Law Society of Scotland

# Debates on the Address 27 and 28 June 2017

The Law Society of Scotland's Briefing

June 2017

## Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee welcomes the opportunity to comment on the Queen's Speech.

## Supremacy of EU Law and the Repeal bill

The objective of the European Communities Act 1972 Repeal bill will be to repeal the European Communities Act 1972 and so end the supremacy of EU law in the UK. Repeal of the European Communities Act 1972 (ECA) will achieve this objective subject to provisions retaining EU derived law which is transposed in UK law and other relevant aspects of the acquis.

Provisions in the Treaties and EU Regulations (distinct from EU Directives which are indirectly applicable and implemented into UK law) currently take effect in the UK by virtue of the ECA. This EU law is directly applicable, meaning that it has effect and is in force through the ECA without further re-enactment, therefore we recognise the aim to transpose directly applicable regulations and treaty provisions in terms of paragraphs 2.4 and 2.11 of the legislating for the United Kingdom's Withdrawal from the European Union White Paper (the White Paper). The Government should be clear about how it will deal with directly applicable EU laws which may not be able to be transposed (because they contain rights which require some form of reciprocity with EU Member States as recognised in *R* (on the application of *Miller and Dos Santos) v the Secretary of State for Exiting the European Union* [2017] UKSC 5) in order to properly implement the withdrawal from the EU by Brexit day.

The time constraints and the significant amount of material in the Acts of Parliament and statutory instruments will make the transposition target exacting, especially taking into account pre-legislative consultation, drafting, debate and the preparation of ancillary documents. A recent House of Commons Library paper found that there are around 19,000 EU legislative acts in force, including nearly 900 Directives. Another found around 7,900 UK statutory instruments

implementing EU law – which does not include the work of the devolved legislatures. In addition, they found 186 Acts passed between 1980 and 2009 with some degree of EU influence. We note that the Great Repeal bill White Paper estimates that the necessary changes "will require between 800 and 1000 statutory instruments (para 3.19)". This seems conservative in the circumstances unless these instruments will be very substantial documents.

## Court of Justice of the European Union (CJEU) and the Repeal bill

We assume that future decisions of the CJEU on matters of EU law which are the same as EU derived UK law will be highly persuasive but this is a matter for the courts to determine by the issue of practice statements and judgements. We recommend that there should be no provision in the ECA Repeal bill which will prevent courts in the UK from considering post Brexit cases decided by the CJEU.

We note that the White Paper envisages that EU derived law will be interpreted by courts in the UK by reference to the CJEU's case law as it exists on the day of Brexit.

In terms of paragraph 2.16 of the White Paper the bill will provide that historic CJEU Case Law will be given the same binding status in the Courts as decisions of the UK Supreme Court (this may have to take account of the role of the High Court of Justiciary sitting as a Court of Appeal in relation to Scottish criminal law cases). This suggests a parallel binding jurisdiction in terms of with EU derived UK law. This is a distinct arrangement from the current provision where the UK Supreme Court would be bound by a decision of the CJEU. Does the UK Government propose to legislate that the UK Supreme Court (and the High Court of Justiciary) will be able to change existing CJEU binding decisions as at the date of Brexit?

In terms of existing pending cases we note that the *EU Council Article 50 Guidelines* (EUCOXT 2004/17) provide that "Arrangements ensuring legal certainty and equal treatment should be found for all court procedures pending before the Court of Justice of the European Union upon the date of withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. The Court of Justice of the European Union should remain competent to adjudicate in these procedures. Similarly, arrangements should be found for administrative procedures pending before the European Commission and Union agencies upon the date of withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. In addition, arrangements should be foreseen for the possibility of administrative or court proceedings to be initiated post-exit for facts that have occurred before the withdrawal date." (para16).

We recommend that UK Government take this issue into account in the ECA Repeal bill so that litigants can be certain about the future of their EU litigation and the rule of law and the proper administration of justice can be upheld. The EU Council Guidelines point the way to a workable solution.

Charter of Fundamental Rights

The White Paper is correct in stating in paragraph 2.22 that the Charter is only one element in the UK's human rights architecture. We note that in terms of paragraph 2.23 the Charter will not be converted into UK law by the ECA Repeal bill. We recommend that the Government should reconsider this matter and take stock of the deep concerns which are held by many, including the Society, about the potential for erosion of human rights which may occur as a result of removal of the Charter and the creation of difficulties for the UK Courts in interpreting the EU derived UK law in the absence of the Charter.

## Delegated Powers and the Repeal bill

Secondary or delegated legislation will be used to convert the acquis into UK Law. The power to make delegated legislation envisaged by the Government will be very extensive and will not be limited to, as the House of Lords Constitution Committee put it the "mechanical act of converting EU law into UK law" (para 3.10 in the White Paper) or of making "corrections" to EU law" which would otherwise no longer operate appropriately once we have left the EU, so that our legal system continues to function correctly outside the EU" but will extend to enable "domestic law once we have left the EU to reflect the content of any withdrawal agreement under Article 50 (para 1.24(c)) or "matters which cannot be known or may be liable to change at the point when the primary legislation is being passed because the Government needs to allow for progress of negotiations" (para 3.9 (a)).

These changes to UK law could be very substantial if, for example, negotiations result in having a Free Trade Agreement in various sectors providing for some freedom of movement of workers in the EU; or changes need to be made to correct "deficiencies in preserved EU derived law arising out of our exit from the EU" (para 3.17). As the extent of these changes could be very substantial we recommend that the Government should clarify the basis for using delegated powers in the Repeal bill.

The Government should confirm if the power to make delegated legislation will also include power to transfer to Scottish Ministers powers contained in EU derived law which are currently exercised by EU bodies.

We note that the Government proposes using existing types of statutory instrument procedure but we take the view that it should be clarified whether this includes all the types of procedure detailed in, for example the Scotland Act 1998, Schedule 7. The use of a special scrutiny regime such as suggested by the House of Lords Constitution Committee should be further explored. We note paragraph 3.23 in the White Paper where room for negotiation between the Government and Parliament is specifically provided for as regards striking the best balance between the need for scrutiny and the need for speed.

We recommend that the need for scrutiny should not be sacrificed to the need for speed. We suggest that legislation such as the Legislative and Regulatory Reform Act 2006, the Public Services Reform (Scotland) Act 2010, the Public Bodies Act 2011 and the Regulatory Reform (Scotland) Act 2014 could provide models for enhanced scrutiny without necessarily undermining the need for expedition in that scrutiny.

In our view there may be circumstances where UK subordinate legislation in connection with Brexit could deal with EU legal issues which fall within the devolved sphere but there would need to be legal justification for that approach. At the least discussions should take place at the JMC(EN) and agreement reached on the terms of such UK delegated legislation. Following on such a Ministerial agreement this legislation should be laid in each of the devolved legislatures for information only.

We believe that the Government should consult on policy proposals for the EU legislation which is preserved by the Repeal bill or through the Withdrawal Agreement or the Continuing Relationship Agreement. This consultation effort will be a significant undertaking and involve multiple consultations from each Whitehall Department. A similar exercise should be required from each of the devolved administrations. We share the concerns of the House of Lords Delegated Powers and Regulatory Reform Committee Report (HL paper 164) which are contained in paragraphs 6-12: https://www.publications.parliament.uk/pa/ld201617/ldselect/lddelreg/164/16404.htm

The process of scrutiny of the delegated legislation involved may need a review of the Committee structure in both Houses and perhaps enlarged Committees. Bearing in mind that this material will already have the status of law in the UK there will need to be a sift to identify those statutory instruments which require special attention because of proposals to repeal or amend the law involved. That sifting process will require significant effort on the part of the Committees, Peers and MPs and the Civil Service.

The Procedure Committee of the House of Commons Report (HC1091) is relevant in this connection: http://www.parliament.uk/business/committees/committees-a-z/commons

## The devolved jurisdictions and the Repeal bill

The UK ought to take into account the views of all devolved administrations. For Scotland, there are particular issues about our legal system, constitutional arrangements such as legislative competency and how EU laws are dealt with once they are repatriated. Scotland may need increased devolved powers. This affects justice and home affairs, environment law, farming, fisheries and research. Withdrawal from the EU should also not precipitate changes to human rights law, see White paper paragraphs 2.21 – 2.25.

The House of Commons Exiting the European Union Committee considered the Exit White Paper: Objective 3 on Strengthening the Union in its report *The Government's Negotiating Objectives: the White Paper (HC1125)* published on 4 April 2017. The Committee identified a number of issues in connection with the devolved administrations (paragraph 65 – 69).

The Committee concludes at paragraph 70 that:

"There are clearly significant differences in the negotiating priorities of the different parts of the UK. If the future deal is to be acceptable to the whole of the UK, then these differences will need to be discussed, negotiated and common ground agreed upon. Differing priorities reflect, in part, differences in the economies and demography of different parts of the UK. The Government must

ensure that it understands these differences and takes them into account when it begins its negotiations with the EU."

and in paragraph 74 that:

"The Government has established a Joint Ministerial Committee for EU Negotiations (JMC (EN)) for consulting the devolved administrations on their priorities for Brexit and it aims to use this forum to agree a UK approach to, and objectives for, negotiations, and to consider proposals put forward by the devolved administrations. The evidence we heard indicated that these meetings have not been effective from the point of view of the devolved administrations. The Government must establish a more effective process for engaging the devolved administrations in developing the UK's negotiating position. If the Government's asserted wish to fully engage the devolved administrations is to be credible, it must share more information and discuss options before decisions are reached. A successful exit from the EU will be measured not just in terms of achieving a good deal with the EU but also whether it "works for the whole of the UK".

The Scottish Parliament's Culture, Tourism, Europe and External Relations Committee also raised questions about the role of the JMC in connection with the negotiation of the Withdrawal Agreement and the future relationship between the UK and the EU in its report *Determining Scotland's Future Relationship with the European Union* (paragraphs 218 – 269, 4th Report 2017(session 5).

Parliamentary, academic and professional discussions are evolving options which may be applied to determine the practicalities of how the framework for devolved policy areas will develop and repatriated laws can be legally and properly transitioned from EU law and the supra national legal order to the national legal order and to that of the devolved jurisdictions.

The Exiting the European Union Committee also commented on this in its report at paragraph 73:

"The repatriation of EU powers to the UK raises questions about how the framework for devolved policy areas will evolve. The Welsh and Scottish governments are clear that any future UK framework for devolved policies should be a matter for consultation and intergovernmental negotiations. Notwithstanding the Government's commitment that "no decisions currently taken by the devolved administrations will be removed from them", the devolved administrations will be looking to ensure that legislative competences which are currently held by the EU which relate to matters which have been devolved are repatriated as devolved competences."

Which method is chosen is a matter for discussion between the UK Government and the devolved administrations. In coming to a decision they should be guided by principles of legality, openness, transparency and clarity. It will be necessary for the transfer to take place within a short timescale and therefore there must be good cooperation between the UK Government and the devolved administrations and broad consultation with stakeholders.

Compliance with EU Law in the devolved jurisdictions is a key feature of all devolution legislation and ensures that the UK meets its obligations under the EU treaties. The Scotland Act 1998 embeds EU law into the fabric of Scottish devolution. Section 29 of the Scotland Act provides that legislation passed by the Scottish Parliament "is not law" if it is incompatible with EU law.

Compliance with EU law is therefore a basic condition of the validity of law passed by the Scottish Parliament. Furthermore, Executive competence concerning EU law is also determined by Section 57 of the 1998 Act which states in subsection (2) that "A member of the Scottish Government has no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with EU law". All the devolved jurisdictions are required to comply with EU law. This obligation is found in the Scotland Act 1998 section 29, the Northern Ireland Act 1998 section 6(2)(d), and the Government of Wales Act 2006 section (108)(2)(c)(Wales Act 2017 Section 108A(2)(e)).

The ECA and the devolution statutes ensure that until the UK formally leaves the EU the devolved jurisdictions are required to comply with that law and the UK will not be at risk of breaching EU law. Therefore any Act of the Scottish Parliament (and law made by either the Northern Ireland Assembly or National Assembly for Wales) enacted before such a change will only be law if it has complied with EU law at the date of enactment. The requirements of compliance with EU law also applies to the actions of Scottish Ministers.

However the situation changes in the following circumstances:

(a) When the treaties cease to apply under Article 50;

(b) When subject to parliamentary approval, the European Committees Act 1972 and the

(c) requirement to comply with EU law is repealed in accordance with the Repeal bill (White Paper paragraphs 2.1 -2.3).

In either case express provision in the Repeal bill and any devolved equivalent will need to be in place to preserve EU law at the point of the UK's leaving the EU and to ensure it will continue to apply within the devolved jurisdictions to Pre-Brexit Acts of the Scottish Parliament and actions of Scottish Ministers. This would preserve, in the new hierarchy of laws (where EU-derived laws will take precedence over other domestic law) the continuity of EU derived law (and prevent a retrospective change in the meaning/scope of pre-Brexit legislation).

The White Paper is silent on this point and clarification from the Government would be helpful. Paragraphs 4.2 – 4.4 of the White Paper proceed on the basis that, in areas such as in agriculture and the environment, "the devolved administrations and legislatures are responsible for implementing the common policy frameworks set by the EU" and proposes that, on Brexit, the UK Government will take over the powers currently exercised by the EU. There appears to be no attempt to address the common understanding of the law under the Scottish devolution arrangements that what is not reserved, is devolved and that agriculture and environment are not reserved.

It is the case that, in practice, the powers actually exercised by the Scottish Parliament and Government in those areas are restricted by the requirement to observe EU law. However, when Brexit occurs, that restriction will be repealed and, if nothing else was provided, the Scottish Parliament and Government would then be able to exercise the full range of powers in those areas without any transfer being required.

So, in order to achieve what the White Paper envisages, it would appear to be necessary to amend Schedule 5 to the Scotland Act at least to some extent and make these common policy frameworks reserved matters.

Although there are a number of views on the matter we consider that changes to the Scotland Act 1998 are likely to engage the Sewel Convention under section 28(8) of the Scotland Act 1998 which states that "the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament." Changes to Parliamentary and Executive Competence (for example providing Scottish Ministers with a power to amend devolved legislation – paragraph 4.6 Great Repeal bill White Paper) are similarly within the ambit of the Sewel Convention in terms of Devolution Guidance Note 10. We also note that the UK Parliament retains the power to make laws for Scotland under Section 28(7) of the Scotland Act 1998.

The Exiting the European Union Committee drew attention to this in its report *The Government's Negotiating Objectives: the White Paper* (HC 1123) at paragraph 72, "the legislation required to implement the UK's exit from the EU will affect the competences of the devolved administrations and it is expected that it will require their legislative consent. We note the Supreme Court's statement that "the Sewel Convention has an important role in facilitating harmonious relationships between the UK and devolved legislatures." The devolved administrations will require adequate time to conduct the appropriate scrutiny and consultation required before consent can be given. It is likely that the devolved administrations will need to pass their own additional legislation, in turn requiring time for proper consideration in the devolved legislatures. The Government will need to take account of the timescales of the devolved legislatures in its planning."

On the interpretation the Sewel convention reflected in Devolution Guidance Note 10 and followed in the process of the Scotland Acts 2012 and 2016 changes of this sort would need the consent of the Scottish Parliament as a constitutional requirement.

The Scottish Parliament Information Centre Paper, *The White Paper on the Great Repeal bill – Impact on Scotland*, identifies that there is a lack of clarity from the UK Government concerning the need for the Scottish Parliament's consent to the Repeal bill (pages 18 – 19): https://digitalpublications.parliament.scot/ResearchBriefings/Report/2017/4/27/The-White-Paper-on-the-Great-Repeal-bill---Impact-on-Scotland

Clarity on this issue from the UK Government would be welcome at the earliest opportunity.

In terms of paragraph 4.5 the Government expects "that the outcome of this process will be a significant increase in the decision making power of each devolved administration." It is also clear that the Government intends that their changes should not disrupt "the effective functioning of the UK single market" (para 4.3). It is not clear what powers will actually be devolved, nor how the protection of the UK single market will be ensured as a matter of law in relation to the future exercise of devolved powers and early clarification would be welcome.

The impact of the UK's withdrawal from the EU on the devolved jurisdictions will be different as regards each individual jurisdiction. The different methods of devolution for Scotland, Northern Ireland and Wales create a complex set of arrangements which prevent there from being a "one size fits all" solution for each devolved area. Therefore each relationship between the devolved

jurisdictions and EU law and between the UK and the devolved administrations will need to be carefully considered. How the withdrawal of the UK will affect both legislative and executive devolved powers will require careful analysis, stakeholder engagement and consultation.