know. However, on the point about general principles, is it the Scottish Government's view that subsidiarity is a general principle of EU law?

Alison Coull: Yes.

Adam Tomkins: Is it the Scottish Government's view that the principle of subsidiarity applies only to the relationship between member states and the EU, or is there a general principle of subsidiarity that also applies to the relationships between the Scottish Government and the UK Government, and between local authorities and the Scottish Government? That is the sort of clarification that we need if section 5 is to have any meaningful effect—if it is enacted at all.

Alison Coull: That may be an example of why it is not a good idea to choose which general principles are frozen. We are trying to take across all the general principles that are currently recognised by the European Court of Justice. The definition of general principles is that they have to have been recognised by the Court of Justice. There will be room for argument about how those general principles will apply in a new context in which we are not a member state, but it would not be right to prejudge the set of general principles that we want to bring across into domestic law on leaving the EU.

Michael Russell: I will bring in Luke McBratney.

Luke McBratney: It is important to be clear about the distinction between the approach of the continuity bill to the general principles and the approach of the withdrawal bill to the general principles. The withdrawal bill would incorporate the general principles with the same tests, as they have been recognised by the Court of Justice, on and after exit day, but it would exclude them as the basis of a right for action. The continuity bill does not exclude them, but provides for greater continuity of law, in that an existing right of action will continue to be available after withdrawal.

The other qualification in the continuity bill that is relevant to Professor Tomkins's question is that the general principles are incorporated under the continuity bill only to the extent that they relate to anything to which sections 2, 3 and 4 apply. The general principles will be retained as part of Scots law after exit day in relation to the devolved retained EU law that will be incorporated under the continuity bill.

Adam Tomkins: All that—especially the critical difference between how the withdrawal bill deals with the general principles and how section 5 of the continuity bill deals with the general principles—is just an invitation to litigate, is it not? The Scottish Government seeking to retain that right of action is a positive encouragement to litigate, litigate and litigate again in the Scots courts on, for example, the applicability of the old doctrine of subsidiarity to the relationship between local authorities and the Scottish Government, because of the way in which section 5 has been drafted but not defined.

Luke McBratney: It is not an invitation to litigate in any situations in which litigation is not already possible.

Michael Russell: It is very firmly our view that that is a necessary and important right, but it is not

in any sense—I repeat: not in any sense—an invitation to litigate.

Adam Tomkins: Good luck with that.

The Convener: This has been a complex and difficult area to deal with. I very much appreciate the tone of respect in which the committee and the Government have carried out this process this morning. We have seen the committee working at its best. I thank our adviser, Christine O’Neill, and the witnesses whom we had earlier for their advice on such short notice. We will move to stage 2 next week.

Adam Tomkins: That is, provided stage 1 is passed.

The Convener: That is absolutely right. I have already been warned by the deputy convener to bring my sleeping bag for stage 2 next week.

Meeting closed at 12:38.

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