OFFICIAL REPORT
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Equalities and Human Rights Committee

Thursday 15 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 15 March 2018

CONTENTS

EQUALITIES AND HUMAN RIGHTS COMMITTEE
8th Meeting 2018, Session 5

CONVENER

*Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Mary Fee (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Gail Ross (Caithness, Sutherland and Ross) (SNP)
*David Torrance (Kirkcaldy) (SNP)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Alison Coull (Scottish Government)
Duncan Isles (Scottish Government)
Luke McBratney (Scottish Government)
Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 15 March 2018

[The Convener opened the meeting at 09:01]

Decision on Taking Business in Private

The Convener (Christina McKelvie): Good morning and welcome to the eighth meeting in 2018 of the Equalities and Human Rights Committee. I make the usual request that mobile devices be switched to aeroplane mode and kept off the table.

Agenda item 1 is a decision on whether to take agenda item 3 in private. Does the committee agree to do so?

Members *indicated agreement.*

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

09:01

The Convener: Agenda item 2 is the continuation of our evidence taking on the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. As members know, Parliament agreed to treat the bill as an emergency bill, and the bill completed its stage 1 consideration in the chamber on 7 March. After a marathon session, consideration of stage 2 amendments was completed at about 9.45 last night.

Section 5 of the bill seeks to save the Charter of Fundamental Rights of the European Union, as it applies to devolved matters, into Scots law. We will take evidence from the Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell, who is accompanied by Scottish Government officials Alison Coull, Graham Fisher, Duncan Isles and Luke McBratney.

Minister, I know that you have had a number of marathon sessions over the past few days, so you will undoubtedly be tired—

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): I am fresh as a daisy, I assure you.

The Convener: We have about 45 minutes with you, because we know that you have to appear before another committee. I do not know whether you want to make a brief opening statement.

Michael Russell: No. I am happy to answer questions. That way, we will get more out of the session.

The Convener: Thank you very much. On that note, I invite Gail Ross to ask the first question.

Gail Ross (Caithness, Sutherland and Ross) (SNP): Good morning, panel. Minister, you have stated previously that, if agreement was reached on the United Kingdom Government's European Union (Withdrawal) Bill, the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill would fall. If that is the case, how can we ensure that the protections under the charter of fundamental rights can still be maintained in Scotland, given that the UK Government's position is that the charter will not be taken into UK law?

Michael Russell: If the bill were to be withdrawn, that would be one of the downsides, but we have made a clear commitment to withdraw the bill if an agreement is found. I will explain why that is. That commitment will be clearer now, because I think that the final

amendment that I accepted last night during the stage 2 process was an amendment from Liam Kerr that indicated that the whole bill—rather than bits of it—would fall if we decided to move in that direction. That honours our commitment.

I do not think that there is any good withdrawal, I do not agree with withdrawal and I think that Brexit is the wrong thing to happen. That said, as far as the overall process is concerned, we have always said that the technicalities have to be observed, because we cannot leave the country without law in place, and European law has become enmeshed with our lives over the past 50 years. The best way to do that is through a single bill, to which legislative consent is given by the devolved Administrations—by the Welsh and Scottish Administrations and, if it were sitting, the Northern Ireland Assembly. We have endeavoured and are still endeavouring to get an agreement on that.

The UK Government did not consult on the draft withdrawal bill before publishing it. We had two weeks to talk about it, but that is nothing compared with what should have happened, given that we are talking about the putting together of legislation that requires legislative consent. We have endeavoured to say that, although there are lots of things that we do not like in the withdrawal bill, the place of the devolved Administrations is to work with the UK Government, if we can, to make it do the right things. We cannot make the bill work, because bits of it run against devolution and, frankly, create a mess in areas such as agriculture, fisheries and the environment as well as some health and legal areas. We could sort that mess by dealing with the detail and the law, although not by getting what we would like.

The proper place to amend the bill to deal with those issues is the House of Commons and the House of Lords. I do not say that with any pleasure, because I think that this Parliament should be able to decide everything but, given the present constitutional settlement, that is the proper place to amend it. The House of Commons chose not to amend the bill although, as you will know, there were split views, even in the Tory party—members will have read Ken Clarke's tremendous speech on it in the House of Commons. The bill is now in the House of Lords, which will be able to take a position, and it may be a different position. I do not look to the House of Lords to save me on many occasions, but we should look to the House of Lords to have the issues ventilated properly. I have briefed peers on our position on the issues in recent weeks. If the House of Lords does not take a different position, that will become a matter for wider debate in the country, and those of us who want the protection of rights will need to find a way to secure that.

One way of course would be to retain the protections and to be part of the single market and the customs union—in other words, to keep the closest possible alignment between ourselves and the EU and not to go down the rabbit hole, assuming that we will get away from everything and that there will be a wonderful world. There will not be; it will be a rabbit hole, and we need to recognise that.

Gail Ross: Is there any way in which we can incorporate the principles of human rights in EU law without adopting the charter?

Michael Russell: The best way forward is to take the charter into Scots law, as we have indicated in the continuity bill. That is one of the differences between our approach to the withdrawal legislation and the UK approach. Ours is the best way to do it. Interestingly, that also appears to be the Scottish Conservative position, after the previous two days. I think that Mr Tomkins indicated that he would drop our approach to some things but that he would keep our approach on the charter. He said:

"there is good reason to maintain the position of the charter of fundamental rights in Scots law after exit day."—[*Official Report*, *Finance and Constitution Committee*, 13 March 2018; c 49.]

I welcome that. I presume that there will be a unanimous view that that is what should happen and, I presume, that it is what should happen at Westminster, too.

Jamie Greene (West Scotland) (Con): Good morning, panel. It is good to see you again, minister. We have spent far too much time together these past few days, but nonetheless—

Michael Russell: I concur with those sentiments.

Jamie Greene: I want to press you on a few points that are based on the evidence session that we had last week, which was extremely helpful. It is worth placing on record my thanks to the clerks and other staff for cobbling together some excellent research notes, especially those from the Scottish Parliament information centre on the implications of the continuity bill and its relevance to the committee. Those have been extremely helpful, so I thank all the staff for that.

Last week, Tobias Lock said in evidence that no non-EU country has ever adopted the charter or proactively sought to incorporate EU directives, regulations and laws into its domestic law. Why does the minister think that Scotland should do that?

Michael Russell: Well, no country has ever left the EU before, so I suppose that that contextualises the issue. The issue is very simple. The reality is that the charter provides the

protections that we have got used to and underpins the system of human rights that we want to have. I should point out that Scotland did not vote to leave the EU so, by extension, Scotland did not vote to have the protections removed from us. In those circumstances, our approach is the right thing to do and the progressive thing to do. I am glad that Professor Tomkins agrees with me. To quote him again, he said:

"there is good reason to maintain the position of the charter of fundamental rights in Scots law".—[*Official Report*, *Finance and Constitution Committee*, 13 March 2018; c 49.]

I am not sure that Dr Lock indicated that it should not be done; he simply indicated that nobody else has done it. I think that a bit of innovation does us no harm as a Scottish Parliament.

Jamie Greene: If the charter is incorporated into Scots law but not incorporated in another part of the United Kingdom, what would the consequences be of having parallel frameworks for different approaches to human rights with regard to liabilities on the state or different policy approaches? Is the minister 100 per cent clear and confident that it is within the Scottish Parliament's competence to adopt human rights and equalities elements of the charter? Is he entirely happy that those are "retained (devolved) EU law" and not reserved in any way? That is more of a technical question than a political one.

Michael Russell: Yes, I am entirely happy about that because we are dealing with devolved competence and putting those elements of the charter into Scots law in a way that is consistent with the constitutional settlement. I am entirely happy that the bill is within competence in all regards. That discussion has been going on for the past couple of weeks and, no doubt, will continue for a period of time, but we are absolutely fine. We can legislate differently on human rights.

With respect, the question is not about us doing something that somebody else is not doing; it is about us holding on to something that is being taken away from other people. That is the difference. I would like everybody to be protected by the charter. I do not see why people in the other parts of the United Kingdom who require those protections should have them taken away from them. However, if I have the ability to allow them to continue in Scotland, that is what I want to do. It is important to recognise the fact that it is not about saying, "Let us do something differently in Scotland." It is about saying that the charter works for us, that we want to keep it and, therefore, that we will keep it.

On the wider point, I am at the very relaxed end of the spectrum on differences in actions and choices in the various parts of these islands. That is the devolved settlement. It is really important to recognise that. I have been quoted recently as saying that one of the problems that we have got into in the negotiations with the United Kingdom Government is that we are often dealing with United Kingdom ministers who, for the best reasons, do not understand devolution and have never operated it. It is necessary for us to remind the United Kingdom Government that devolution exists, is the constitutional settlement and was voted for by the Scottish people. I may wish to go further but the reality is that that is where we are. It is, in that immortal phrase,

"the settled will of the Scottish people"

but it is also the settled constitutional will of all parts of these islands. Therefore, we should recognise it and the United Kingdom Government should respect it.

Jamie Greene: I have no further questions. The minister said in a previous answer that Scotland did not vote for Brexit. With the greatest respect, I point out that Scotland is not the member state of the European Union; the United Kingdom is the member state. The United Kingdom voted for Brexit and that should also be respected.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning, minister and the officials. Thank you for coming to see us.

I will focus on section 13, which exercised my party in the stage 1 and stage 2 deliberations in respect of the powers that the Parliament might be about to confer on the Scottish ministers to keep pace with EU legislation after withdrawal. We have made some progress on that and I am grateful to the Government for the concessions that it has made so far. I look forward to further discussions on the matter.

Irrespective of the progress that has been made, if we confer on the Scottish ministers for whatever period of time power to, by regulation, keep pace with directives from the European Union, the Equalities and Human Rights Committee has a duty of care to the scrutiny for those changes, particularly on equalities and human rights. I am concerned that, if we make such changes through ministerial regulation, they will not have the statutory requirements for an equalities impact assessment or a child rights impact assessment, for example. Will the minister explore how we square that circle and ensure that scrutiny can take place, particularly on relevant directives and regulations that he might choose to make?

Michael Russell: We should recognise that the power under section 13 is of limited scope and designed to address comparatively minor matters. I am not dissing fish health, invasive species or animal health but nor am I saying that section 13

is a means by which ministers would regularly seek to address major issues. As you correctly pointed out, I accepted at stage 2 substantial changes to the section, many of which came from your colleague Tavish Scott. We will continue to discuss other changes.

09:15

Having said that, the section 13 power is an important one. There could be areas in which the Scottish Government, in consultation with the committee and with stakeholders, would believe it was useful to have powers. That would require the minister to make a recommendation, and the Parliament to be satisfied that that was the right thing to happen, by the affirmative procedure. Sometimes that could even be by the super-affirmative procedure—I do not believe that that should be of right, but it could be. In those circumstances, there would be wider consultation. The committee would be absolutely entitled to hold hearings on the matter—I would encourage it to do so—so there would be scrutiny.

However, if we are to recognise, for example, the importance of regulatory alignment in some key areas—that is crucial for the Northern Irish border—it is important that there is a power that allows us to give effect to regulatory alignment without having to go through the process of primary legislation every time, because that would be difficult to do and, in some areas, would negate the issue of keeping pace. The UK Government did not want that, because it did not put that in its withdrawal bill. The current situation is one in which we need that power. It should have been in the withdrawal bill, and we have put it in our bill.

Alex Cole-Hamilton: With regard to the times at which we agree that primary legislation will be required, considering that the Parliament has quite a full diet of legislation already, has any scoping been done on the increased level of legislation that would be brought forward, and how that would stand up to scrutiny?

Michael Russell: We estimate that there would be 300-plus items of secondary legislation for this process. That is a lot—it is at least a year's worth for the Parliament, and it could be more. It is difficult to tell, because we do not know precisely what the United Kingdom Government will propose. We believe that some of these things should be done jointly with the United Kingdom Government. Estimates exist and work has been done, and continues to be done, on secondary legislation. It is a very complex task. It is not just about bringing law back in; it is about correcting deficiencies too, which is a serious business.

We do not have estimates on primary legislation, but we know, for example, that the UK Government intends to bring forward an agriculture bill, a fisheries bill and a trade bill—in fact, the first part of the Trade Bill is in the House of Commons—so we can see things coming. That is then complicated—I am sorry to complicate things further—by where we are with the negotiations with the UK Government. We have indicated our willingness to establish frameworks to cover, for example, agricultural issues, which is one of the areas in the list of 24 or 25 areas of disagreement, depending on how we define them. If there was a framework in those areas and then legislation, there would be a process of agreeing that, and of developing the legislation in a way that suited Scotland and matched Scottish circumstances.

We are in for a heavy programme of secondary legislation, a heavy process of legislative consent if we can resolve the present dispute with the UK Government, and a heavy programme if the frameworks are such that we also require Scottish legislation. We have quite a bit of legislating ahead of us. Alex Cole-Hamilton and I agree that it would be better to spend our time on things other than Brexit. It is a massive distraction and a black hole that sucks in resource, energy and initiative but, regrettably, we are where we are. Therefore, we will have to look at the legislative programme very seriously. I hope that we will not have 11 hours of stage 2 over 24 hours, but what else am I doing?

Alex Cole-Hamilton: Thank you, minister. I might come back in later.

Mary Fee (West Scotland) (Lab): Good morning, panel. I want to raise with the minister the same issues that I raised with Tobias Lock last week. Much of the employment protection that we have in this country comes from the EU, and I am concerned that there could be some slippage in workers' rights. Can you comment on that? How will you protect workers' rights post-Brexit in the continuity bill?

Michael Russell: I do not want to be unkind to ministers of the United Kingdom Government. I am sure that I would be ruled out of order were I to go too far. However, I do not necessarily accept their assurances on these matters. There is a deregulation imperative for some of those ministers and they want to see a situation in which workers' rights, human rights and rights of all types are diminished. Before Mr Greene or Ms Wells intervenes, I accept that that is not what they are saying and I could therefore be accused of being unfair, but I do not necessarily trust the assurances that we have from them.

The question then becomes how we do something about it. In the bill, the charter of fundamental rights helps us along that way. The charter is a wider way of doing that because of what it includes, such as the Human Rights Act

1998 and the European convention on human rights. I am not dissing the ECHR, but the charter is a more useful tool in that regard. It also ranges more widely. We have been debating environmental law and there are environmental guarantees within that charter. Sometimes they are not as wide as we would want, but they are pretty wide.

We have all that, and the European pillar of social rights stands as something of huge importance to us. We will therefore have to be clever and fleet of foot. I do not want to be overcomplicated but I suppose that we could look at this as a series of steps. The first step should have been to say to the UK Government that we are keeping the good things. Even if the UK Government is seduced by the pot of gold at the end of the trading rainbow—even though it is not true—it could have been sensible about it and said that we will stay in the single market, but that did not happen.

The next step should have been to ask whether there was a way for it to happen at Westminster, and whether a route was still open. Anybody who saw anything of the debates in the House of Lords in the past couple of days—I am sad enough to have glanced at them as well as what I have been doing here—will have seen some very interesting reactions. Some are saying that they are not going to be told that the referendum was the be-all and end-all.

There is now this bill. It exists for a purpose. It has to be able to be worked. It is a workable bill. If there is no agreement with the UK, this bill will do some, but not all, of those things, and we should remember that some of the things that Mary Fee asked about are reserved.

If we do not have this bill and the UK Government is not on side, we are left in the old and tiring but necessary process of campaigning and arguing and standing up for the things that we believe to be right. The third sector has a big role to play in that. I was pleased to see the Edinburgh declaration that the sector agreed about rights—the convener was present when that was signed. That indicates the strength of the third sector and other bodies when they are saying that they are not going to accept what is happening, and we will have to assert that.

This might remind us that social progress and progress in rights are not a straight line. We have lived our lives with the view that everything is going to get better and people are enlightened, and that has turned out not to be true.

I cannot give you much more hope than that. On the other hand, I know that Mary Fee and I and a lot of people around this table have spent a lot of time campaigning and done a lot of arguing, and we just have to go on doing it and saying what has to happen.

Mary Fee: In answer to my question last week, Dr Lock said that, if a change was made by an act of the Westminster Parliament, there would be little that we could do in Scotland. If my memory serves me right, the example that he used was that, if the Westminster Government decided that everyone was entitled to only two weeks' holiday, there would be very little that we could do to change that. It is a massive concern that there is potential for slippage in rights that have been hard won.

Michael Russell: One of the issues around Brexit is making it real to people that those things that we thought were ours as of right—and we did not realise how fortunate we were—had come to us because people had campaigned and argued for them. We could take the same view of the role of women in suffrage. People campaigned and worked for those rights and they are there, but now they are at risk. That might make us value them more, but we must also be aware that we have to find the democratic structures to allow them to continue to be so.

I want to continue with this consensus, but my view is that the Scottish Parliament should be making all those decisions and, if it was, the political consensus in Scotland would ensure that those things, and quite a lot of other things, happened. If you do not believe that, and you believe that the UK is the right unit, while I disagree with you, I look for you to say how it will work.

Mary Fee: The other question that I asked Doctor Lock about last Thursday was about the Francovich right. Although it is something that might not be used by many people, it is still a right that an employee would have. However, the continuity bill makes no provision for that right after Brexit. Tavish Scott MSP lodged an amendment on that, which I supported, but I know that it has fallen. I would be grateful if you could explain your thinking in not including Francovich in the bill.

Michael Russell: We do include Francovich and I believe that we include a better protection for Francovich than the withdrawal bill does. Under our bill, the right of action under Francovich does not terminate on exit day because the action has not been settled. However, beyond the right that we are granting, I see no way in which we can give a guarantee about Francovich if we are not a member of the EU; regrettably, I do not think that it is possible to do that if we are not a member of the EU. Francovich is included in the continuity bill. Section 8(1) states that

"There is no right in Scots law on or after exit day to damages in accordance with the rule in Francovich",

but section 8(2) states that,

"Subject to any transitional, transitory or saving provision made by regulations under section 32, subsection (1) does not apply in relation to any right of action accruing before exit day."

If the matter about which someone was complaining was before exit day, they would have a continuing right in that regard, but if the matter of complaint was after exit day, they would be relying on Francovich to do something that is subject to the European Court of Justice, which we will not be subject to. There would then be a huge difficulty about how that would operate. As you will know, Francovich is partly about an act of shaming. I would be ashamed enough not to be in the EU, but no act of shaming could take place under the circumstances that I have indicated. There would therefore be only a very limited action and it would be very difficult to enforce. I also think that the courts would be uncomfortable about it.

It is therefore not that we are doing nothing. We had a very full discussion at committee about Francovich, and your name was attached to Tavish Scott's amendment. That was quite a good thing to do, because Tavish Scott must have got more amendments through than most members. That is probably a tip for the future—attach your name to Tavish Scott's amendment. However, on this occasion, he did not get his amendment through, because it is impossible to see how Francovich could be operated. It is not that I am unsympathetic to Francovich; it is just that I do not think that continuing it can be done.

Mary Fee: That is because Francovich is linked to an EU statute.

Michael Russell: It is for a variety of reasons. It is linked to an EU statute, and we can take that statute in. Although the quantum involved in a Francovich action is decided by a national court, the whole regulation is set by the European Court of Justice, but that whole element is being taken out. Trying to use Francovich would involve making a non-EU country responsible for rights that accrue for those in an EU country. Francovich could apply right up to the last moment of exit, but that is not where the UK Government is. Regrettably, Francovich cannot apply when we are not in the EU.

Mary Fee: That is very helpful. Thank you.

The Convener: I want to pick up on a couple of points to do with something that I spoke about in the debate the other day. I have grave concerns about some of our primary legislation in our domestic law that is EU directive derived. EU directives have been accepted and ratified by the United Kingdom but, because Scotland has a separate legal system, we have passed our own primary legislation on a number of matters, such as the trafficking of human beings and child sexual exploitation in pornography. The legislation in those two areas derived from EU directives, but the primary legislation in Scotland on those two areas goes much further than the primary legislation in England does. I am concerned about matters such as that. How on earth do we protect our more extensive legal position of having more protections in place for victims than there are in English law? If the powers that are derived from EU directives are rereserved or retained by the UK Government, how do we ensure that we can continue with our more progressive and advanced legislation?

Michael Russell: I will bring Luke McBratney in on the technical issues. The political issue that you raise is a considerable worry. The reason why we can go further than the UK is that we have a devolved settlement with a legislature here that has the right to legislate in certain areas and does so. We can make those choices. Another example would be minimum pricing for alcohol, which we can make decisions about because of the circumstances that we are in. The principle of subsidiarity is recognised.

If the UK Government is intent on hemming in the devolved Administrations, which is what appears to be happening, and if the powers that the UK Government essentially wishes to rereserve are not sunsetted in any way, there is a problem.

There is no limit to those areas. As Adam Tomkins said in the Finance and Constitution Committee yesterday, there are "buckets" of powers. One of them has 24 items in it. As I pointed out to him yesterday, the buckets have no lids and the UK Government can keep throwing things into them. That is an issue for the UK Government. The UK Government could suddenly show an interest in and want to do something about areas that are not on the list.

Respecting the devolved settlement is a political issue that allows us to do the things we need to do.

09:30

Luke McBratney (Scottish Government): I can confirm for the committee that section 2 of the continuity bill preserves all devolved EU-derived domestic legislation, including the type of statutes that the convener has referred to. Section 2(2) explicitly preserves them in relation to matters where the method of implementation in Scotland has gone further than what was required by EU law. The bill also preserves the continuing ability to make a different choice for Scotland, as the

minister referred to. Section 13—the keeping-pace power—would allow post-withdrawal developments to be reflected in domestic law, which the convener referred to.

The Convener: One of my worries is that there would be an attempt to harmonise some of those things. Harmonisation may mean regression in our case. That is my worry on the rights-based primary legislation that Scotland has.

Michael Russell: We need to get recognition from UK ministers of the existing situation and the importance of diversity and difference within it. Devolution is based on the fact that there are some things that need to be done differently. Some of us believe that we should go much further, but the present system is based on that diversity. It needs to be described accurately. There is no such thing as a "single market" in the UK. There is a uniform market, but it is not a unitary one. There is divergence and diversity. In legislative terms, that is what the settlement is. That has to be recognised.

The Convener: Section 4 of the continuity bill, which mirrors section 4 of the withdrawal bill, ensures that devolved rights are available within Scots law. It is called the equal treatment framework, as in equal treatment legislation. How will that work? I know that the sections mirror each other, but they do slightly different things.

Michael Russell: When I am looking for insights, I always turn to my colleagues.

Duncan Isles (Scottish Government): Equal treatment legislation, as the committee is aware, applies at the UK level. It is brought into the law of Scotland through reserved action. It is a complex area, which is why I am hesitating. I would prefer to have the benefit of input from legal colleagues with specialist knowledge of the subject. The issue of equal treatment is part of the existing law of Scotland. It is something that we share in large measure with the law that applies elsewhere in the UK. There is no suggestion that that will be undermined or eroded. There is reference to equal treatment in the list of common framework topics that remains open for discussion. We can write further to the committee on the detail.

The Convener: That would be helpful. We know where we with the Equalities and Human Rights Commission, its place as the reserved body with a UK-wide remit and how it interplays with the Scottish Human Rights Commission and its responsibility for devolved matters relating to equal treatment.

The committee is very interested in the matter because it brings into sharp focus the outcomes for the people we are interested in in relation to some of the protected characteristics—whether it is race, religion, sexuality or whatever. Those are the things that really interest us. We want to know how people will be protected. There is a concern that regression would kick in and we would lose some of those rights as well.

Alison Coull (Scottish Government): Can I just check that you are asking about section 4(3)(b) of the bill?

The Convener: I do not have that much detail.

Alison Coull: I thought that was where your question came in.

Michael Russell: I take lawyers with me everywhere, just to make sure.

Luke McBratney: The convener mentioned that section 4 of the continuity bill corresponds to clause 4 of the withdrawal bill. That approach largely applies to sections 2 to 4 of the continuity bill. That is a deliberate choice by the Scottish Government, which recognises that those sections, which are the continuity sections, take all the existing law and rights, as implemented, and attempt to transfer them precisely into domestic law post-exit day.

I think that this is set out in the policy memorandum, but the Scottish Government considers that there is value in having a high level of complementarity between how reserved law is carried forward on exit day and how devolved law is carried forward. For that reason, we have chosen to closely mirror clauses 2, 3 and 4 of the withdrawal bill in sections 2, 3 and 4 of the continuity bill.

Alison Coull: I will try to explain what might be the technical point that the convener raised. The convener asked quite a detailed question about section 4, which says that it saves all the "devolved rights, powers, liabilities," and then says that that does not apply

"so far as they ... form part of Scots law by virtue of section 3, or ... arise under an EU directive".

That is simply an exception to reflect the fact that those things are saved under sections 2 and 3 of the bill. It is not trying to exclude them; it is just reflecting the fact that they are all saved elsewhere in the bill. That would include, I think, the directive that the convener mentioned, in so far as it relates to devolved matters.

The Convener: Okay—any other information that you can provide us with would be incredibly helpful. We would appreciate that.

Alex Cole-Hamilton: I would like to pick up on the convener's line of questioning in respect of the powers conferred on ministers by sections 11 to 13, in relation to deficiencies in our international treaty obligations and, as we discussed earlier, keeping pace.

I want to explore that in respect of how it pertains to the Equality Act 2006 and the Equality Act 2010. It is clear that those powers will be limited in that they cannot modify either the 2006 act or the 2010 act. However, a phrase that is repeated in the provisions suggests that the provisions would not

"prevent the removal of a protection or the making of a modification if alternative provision is made in the regulations that is broadly equivalent to the protection being removed or the provision being modified."

I seek clarity as to whether the minister believes that the regulation-making powers can modify in any way equalities legislation as it stands.

Michael Russell: The minister believes that Luke McBratney has the answer.

Luke McBratney: The word "broadly" was removed from that phrase during stage 2 last night, so you can take your pen to that. Sections 11 to 13 are technical measures that rely on the fact that we do not want to prejudge the precise form that the drafting of any amendment required to address deficiency might take. It may involve moving around words in legislation or replacing a scheme with another scheme that works in a slightly different way.

However, what the sections make clear—and what they make especially clear now that the word "broadly" has been removed from that phrase in all the sections—is that whatever the modified or replacement provision is, it must contain a protection that is equivalent to the protection that is being modified or moved.

Alex Cole-Hamilton: Okay.

Michael Russell: It is important to recognise that the continuity bill does not and cannot innovate on policy. It brings things in, it corrects and it deals with deficiencies. Ministers have the power to do that, subject a very high degree of scrutiny and a whole set of checks and balances, which we have added to and indeed improved on at stage 2.

This is not about policy change or modification. That is frustrating for people—I know that it is frustrating for me—but that is not what we are doing.

Alex Cole-Hamilton: Okay. I think that that is fine—I think that you have covered what I was looking for there.

The Convener: I am just trying to make sure that we tick all the boxes and get all the questions in line. Members have a couple of supplementary questions. Does Jamie Greene want to come back in?

Jamie Greene: Yes. I want to pick up on the minister's point that the bill does not present any opportunity to innovate. Does he mean that any regulations that he or any other Scottish minister brings in as a result of any additional powers that the bill confers on them will deal only with deficiencies and with like-for-like replacements, as opposed to new regulations that derive from policy? I am a bit confused by that.

Michael Russell: "Like for like" is not the phrase that I would use, but I am sure that Luke McBratney will explain that carefully.

Luke McBratney: Section 11(2) of the continuity bill, which sets out what a deficiency is, takes an almost identical form to the equivalent powers in clause 7 of the withdrawal bill for UK ministers and schedule 2 to that bill for devolved Administration ministers. Importantly, section 11(2) of the continuity bill includes an exclusive, exhaustive list of types of deficiency. Under that section, a deficiency in retained devolved EU law exists where it

"makes provision for, or in connection with"—

to take one example—

"reciprocal arrangements between ... the United Kingdom ... and ... the EU ... which no longer exist".

The power in section 11(1) may be used only

"Where the Scottish Ministers consider ... that there is ... a failure of retained (devolved) EU law to operate effectively, or ... any other deficiency"

as defined, and that

"it is necessary to make provision for the purpose of preventing, remedying or mitigating the failure or other deficiency".

There is quite a textured test to be applied by ministers in satisfying themselves that they have the power, and that is backed up by provision in the bill that requires ministers to set out in an explanatory statement accompanying every regulation both that they are satisfied that the test of necessity has been met and that the provisions that they are making do no more than is appropriate to remedy the deficiency that has been identified.

Michael Russell: I should point out, also, that the test of necessity exists for us as a result of recommendations from the Delegated Powers and Law Reform Committee, among others. Such a test does not exist in the UK bill. It is a higher test. Indeed, as I pointed out to the Delegated Powers and Law Reform Committee when I gave evidence last week, it is a severe test. Very few pieces of legislation talk about making provision for

"preventing, remedying or mitigating the failure or other deficiency".

That is a clear and severe test of how this should operate.

Luke McBratney: The powers that are conferred on the devolved Administrations by schedule 2 to the withdrawal bill do not at present include a test of necessity.

Jamie Greene: So the only area of subjectivity lies in whether ministers believe that there is a deficiency. By default, that will be a subjective decision rather than being subject to any test.

Luke McBratney: The decision will be informed by the description in section 11(2) of what is a deficiency. The power could not be used in any area where there was not such a deficiency.

Michael Russell: As I pointed out last night, I think in response to an amendment that Jamie Greene lodged, the phrase "in the opinion of Scottish ministers" is exactly the same, if we swap "Scottish" for "UK", as the phrase "in the opinion of UK ministers." The bills allow the opinion of ministers to guide the matter, subject to a huge degree of scrutiny and to a legislative test, which in Scotland is a more severe legislative test than that in the UK bill. I think that hemming it in in that way is the right approach.

Jamie Greene: Why does the minister, or why do the panel, believe that urgent cases should not be subject to the affirmative procedure? I believe that that was the subject of another amendment that was mooted but voted down last night. I felt that it would have added to and even enhanced the scrutiny that the minister has just discussed.

Michael Russell: Last night, the Finance and Constitution Committee accepted the arguments that I made that, in an urgent case, there is, by definition, urgency, so we have to address the matter more quickly and urgently than we would address something else. However, strict safeguards are built into the urgent procedure. We have not only accepted those, but accepted their being strengthened during the process.

Urgent cases have to be treated differently because they are urgent, but they can and will be treated in a way that includes substantial scrutiny and the possibility not only that ministers will be rebuked but that the step that they are trying to take will be annulled or got rid of.

The continuity bill has tighter scrutiny provisions and more safeguards than the withdrawal bill. These are circumstances that are not of our making; we are being forced into doing things because of Brexit. We are trying to deal with urgent cases as quickly and effectively as possible, but with a much stronger recognition of the need to ensure that, wherever possible, such instruments can be scrutinised in the best way possible.

09:45

Luke McBratney: I confirm to Mr Greene that the procedure that would apply to every instrument that is subject to section 31 of the continuity bill would require a vote in Parliament. At present, the bill would require that vote to take place within 28 days. The minister has committed to looking at that again at stage 3.

In the Westminster Parliament, for example, that procedure is called the "made affirmative procedure". Its signal feature is that there will be a vote in every case. The only difference is that, in urgent cases, regulations can come into force in advance of a vote. That is a necessary consequence of the urgency of the situation that section 31 contemplates.

Jamie Greene: Thank you for clarifying that.

Mary Fee: My question, which is about dealing with deficiencies arising from UK withdrawal, may be an obvious one, but I would be grateful if you could answer it for me.

Section 8(3) of the withdrawal bill states:

"regulations under this section may not ... create a relevant criminal offence".

We have a separate justice system in Scotland, so what does that mean?

Michael Russell: Luke McBratney will explain the position legally, and I will sweep up because there is a political element in that, too.

Luke McBratney: That is a carry-over limitation from the present power in section 2 of the European Communities Act 1972 to implement EU law, which allows criminal offences to be created in broad terms but only where those offences can result in imprisonment of two years or less. That is necessary because in many cases the establishment of a regime under EU law, or under a set of regulations, requires an enforcement mechanism to be attached to that regime. A regulatory offence is often the most appropriate enforcement mechanism. The provision carries forward into the fixing powers the identical provision that we have in our implementation powers for EU law.

Mary Fee: That is helpful.

Michael Russell: We require to do that, and mirroring the existing provisions is the right thing to do.

Mary Fee: Thank you.

The Convener: We have exhausted our questions to you this morning, minister.

Our understanding is that equal treatment legislation is included in the list of non-legislative common frameworks that may be required. I ask Luke McBratney to give us some information on

that issue, too, when he writes to us on other matters.

Michael Russell: It is perhaps more appropriate for me to do that, because I need to explain what that list is. Up until last Thursday, there were three categories—or "buckets", to quote Professor Tomkins. One says that we do not require to do anything at all, another says that we require to do something, but it would not be legislative, and the third says that we think—so it is not definite—that legislation will be required. Officials in London, Edinburgh and Cardiff have been doing what are called "deep dives" into each topic to see where we are in relation to those categories, and definitions have been reached.

Last Thursday, the UK Government, without giving us any notice—it did not even give ministers the paper—produced a new paper on the issue that was more complicated and had more information, but which also created a new category. The fourth category is items that the UK considers to be reserved. It has taken from the three categories some of the items on which we had reached agreement and put them into the fourth category.

We do not accept that, but in the interests of transparency, we urged the UK Government to publish the paper, which it did last Friday morning. Furthermore, on Tuesday, I wrote to all members to explain the differences that we have with that list, which are broadly the same as those that the Welsh have.

The category that you are talking about means that arrangements either are already in place or could be put in place without requiring legislative action. Those should not be then frozen or re-reserved in any way, and should continue to function. However, that is presently only at the agreement of the UK Government; there is no need for us to consent to that. That is the very heart of the dispute. That would apply to the power that you mention or to any power in the list—or to any other power.

The Convener: I know that the minister has to get off to another committee. We are very grateful to you and your officials for your time this morning. Thank you very much.

09:50

Meeting continued in private until 11:29.

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