OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 2 May 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 2 May 2018

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FINANCE AND CONSTITUTION COMMITTEE
14th 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:

Gerald Byrne (Scottish Government)
Luke McBratney (Scottish Government)
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 2 May 2018

[The Convener opened the meeting at 10:00]

European Union (Withdrawal) Bill

The Convener (Bruce Crawford): Good morning, and welcome to the 14th meeting in 2018 of the Finance and Constitution Committee. The only item on our agenda is to take evidence on the European Union (Withdrawal) Bill from Michael Russell, the Minister for UK Negotiations on Scotland's Place in Europe. Mr Russell is accompanied by officials from the Scottish Government's constitution policy team: Gerald Byrne, the team leader, and Luke McBratney, policy officer. I welcome our witnesses to the meeting.

Members have received copies of the Scottish Government's supplementary legislative consent memorandum, which includes proposed amendments to the bill from the Scottish and United Kingdom Governments, as well as a draft proposed intergovernmental agreement on the bill and the establishment of common frameworks, and a Scottish Government overview of amendments that have been made to the bill at Westminster. Members should note that we will need to conclude our session by 11.30, because Mike Russell has other commitments in his diary that he needs to fulfil—I hope that we will be finished by that time anyway.

Before we move to questions, would the minister like to make an opening statement?

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): I was not intending to; I will be quite happy to answer questions.

The Convener: I thought that you would want to make one. In that case, just for the record, will you set out the Scottish Government's view of proposed new section 30A(4) of the Scotland Act 1998, which is in amendment 1, which is one of the UK Government's most recent proposed amendments? The amendment defines the Scottish Parliament's consent as

"a decision to agree a motion consenting to the laying of the draft, ... a decision not to agree a motion consenting to the laying of the draft, or ... a decision to agree a motion refusing to consent to the laying of the draft".

In every one of those cases, it seems that consent is given.

Michael Russell: That is our view of the amendment. The kindest thing that we can say about it is that it is carelessly drafted. It is a very unfortunate amendment. The problem with the amendments in the name of Lord Callanan is that they do not in our view take into the bill the commitments that are in the proposed intergovernmental memorandum. The provision is referred to nowhere in the intergovernmental memorandum, which was the document that we were asked to sign.

We must look at the package that is being brought forward by the UK Government to understand what is acceptable and what is not acceptable. Our position on that package is not only clear but principled, and I hope that it will be accepted. It is possible to reach a deal, but the deal has to be reached on the basis of respect for the devolved settlement.

The Convener: I have seen suggestions in the media and elsewhere that, in some way, in the proposals that the Scottish Government has put forward in response to the recent amendments that have been tabled by the UK Government, the Scottish Government wants to have a veto. What is your view of that accusation?

Michael Russell: It is not true or fair. That matter is really important and I am glad to have the opportunity to address it. Later today, I will go to the joint ministerial committee in Whitehall, and I want to make our position clear before I go, and when I am there. The issue at stake is that of changes to the devolved competences without the consent of the Scottish Parliament. For us to come to a position on which we could agree, clause 11 would need to be withdrawn or the bill would need to be amended in such a way that we revert to what is the normal process in devolution in order to discuss and agree changes to competence. That is what it is about; it is not about a veto on any individual item. Once the frameworks are agreed by means of an order under section 30 of the Scotland Act 1998, thereafter the operation of the frameworks is governed in a different way.

The operation of the frameworks will be governed by the normal processes, including the Sewel process. I do not like the situation in which, in the end, Westminster is sovereign. I would prefer a different constitutional outcome, but that is not what I am either endeavouring to achieve or that we could achieve in these negotiations. I am trying to make sure that devolution is protected, and that the way in which it operates is not undermined by a proposal that would, uniquely, for the first time ever in devolution, give UK ministers the right to use secondary legislation to alter the devolved competences of the Scottish Parliament—the things for which we are responsible.

It would be the first time that that had ever happened and it should not happen. I do not think that, on reflection, many people in Scotland would support that. It is not about vetoing individual decisions about frameworks. I am sure that we can establish frameworks and operate them; the deep-dive process has been about working that out. Our position is about ensuring that the existing arrangements in devolution continue to operate, so that the competences are changed only with the consent of the Scottish Parliament.

The Convener: I know that all members here would still like there to be an agreement between the two Governments.

Michael Russell: As would I.

The Convener: That is quite clear between everyone, and you have just said that you want that. Will you confirm that, if clause 11 is removed from the bill, the Scottish Government would be happy to sign an amended intergovernmental agreement in which you would provide a political commitment not to introduce legislation in areas in which common frameworks are likely to be needed? In essence, that would have the same effect as the clause 11 regulations.

Michael Russell: Yes—without equivocation. We have said that there are two options. That is one of them—a situation in which clause 11 disappears. The other one is to amend the bill—to amend the amendments—so that we have a situation that reverts to the normal use of sections 30 and 63 of the Scotland Act 1998. That would be the normal thing that would happen.

Those are the choices. They are both on the table, and if either of those were to be brought forward, they would happen. It may be that, later today, the second choice will be introduced through amendments that have been laid by Lord Hope and Lord Mackay of Clashfern. I do not yet know whether that will come to a vote in the House of Lords, but they have been tabled. That would be a very helpful way forward that would conclude the matter.

Adam Tomkins (Glasgow) (Con): Good morning, minister. I hope that you accept that all of us round the table—indeed, all the five parties in the Scottish Parliament, including the Scottish Conservatives—were agreed that the original clause 11 was not fit for purpose and that it needed to be "removed or replaced", in the words of this committee.

Michael Russell: Absolutely.

Adam Tomkins: Would you accept that it has been reversed by force of the amendments tabled last week in Lord Callanan's name, in the sense that the original clause 11 held all competences until UK ministers decided to hand them back, as it were? That has been reversed.

Michael Russell: I am not sure that I would use the term "reversed". There has been progress in softening the edges of the issue, but I do not think that it removes the basic difficulty. You talk about all the competences, and one of the ways in which it does not remove the difficulty is that it is still open ended. The process is such that any additional item could be introduced into it, and we would not be in a position to consent to that.

Adam Tomkins: But you said a few moments ago that the amendment, the intergovernmental agreement and the memorandum of understanding had to be understood together because they come as a package. I strongly agree with that, but if you are serious about it—I hope that you are—what you have just said is not quite the case, because in the accompanying political documents that sit alongside the memorandum there is a list of the areas in which it is anticipated that that power will be used. It is not open ended; there is an agreement between the Governments about the areas that we are talking about.

Michael Russell: But there is a caveat in that list, which is something that has featured in our discussions throughout the whole period. I understand why there is a caveat, but that caveat is an open-ended possibility of other items being brought in. It was first expressed in the JMC process as being there just in case there were any items that had been overlooked. However, in reality, if we consent to a process in which secondary legislation can alter competence, that can be used for anything, and there is no restraint on the UK Government in so doing.

Adam Tomkins: It cannot be used for anything. Subsection 1 of the proposed new section 30A, which is in amendment 1, confines the exercise of this power to legislation that seeks to modify retained EU law. It cannot be used for anything; it can be used only within the scope of retained EU law. In other words, it can be used only within the scope of powers that this Parliament does not currently have, because the exercise of those powers would be contrary to EU law, which would make it unlawful for us to exercise those powers.

Michael Russell: But it does not restrain it to the 24 areas, as you are indicating—

Adam Tomkins: It restrains it to retained EU law. Is that correct?

Michael Russell: It restrains it to the 111 areas, and the 111 areas are very wide. One of the difficulties with the proposed Welsh approach—this will become very technical, so I apologise for that—which involved a schedule to the bill and which was under discussion until comparatively recently, is the difficulty of unpicking what are

headlines in the 111 areas and delving into them deeply enough to understand all the implications.

The deep dive that we have done in relation to the 24 areas has taken a considerable period of time and has covered wide-ranging areas. For example, number 1 on the list is agricultural support, which is enormously wide. That definition brings in all the other ones up to 111, and even that is not exhaustive, because the UK Government retains to itself the right to say that there is, for example a 112th area that has been overlooked and which needs to be added to the list. With respect, that arrangement is open ended, which means that it allows for the alteration of competences by an act of ministers rather than by primary legislation.

Adam Tomkins: It is open ended, subject to the power being available only with regard to retained EU law. That is not negotiable; it is in black and white in the amendment. The whole bill is concerned only with retained EU law.

Michael Russell: That is very wide indeed. As I have indicated, we have to unpack each item. It is not as if the bill refers to only one thing when it refers to one item, because those items are wide ranging.

Adam Tomkins: I will move on. As you know, despite our occasional disagreements, we have been trying to reach agreement on the issue. As you also know, we have supported the view of the Scottish and Welsh Governments that Brexit—including the withdrawal bill—needs to be delivered compatibly with and not incompatibly with the fundamentals of our devolution settlement. Do you accept that the Sewel convention is one of the fundamental parts of our devolution settlement?

Michael Russell: It is an absolutely essential part of our constitutional settlement, given that Westminster regards itself, and is regarded in our settlement, as sovereign.

Adam Tomkins: Would you therefore not also accept that the force of the amendments in Lord Callanan's name—this is the difference between his amendments at report stage and his amendments at committee stage in the House of Lords—is, essentially, to copy and paste the Sewel convention into the clause 11 process so that, as the convention states, the Westminster Parliament may not normally legislate on devolved matters without the consent of the Scottish Parliament? That is exactly what the revised clause 11 says: that a power will not normally be taken into the holding pattern that clause 11 represents without the consent of this Parliament. It is a direct copying and pasting of one of the fundamentals of our devolution settlement in order to reverse the effect of the original clause 11, which was incompatible with devolution, to make it compatible with devolution. That is why the Welsh signed up to it.

Do you agree that that is an accurate constitutional analysis of the force of the amendment?

Michael Russell: Where are the words "not normally" in Lord Callanan's amendments?

Adam Tomkins: They are in the proposed section 30A—that is what the consent decision provision is.

Michael Russell: Where are the words "not normally"? They are not there.

Adam Tomkins: I go back to what you said at the beginning. You said that this has to be understood alongside the memorandum of understanding and the intergovernmental agreement as a package. Those words are in that package.

Michael Russell: But this is the bit that becomes law, and it does not have the words "not normally" within it.

Adam Tomkins: The Sewel convention is called a convention because it is a non-legal rule of constitutional behaviour. That is what constitutional conventions are. You will not find the Sewel convention in statute.

Michael Russell: But this is the bit that becomes law, regrettably—

Adam Tomkins: So it is not a package any more.

Michael Russell: No—I have not said that, and I am happy to confirm that it is a package. However, the bit that will become law does not cut and paste the Sewel convention. The Sewel convention is essential, but it applies to the operation of the frameworks. In our view, it should not apply in the circumstances of changes to legislative competence, because changes to legislative competence are done by a section 30 order or by primary legislation. In this case, the amendments from Lord Hope indicate the way in which what we are saying could happen.

10:15

Adam Tomkins: I understand that but, with respect, that is where there is a fundamental disagreement between us. The issue is not correctly understood as a change in legislative competence, because we are dealing only with modifications to retained EU law, and it is currently outwith our competence to make modifications to retained EU law. As a matter of law, we cannot pass laws, and as a minister you cannot make

regulations, that are contrary to EU law. Therefore, it is not a change to our competences.

Michael Russell: The Sewel convention is of course in law, because it is in the Scotland Act 2016, as you know, because you were involved with that act. The problem with that is that, in the Miller case, what we thought was perhaps a stronger intention of the UK Government to recognise that was weakened as a result of the UK Government's submissions.

Sewel is essential. We have to look at devolution as a set of fragile compromises. In essence, in a system in which there is Westminster sovereignty—I do not agree with that, I would much rather that it was not there and I would like to change it—the Sewel convention is a way to guarantee some opportunities and rights while respecting that Westminster sovereignty. I accept that that is the case. It is very fragile, and what the UK Government is trying to do is undermining and damaging the fragility of the devolution settlement by in essence introducing the concept of being able to change legislative competence of the Parliaments without seeking the consent of the Parliaments, and that relates to the spirit as well as to the letter of Sewel. That is where the problem is.

I accept that Mr Tomkins's party in Scotland has been supportive of trying to get the matter right. It would be far better if we could choose one of the two options that we have put on the table. Those are to withdraw clause 11, which is where we were last July—if only we had persuaded people to do that then, that would have saved an awful lot of work over the past 10 months—or to make sure that the legislation recognises absolutely the way in which competence can be changed. That is what we should do.

Adam Tomkins: The convener has been very indulgent, for which I thank him, but I have one final question. Given what you have said about the importance of the package and of words being in statute, even at this 11th hour, would the Scottish Government accept that the deal is done if the words "not normally" were written into the text of proposed new section 30A of the Scotland Act 1998?

Michael Russell: I have indicated how the deal can be done. I have not been difficult in any way about that. I have been very clear about it.

Adam Tomkins: The approach is: agree with the Scottish Government or bust.

Michael Russell: Absolutely not. It is: agree with devolution and accept the devolved settlement or remove the clause. That is where we are, and that is how the deal can be done. It does not move forward an inch an argument against devolution; what it says is that we are going to protect devolution because we think that that is the right thing for the people of Scotland and that it is in their interest. That is how the deal can be done and that is how I would like to do it. I could do it today.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): My questions are in the same area—they are about the amendments to the bill and what they say about consent. For the ordinary person in the street, could you clarify what amendment 1 means? From my reading of it, a decision to agree to a motion and a decision not to agree to a motion would be taken to be the same outcome.

Michael Russell: For the person in the street, it simply means that if every person in the Scottish Parliament—every one of the 129 members—said no, Westminster would say, "Thank you; that means you've agreed." That is what it means. In actual fact, it means that language does not mean what it should mean.

Willie Coffey: You were very kind about that in your opening remarks, but surely it is the worst example of something that we would expect to see in Monty Python.

Michael Russell: You and I are of a certain vintage. We enjoyed Monty Python, but I am not sure that I would laugh very much at this. It is a pretty outrageous piece of drafting and it would have been sensible, if UK ministers were really thinking about it, to have looked at that. It is on page 1, after all, so you do not even have to turn to page 2 before saying, "Hang on a minute. That's not going to go down very well." Moreover, advice has been given. Maybe it was not helpful, but that is where we are.

Willie Coffey: I ask you to be absolutely straight with the committee and with the Scottish people: are you asking for anything other than what we have at the moment in terms of the devolution settlement?

Michael Russell: No. What we are saying is that all the devolution legislation has a backstop in it, or several backstops, saying that, in the end, Westminster is sovereign and can choose to do what it wants to do. However, for 19 years, we have been able to operate a fragile system, with its checks and balances, that has allowed people to get on with their business and to do it as well as possible, and all the parties in the Parliament have been involved in that. This is the first occasion on which there has been an attempt by the UK Government to alter the terms of that, not openly and above board, by coming in and saying, "This is what we plan to do, for the following reasons," but by doing it, and continuing to do it for a considerable period of time, by secondary legislation. That is unacceptable. That has never

been envisaged and it is not something that any Parliament could accept.

Willie Coffey: If the bill goes ahead and the amendments go through, what will that do to the principles of devolution that were set up in 1998?

Michael Russell: It will undermine them and damage devolution, which, in my view, could lead to further damage being done. The institution is important, but it is not as important as the people. In areas of great importance to the Scottish people, clause 11 will damage what the Scottish Parliament can do for them. It will damage the way in which we can serve people in Scotland, in all those areas and possibly many others, as I indicated to Mr Tomkins.

Ross Finnie from Food Standards Scotland was on the radio this morning, talking about the way in which he feels that the process will undermine the work that FSS is doing, for example, to tackle obesity and to protect food standards. That is really important. It has a direct effect on the people of Scotland. The list of policy areas that are likely to be subject to clause 11 includes, at number 16, "Food compositional standards", at number 17, "Food labelling", and a whole range of other issues. For the people of Scotland, it is not some game among politicians; we are talking about real damage to the way that they lead their lives.

Ash Denham (Edinburgh Eastern) (SNP): The UK Government's withdrawal bill, in its present form, does not respect the devolution settlement, so the Scottish Government has put forward two different options. We have touched on that already. The first option is the removal of clause 11, which the Scottish Government has consistently spoken about for quite some time. The second option is a bit more complicated, and it would involve accepting a power to restrict the competence of the Scottish Parliament, but it would be subject to an order in council process that would involve the express consent of the Parliament.

The first option is a bit more self-explanatory, although you might want to explain how it works with the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill that we recently passed here. The second option is more of a halfway house. Could you explain how the order in council process might work?

Michael Russell: I am sure that Mr Byrne will be much better at explaining the order in council process than I am. I have landed him in it now, but I am giving him a moment or two to prepare his answer.

The first option is essentially that we revert to the status quo and that we show respect for each other. I gave evidence to the Westminster Public Accounts Committee this week, in which I said that I thought that the relationship of trust between the two Governments was at a very low ebb. That is expressed by the fact that the proposal is to legislatively constrain the Governments of Wales, Scotland and Northern Ireland, but for the UK Government simply to enter into a voluntary agreement. There is not the trust in the system that would give me any confidence in that.

If we were to take out clause 11 and say that we would just work together, that would begin to restore trust, because then we would have to work together. That has been the nature of devolution. The successful intergovernmental work has been based on the fact that we can sit down and talk to people, and that is what works, so I think that the clause should go. That would not affect the continuity bill. We would simply operate frameworks on a voluntary basis, and we have said that we are willing to do that. As the convener indicated at the start of the meeting, we are willing to sign an agreement saying that we will not unreasonably withhold agreement to things and that we will find ways to work together. It is perfectly possible to do that.

The second option would involve reverting to the normal devolution system in relation to changes to legislative competence. Gerald Byrne will explain how that works in a moment. We need such a system of approval by both Parliaments for both positive and negative reasons. The negative reasons are that we would not want changes to be made to devolved competence that did not come with resource, given the system in which we operate. If we had a system in which the UK could simply say, "We're going to transfer all these powers to you, but we're not giving you any money," Westminster might vote for it, but the Scottish Parliament would not. The system needs to operate in a well-balanced way.

Gerald Byrne can say a few words about what an order in council is.

Gerald Byrne (Scottish Government): The difference between regulations and orders in council is that orders in council, as it says in the amendments, are formally made

"by Her Majesty by Order in Council"—

which is the Privy Council. Her Majesty makes the order on the advice of the Privy Council. The proposed mechanism would mean that such advice cannot be given to Her Majesty unless the draft of the regulations has been laid and approved by both Houses at Westminster and the Scottish Parliament. That is what is known as a type A procedure under the Scotland Act 1998, and it is how sections 30 and 63 work; section 30 is on the procedure for adjusting legislative competence and section 63 is on the procedure for adjusting executive competence of ministers.

That means that the Administration and the legislature are both protected in the way in which the minister has just described.

Although the procedure sounds archaic, it is a non-trivial point that the order in council procedure is used when both Parliaments are involved in approving regulations, rather than a UK minister formally making the regulations after approval here, because it recognises the interests of both Parliaments in the order that is eventually made by Her Majesty in council.

Michael Russell: I point out that the phrase "laid and approved" is important. The word "approved" means what it says in the dictionary—it is not subject to the rather odd definition of "a consent decision". It means that Parliament has to say, "Yes".

Ash Denham: Does it work with a simple majority?

Gerald Byrne: It needs a simple majority in all three legislative houses.

The Convener: I am interested in what Gerald Byrne said about the section 30 order process. Those who designed the bill that became the Scotland Act 1998 thought about how devolved competences could be changed, and they obviously had in mind that process—the section 30 order process that Gerald Byrne described—for any changes to competence that came about. I had not appreciated that.

Michael Russell: Moreover, those who set up that process understood that it would involve a Parliament of minorities—that has been the case in all the sessions of the Scottish Parliament save one—so achieving a majority would require the support of more than one party.

Gerald Byrne: The way in which the Sewel convention operates also respects the procedures in sections 30 and 63. Approval under the Sewel convention is required for changes to competence as well as for the Westminster Parliament to act in devolved areas. That is how it has operated for the past 19 years.

The Convener: That explanation is useful in helping us to understand why the Scottish Government is so focused on that issue.

Ash Denham: Amendments were laid in the House of Lords yesterday by Lord Hope and Lord Mackay. You said that if those amendments are accepted, the Scottish Government would recommend that consent be given to the withdrawal bill as a whole. Is there any likelihood that they will be accepted?

Michael Russell: I am not Mystic Meg and I cannot tell you what the House of Lords will do. It will be up to the House of Lords, which has certain conventions. Not everything is put to a vote—issues are often raised in order to allow the Government to consider them. Another amending stage—the third reading—is still to come.

I am very grateful for the work that a range of members of the House of Lords have done. Lord Hope, Lord Mackay of Clashfern, David Steel, Jim Wallace and Dafydd Wigley are just a few of the peers who have discussed the issue regularly. That discussion will continue. However, it is up to the lords to consider the amendments. Lord Hope and Lord Mackay are very distinguished lawyers and they approach the matter from a legal perspective. The issue of how to allow the devolved settlement to continue to operate effectively is at the centre of their minds.

The Convener: I know that Patrick Harvie is interested in asking about the House of Lords. Given that we have reached that topic already, I will bring him in immediately after James Kelly.

10:30

James Kelly (Glasgow) (Lab): I suppose that the fundamental issue is dispute resolution. I understand that the Scottish Government's objection to the amendments that the United Kingdom Government has tabled is that, in a disagreement between the Governments about where retained EU law should be allocated, the House of Commons would be the arbiter in that dispute. It can be understood why the Scottish Government is uncomfortable with that. You have therefore put forward two alternatives. Mr Byrne has just discussed the second alternative—an order in council and the use of type A categorisation, whereby consent is required by both Parliaments. If there is a disagreement between the Parliaments, what is the dispute resolution procedure?

Michael Russell: There is not one, in the sense that we are talking about how to change devolved competence. You would negotiate until you got an agreement to change devolved competence. The argument has often been put that there needs to be a resolution in that case and that somebody needs to win, so it automatically has to be the UK. That is true in devolution. At the end of the day, there is already the power under devolution for the UK Government to say, "Sorry, but we're going to do it our way." I do not like that. I think that that is wrong, but that power exists. Dispute resolution is therefore built into the system, but so is the requirement or the expectation that there will be meaningful discussion in the negotiation and that the negotiation will be done openly and above board by the Parliaments.

In the system that is being talked about, things would be done by secondary legislation by ministers. That is not the same thing.

James Kelly: I understand what has been proposed. You are trying to get the consent of both Parliaments, but is there not a weakness in that there is no mechanism for resolving the dispute if the Parliaments end up at loggerheads?

Michael Russell: With respect, there is. The UK Government can decide what it wants to do. I agree that that is a weakness, but that is also the weakness in the JMC dispute resolution procedure, for example. If three of the four countries that are involved in the JMC say that they do not like something, the UK Government is, in the end, the arbiter in the process. That is devolution. I and other people are not happy that that is the case, but that is the case. There is a dispute resolution procedure, which is as I have described it.

James Kelly: You have repeatedly said that you are seeking to protect the devolution settlement. Can you give an assurance that, as the situation develops, that is your central aim and that you will not use the situation to try to trigger a second independence referendum?

Michael Russell: I have made it clear from the beginning of the negotiations that I am endeavouring to get an agreement, because it will do two things. The question is very helpful, as it enables me to point this out. First, an agreement will solve the important issue of how we deal with the repatriation of powers. I do not like Brexit—I do not think that it is a good idea, and I think that it will end in tears—but I have always said that that legal work needs to be done, and that is what I am seeking to do. It has been a long 10 months, and I would be quite pleased if we were able to get an agreement.

Secondly, an agreement would lay the groundwork for further legislation to deal with the legalities of the EU exit and what will follow thereafter—in, for example, an agriculture bill, a fishing bill and subsequent bills. It would make it easier for those things to be dealt with in such a way that we can concentrate on the political rather than the technical issues.

I give members an absolute assurance that I seek a resolution on the basis of the devolved settlement. I do not like the devolved settlement, and I am absolutely clear that I would like to change it, but the process in which I am engaged is an attempt to ensure that the devolved settlement is not damaged by the withdrawal bill and that we come to a conclusion on the issues.

Patrick Harvie (Glasgow) (Green): Good morning. You referred to the new amendments that have been tabled in the House of Lords—on Monday, I think. I saw them on Tuesday, and I will not pretend that I have had an extensive opportunity to fully understand them; I hope that the Government has had such an opportunity.

Yesterday, you tweeted:

> "Some very useful amendments now tabled in the House of Lords for their discussion of the #EUWithdrawalBill devolution clauses tomorrow."

That discussion will happen today. Obviously, we do not know whether the amendments will be put to the vote, but at least they will be debated. You said:

> "Grateful to Lord Hope, Lord Mackay of Clashfern, David Steel, Jim Wallace & Dafydd Wigley for trying to help resolve current difficulties".

Will you give the Government's reaction to the details of those amendments, without the Twitter character limit? Do not take that too far, though.

Michael Russell: No, indeed—I will not.

There are two separate strands running in the amendments. First, there are the amendments that the Scottish Government drafted, which were sent to the Lord Speaker by the First Minister at the weekend. They were in two sets. There is a set that allows clause 11 to be removed, and there is a set that creates circumstances in which the section 30 and section 63 orders would apply. It is the second set that has been tabled by Lord Hope and Lord Mackay. We know, and I accept, that the amendments are very technical. Essentially, they do the second job.

There is another set of amendments, tabled under a variety of names. Dafydd Wigley is a supporter of some. They have different effects. They do not do the full job, but they help to take the issue a bit further forward. For example, one of them, which I think has the support of Jim Wallace and David Steel—certainly, it has the support of Jim Wallace and Dafydd Wigley, and I think David Steel will support it too—is to do with nothing coming into effect until it has been accepted by the devolved Parliaments. In other words, it would create space for further negotiation until we were happy with the proposal concerned, and we would then be asked to vote on it. Those are helpful amendments. There are also a variety of other amendments.

We do not have anybody in the House of Lords, which is entirely right and proper and is the approach that we think that we should take. As we did with the Welsh Government on the previous such occasion, we have been putting forward ideas and amendments. Amending bills, as everybody in this room knows, is a technical exercise, and it is useful to get lawyers and others engaged in it. We have been helping with that, and

we have been having a dialogue about it. That has been very helpful.

I very much respect Lord Hope and Lord Mackay. They are distinguished lawyers, and they understand things far better than I understand them. They have approached the matter from a legal perspective, not from a political perspective, and they have been helpful.

Patrick Harvie: In short, within this group of amendments, there are some that would fully implement the second option that the Scottish Government has been proposing.

Michael Russell: Yes.

Patrick Harvie: And you would be happy with that.

Michael Russell: If those amendments were agreed to, that would conclude the matter.

Patrick Harvie: If those were agreed to, or if the UK Government accepted that it would do something very similar, that would effectively resolve the impasse between the two Governments.

Michael Russell: Subject to the approval of Parliament, yes. It would certainly allow me make that recommendation.

Patrick Harvie: I seek your reaction to one or two others amendments in the batch. In particular, one from Dafydd Wigley suggests that a joint ministerial committee could take certain action when a majority of the Governments agreed to it. That would mean that two out of three would have to agree, which leaves open the possibility not only of the Scottish Government having to accept a decision being imposed on it, but—in theory, and leaving aside the particular perspective of Scotland—of a majority Government effectively being told to accept a position decided by two minority Governments. Would it be reasonable to assume that the Scottish Government is not convinced that that is the right approach to shared decision making?

Michael Russell: It has interesting elements in it—and I do not say that dismissively in any way. It is not a new idea. It was in the paper on these issues from the Welsh Government last August, and it has been refined a little. The idea of a council of ministers was contained in an amendment from Lord Mackay at the second stage in the House of Lords. The proposal is worth discussing, although it would need to be worked through very carefully. Essentially, it works on the basis of pooling not sovereignty—that is the wrong word—but responsibility in order to operate. The proposal formalises that idea.

The proposal does not deal with the issue of consent to a change to legislative competence. I do not think that such a way of operating for changing legislative competence could be accepted. However, in decision making, among a group of ministers who were deciding the details of a policy, it could offer a way forward, although it would have to be well put together. There would have to be a rule book, and everybody would have to know how it would operate.

I also think that such an approach would be the exception, rather than the rule. For example, in fisheries, there are good intergovernmental relationships that govern difficult issues that have arisen in relation to the European common fisheries policy and which have operated without being formalised. They have operated on the basis that there is a shared interest in getting things right and, therefore, people work in that way. However, the idea is worth discussing.

An important point, which the House of Commons Public Administration and Constitutional Affairs Committee also focused on, is that there needs to be a discussion of post-Brexit relationships in these islands. The Welsh have been constructive and positive about starting that discussion and pushing it forward. We have not been quite as quick in that regard, but we are keen to take part in it. Parts of the House of Commons—including Bernard Jenkin's committee, as I said—are focused on it. The UK Government does not seem to want to talk about it yet and, of course, in Northern Ireland, there is a hiatus. The proposal might push us to have those conversations.

Patrick Harvie: Some of us met that committee at the UK Parliament on Monday. There are some significant disagreements in this area, but willingness to engage in that dialogue is not one of them.

For clarity, are you saying that the amendment contains the basis of a useful idea, but that it does not represent its final form?

Michael Russell: I do not think that Dafydd Wigley would say that it is in its final form. In the House of Lords there is a respectable and strong tradition of raising ideas and having debate. Normally, someone gets to speak only if they table an amendment, so that also has an effect on the process.

The Convener: Neil Bibby has a question on sunset clause issues.

Neil Bibby (West Scotland) (Lab): Before I ask my question, can I just clarify that the Scottish Government's position is that clause 11 be removed entirely?

Michael Russell: No, there are two options, and we support both. One option is for clause 11 to be removed, and the other option is for the

amendments that we are discussing to be supported.

Neil Bibby: Have you considered any other options?

Michael Russell: Not at the moment, but if someone were to come up with a set of proposals that met our objective, which is to ensure that devolved competence can be changed only with the agreement of the Scottish Parliament, we would consider them. That is the core issue, however.

Neil Bibby: Following your statement in the chamber last week, I asked about timeframes, and you said that there was still an issue around consent. I know that there is an amendment in the House of Lords that would seek to limit the length of the period in the sunset clause. The Labour Party and the Scottish and Welsh Governments have called for a sunset clause, and it is now being proposed for inclusion in the bill. I appreciate that you have a principled objection with regard to the consent issue, but I would like to ask you about practicalities. It has been suggested that there would be little point in the UK Government imposing a framework for the period in the sunset clause if the Scottish Government or the Welsh Government could reject it at a later point. What is your response to that issue, which concerns the practicalities of the situation?

Michael Russell: You have to differentiate between consent to the establishment of the frameworks and consent to the operation of the frameworks. With regard to consent to the establishment of the frameworks, it is perfectly feasible for imposition to take place, although the UK Government has said that it will not impose a framework—that is a conundrum that the committee might like to raise with David Mundell, who was very clear that there should be no imposition.

The proposal is that the operation of the frameworks would be subject to the Sewel convention, in terms of legislation and the normal process of intergovernmental activity, which can operate quite effectively.

I do not think that the sunset clause affects both those elements. In my view, the issue with the sunset clause is that seven years is a long time, especially if there is a change of competence to which you have not agreed. The seven-year period comes from adding together the two-year period and the five-year period. In effect, at the very end of the existence of the first power, something that was done would have a five-year life. That is a long period of time. However, that is not my biggest difficulty with the bill. The biggest difficulty is the one that we are focused on.

Emma Harper (South Scotland) (SNP): I am interested in exploring the seven-year issue so that people understand exactly what it means. Could you explain a bit more about that? Is it reasonable to assume that the Scottish Parliament, on behalf of the Scottish people, should agree to a transfer of powers in such a way that, technically, the UK Government could do whatever it wants for up to seven years?

10:45

Michael Russell: It would not be reasonable if that was what took place. I do not want that to take place. I want to make an important distinction between establishing the frameworks—that is, changing the competence of the Parliament—and the operation of the frameworks, which is an intergovernmental activity governed by the normal rules. You and I would like the existing system to be different, and we would like it to be much more equitable, but within it, one has to say that it cannot be agreed that there should be a unilateral change of devolved competence by fiat of ministers through secondary legislation. That is not acceptable. However, if the Scottish Parliament accepts that those frameworks should exist, I cannot imagine that it would be difficult about saying that, as long as normal processes took place, we would be able to operate thereafter. It is that initial thing that is the real issue, and if that is the thing that is done without consent, the seven-year period becomes really intolerable, because one is being forced to do something to which one did not agree.

Emma Harper: Does that mean that it is feasible that Westminster could take control over genetically modified crops, fracking or something like that?

Michael Russell: It is perfectly feasible, as Mr Tomkins has pointed out, as long as those are matters that lie within the list of 111. As it happens, both of those probably do.

Adam Tomkins: Fracking is not an EU competence.

Michael Russell: Hydrocarbons are on the list of 111.

The Convener: Let us clarify that. As you understand it, are GM crops and hydrocarbons on the list of 111?

Michael Russell: GM crops are undoubtedly on the list. As far as hydrocarbons are concerned, I remember them being somewhere on the list. However, that is not the central point, so could we write to you to clarify that?

The Convener: Fine. Let us just get that clarified.

Ivan McKee (Glasgow Provan) (SNP): I just want to tidy up a few issues that we have mentioned in passing, relating to the intergovernmental agreement and the concept that the UK Government would retain the power to restrict the competence of the Scottish Parliament and would just give an undertaking that it would not do so. There is clearly an imbalance there, and I understand that the Scottish Government's proposal was that that should be balanced so that both could give an undertaking, but the Scottish Government and Scottish Parliament would not be constrained by legislation. Can you talk through how you see that imbalance and the trust issues?

Michael Russell: In the best of all possible worlds—which we are clearly not presently in, but we are aye hoping—we would have a relationship based on trust between the two Governments. The UK Government would say to us, "We hope you don't do this," and we would say, "We hope you don't do that," and we would sign a bit of paper saying that neither of us is going to do it, and that would be fine. However, what is being proposed is a legislative restriction on the devolved Administrations—all of them, although the Northern Ireland Assembly is not presently in session—but no legislative restriction on the UK.

That is allegedly because the UK is sovereign and will not be bound in that way, but that is a bit problematic, because who knows who will be in Government next month or next year? Entering into a voluntary restraint and then saying, "Actually, the circumstances have changed," is perfectly feasible, and there is nothing that could be done about that. However, if we enter into a legislative constraint, we can be held to it. That does not seem to be sensible, and it does not follow the pattern of devolution. The more one thinks about it, the more one suspects that people would say, "Why don't we just stick with the system we've got, because it's worked for 19 years and there's no reason why it shouldn't continue to work."

That is the option in the second set of amendments, in which we would accept that the section 30 process and the section 63 process are what have worked and what we operate. I stress again that it is about changes to legislative competence—changes to the powers of Parliament.

The Convener: I think that Murdo Fraser wanted to ask about the Welsh Government and the Scottish Government.

Murdo Fraser (Mid Scotland and Fife) (Con): Yes, I want to ask about the relationship between the Scottish Government's stance and that of the Welsh Government. I know, minister, that you have worked closely with your counterpart in Wales, Mark Drakeford. You have told us in the past that

"we are working very closely with Wales, and we cannot envisage a situation in which Scotland would be content and Wales would not be, or vice versa."—[*Official Report*, *Finance and Constitution Committee*, 20 September 2017; c 25.]

Separately, you talked about how you and your Welsh counterpart "worked in lockstep" and also said that you are in "exactly the same position". That was the clear position until about a week ago; it is not the position any more. What is your view on why the Welsh Government has been able to find compromise with the UK Government and reach agreement whereas you have not?

Michael Russell: We have found compromise in the sense that the discussion that we are having now is very different from the discussion that we were having last July, but we have not reached final agreement.

I am tempted to say that you must ask your question of Mark Drakeford, not me, because he is responsible for it. However, I will see him this afternoon when I am in the Welsh Government offices to have our pre-meeting, as we sometimes do. We will discuss a range of issues that will come up in the JMC, on most of which we will agree, I am absolutely sure. On the central issue, there will be political reasons why he and the Welsh Government have decided not to continue in the way that we are. I suspect that one of the issues is the context: Wales voted to leave and Scotland did not, which is a significant factor, and the make-up of the Welsh Parliament is different. There are many reasons.

I want to repeat something that I said in my statement in the chamber last week. I anticipate—both of us anticipate—that we will continue to work closely together on these issues. We have a disagreement on this issue, which we accept openly and will no doubt discuss openly, but on most issues we remain very much focused on trying to resolve the same problems. I am certainly not going to fall out with Mark, and I anticipate that he is not going to fall out with me, no matter the provocation from whatever side.

Murdo Fraser: I would not expect you to fall out with him, but given everything that you have said until now about working in lockstep and being in exactly the same position, and given that you said that you cannot envisage a situation where you would diverge, the difference in tone and language is quite striking. I will quote from the statement made by Mark Drakeford just last week, because it is quite important.

"The original draft Bill meant powers already devolved would have been clawed back by the UK Government post-Brexit and only Ministers in London would have had the right to decide if and when they were passed back to the

devolved parliaments. This was totally unacceptable and went against the will of the people of Wales who voted for devolution in two referendums. We are now in a different place. London has changed its position so that all powers and policy areas rest in Cardiff,"

or Edinburgh,

"unless specified to be temporarily held by the UK Government. These will be areas where we all agree common, UK-wide rules are needed for"

the

"functioning"

of a

"UK internal market. London's willingness to listen to our concerns and enter serious negotiations has been welcome."

He sums it up by saying:

"This is a deal we can work with which has required compromise on both sides. Our aim throughout these talks has been to protect devolution and make sure laws and policy in areas which are currently devolved remain devolved and this we have achieved."

That is very different from the position that you have outlined to us this morning. Given that there are three parties involved—the UK Government, the Welsh Government and the Scottish Government—and that two of those parties are now in agreement with very warm words about compromises, agreement and willingness on both sides, surely the people left out of step are the Scottish Government. Is this not, therefore, more about you playing politics than about trying to find a solution, as the Welsh have done?

Michael Russell: Let me take all of that, apart from the last two sentences, which are clearly designed to be politically provocative. I am not going to get engaged in those.

I said to Mr Kelly quite clearly that I am seeking a negotiated outcome. I will be seeking that today and I will go on seeking it, on the basis of protecting devolution. I do not disguise the fact that I disagree with Mark Drakeford on his analysis. I will say that to him today, to his face, and no doubt we discuss the issue. I disagree with that analysis, because I believe that the changes to legislative competence that are being proposed are contrary to the devolution settlement.

We live in a country of asymmetric devolution. Wales has only recently—on 1 April, I think—moved into the model of devolution that we have in terms of reserved powers. There are significant differences in how we view devolution, because of that history and how we have operated. There are also significant political differences in the country in terms of the nature of devolution and how it operates, because Wales only got primary legislative powers two or three years ago—I am happy to check that. So there is a difference in devolution, political culture and the make-up of the Parliaments and, clearly, there is a difference in analysis.

I have friends with whom I have differences on political analysis. That happens. I can still work with them, enjoy their company and think that we have lots in common, but, from time to time, we will have different views. Mark Drakeford and I have such a difference of view on this matter, which Mr Fraser has outlined so well—primarily because he has quoted Mark Drakeford's own words. [*Laughter.*]

The Convener: Murdo, would you like to quote any more?

Murdo Fraser: I could happily spend the rest of the morning quoting more, but I think that I have made my point and the minister has given his view. Clearly, there is a different approach.

Alexander Burnett (Aberdeenshire West) (Con): Minister, I appreciate that my question may seem repetitious, given your previous answer. However, you have repeatedly told the media, Parliament, MSPs and committees, including this one, that we are in lockstep with Wales and have exactly the same position. I will not quote the numerous instances. You have the meeting of the JMC this afternoon. How will changing your position affect Scotland's standing, particularly on the agreement with the devolved Governments? Do you recognise that backtracking on your position has probably weakened the collective bargaining position of the devolved bodies?

Michael Russell: I do not understand your point about changing positions; I have not changed mine at all. The position that we are in has been perfectly consistent from the beginning. I am where I am. This afternoon, I will speak as the Scottish Government representative on the JMC and I will make the points that I have made to the committee.

As is my wont, I will also come to that meeting with solutions rather than just problems. I will be there with two solutions that I believe could be implemented, which is a strong position to be in. Paradoxically, as I said in a television interview on Sunday, I think that the situation is now easier to solve than it was last week, because it is absolutely clear what will produce a solution. There is no dubiety about it and we are not beating about the bush. A solution is in hand and, indeed, it is on the order paper of the House of Lords, which I think is positive.

The Convener: Neil, you were interested in the area of general negotiation. Has that been covered?

Neil Bibby: No. In recent weeks, and at the Delegated Powers and Law Reform Committee's meeting yesterday, my colleague Neil Findlay

raised the issue of cross-party working and the possible lack of a cross-party approach. Given that the Welsh have a deal but we still have stalemate between the Scottish and UK Governments, and if the JMC today does not provide a way forward, is it not time—and would it not be the responsible thing to do—for this Parliament to establish a cross-party delegation or commission to negotiate a deal that works for Scotland and that everyone in this Parliament can get behind?

Michael Russell: It is the responsibility of the Government to enter into negotiations with other Governments and then to bring the results of those to the Parliament. I accept the point that Neil Findlay made to me at yesterday's meeting of the Delegated Powers and Law Reform Committee, which was that it would have been better to draw him and others in early last week. I accept that and am absolutely clear about it.

I do not accept the point that was made to me by the Liberals, which was that I should have announced the Welsh position to the chamber. Not only could I not have done so, but I did not see the final letter from Wales until after I had spoken. Given those circumstances, I do not agree with that point. I spoke to Neil Findlay and Richard Leonard last night, and I spoke to Willie Rennie yesterday. I am also in regular contact with others. I have undertaken to make sure that information is provided regularly, as we are in a very sensitive period.

We will meet and discuss those things, and I am very open to those members. At any time, anybody who wants to can come and talk to me about it. I go and talk to people: I have informal conversations with Mr Tomkins and others, which are useful to have. If there is a possibility of our progressing this, and people have good ideas and are being provided with information, I think that, collectively, we can apply our minds to it. However, there is a Government responsibility, which I must exercise on behalf of the Scottish Government.

The Convener: The JMC meets this afternoon. At this stage, can you tell us what might be discussed or what will happen? Is this the last throw of the dice or is there yet some way to go in the negotiations?

Michael Russell: We know what the timetable is. Assuming that the bill will reach its third stage in the House of Lords on 16 May—which it may or may not do—that would be the last stage for amendments and the time at which we would have to have a legislative consent motion.

The timetable that is currently proposed is for the committee to report and then to have a debate in the chamber on 15 May. I will go on discussing, negotiating, having ideas and trying to talk about it right up to the wire—and possibly beyond—because we need to resolve the issue. The JMC will consider the topic today, although it is not the only thing that is being discussed and there are other items on the agenda. I will report back accordingly.

11:00

Adam Tomkins: The supplementary legislative consent memorandum that the Scottish Government published in the last few days talks about a range of issues, including the possibility of some sort of partial consent to the withdrawal bill, which is not very well defined yet—that is not a criticism. If I understand it right, in the event of that partial consent being given, bits of the withdrawal bill will sit alongside bits of the continuity bill, which, as Ash Denham referred to earlier, was passed by the Scottish Parliament, by majority, a few weeks ago. Has any legal or political analysis been undertaken on behalf of the Scottish Government or by the Scottish Government on the logistical compatibility of those two pieces of legislation? If so, can the Government share any of that with the committee?

Michael Russell: I referred to it and we dealt with that issue extensively during the passage of the continuity bill. The policy memorandum also refers to that.

Gerald Byrne: The policy memorandum to the continuity bill, which Luke McBratney was responsible for—in the best possible sense—set out in paragraphs 12 to 20 various scenarios for the operation of the continuity bill in tandem with the withdrawal bill or on its own. We also discussed the matter with the Delegated Powers and Law Reform Committee yesterday. An analysis has been set out and is on public record.

Michael Russell: The *Official Report* of yesterday's Delegated Powers and Law Reform Committee meeting will prove useful, because we went into in some detail on a range of options and how the two bills sit together.

Luke McBratney (Scottish Government): The purpose of getting the continuity bill and some elements of the withdrawal bill to work together was set out during the passage of the continuity bill. It was to protect the ability, in appropriate situations, to make UK-wide fixes to deficiencies when they arose. The supplementary legislative consent memorandum sets out some options for achieving that, and the minister went into more detail about that yesterday at the Delegated Powers and Law Reform Committee. The core of the proposition is that qualified consent would be given to clause 7 of the withdrawal bill, allowing fixes to be made in devolved areas. As Professor Tomkins points out, that would require some work

to be done. We have been quite clear that it would require work on behalf of the UK Government, too. That is the intended operation of the two bills alongside one another.

Michael Russell: The advantage is that it would simplify the very complex process of the burden of secondary legislation.

Adam Tomkins: I recall what is said in the policy memorandum and I appreciate that, but the policy memorandum is now a rather historic artefact, because it relates to the bill pre-amendment and the withdrawal bill as it was before it was amended in the House of Lords.

It would be useful, minister, if you would reflect on whether the Parliament could be better and more fully informed before 15 May—if, indeed, that is the date on which the debate will take place—on the question of the compatibility of the bills as they will be on that date, rather than as they were weeks or months ago, when the continuity bill was introduced. There are several incompatibilities between the continuity bill and the withdrawal bill that were not identified in the policy memorandum, but were identified by Opposition MSPs during the passage of the bill.

Michael Russell: It would also be useful to note that I indicated yesterday at the Delegated Powers and Law Reform Committee that there are elements of the continuity bill, such as on the sifting procedure, in which we believe there are better procedures that we will still try to implement here, no matter what takes place.

I will reflect on that and see what we can do.

Adam Tomkins: Thank you.

The Convener: Thank you for coming to give evidence to the committee today. We wish you the best of luck for the JMC this afternoon.

Meeting closed at 11:04.

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