



Law Society
of Scotland

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

Stage 3 Briefing by the Law Society of Scotland

March 2018



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 consider and respond to the UK Withdrawal from the European Union (Legal Continuity) (Scotland) bill ("the LCB").

General Comment

The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since 1945. The UK's exit from the EU has so many significant aspects including economic, financial, legal, social, and cultural, which will affect every person living in the British Isles and it has as much potential to affect people living in the EU in some ways which are known and understood and in other ways which are currently unpredictable. The impact of the change however will also have a breadth, depth and far reaching effect for the immediate future and for several years to come.

The LCB mirrors many aspects of the European Union (Withdrawal) Bill (EUWB) currently in Committee in the House of Lords. The LCB therefore replicates many of the issues which affect the EUWB. In our view like the EUWB it is complex, often difficult to interpret, and sometimes lacking in clarity. Even where the LCB takes a different approach, for example in connection with the Charter of Fundamental Rights or the role of Ministers regarding Ministerial regulation making powers, the Scottish Government should be permissive with suggestions to improve or clarify the bill as it passes through the Parliament.

The LCB introduces new categories of law like "retained (devolved) EU law" - this approach (while to a certain extent understandable) may make it more difficult to be certain about the law. This is highlighted when considering "retained (devolved) EU law" alongside "retained EU law" under the EUWB. Individuals and their advisers will need to be alert to the potentially different treatment in the context of withdrawal from the EU for both reserved and devolved areas of Scots law.

We recommend that the Scottish Government immediately commence a programme of consultation on the draft subordinate legislation which will be needed under the bill. The large number of orders and the

relatively short period for scrutiny means that early consultation will be crucial in ensuring that the transposition of EU law into Scots law can be as efficient as possible.

Specific Comment

Section 1 - Purpose and effect of this Act

Our Comment

Since the decision in the EU referendum we have consistently maintained that it is vitally important that there is stability in the law following withdrawal and that there should be the greatest amount of clarity about what that law is. The Scottish Government have stated in paragraph 7 of the Explanatory Notes on the LCB that *preparations have to be made for withdrawal from the EU. Those preparations include maintaining a functioning system of devolved laws on UK withdrawal by providing, where possible, for continuity of law on exit day and ensuring that laws operate effectively once the UK has left the EU.* We have not commented on the issue of whether the bill is within the competence of the Scottish Parliament. It is not for the Society to adjudicate on that matter - under section 33 of the Scotland Act 1998 that is a matter for the UK Supreme Court to decide if the bill is passed by the Parliament and if it is referred to the Supreme Court by the Law Officers.

Section 5 - General principles of EU Law and Charter of Fundamental Rights

Charter of Fundamental Rights

It makes sense for the Charter to form part of retained (devolved) EU law because the Charter only applies in areas to which EU law applies. The courts can therefore rely upon its terms when determining the validity, meaning and effect of retained (devolved) EU law as detailed in section 5(2)(b).

Section 7 - Challenges to validity of retained (devolved) EU law

We note the enhanced scrutiny provisions which were added to the bill at Stage 2 in new Sections 9A and 9B.

We believe that consultation on the regulations will enhance parliamentary scrutiny.

Section - 10 Interpretation of retained (devolved) EU law

Section 10(2) provides that a court or tribunal exercising devolved jurisdiction may have regard to anything done on after exit day by the European Court, another EU entity or the EU.

We believe that it would provide better guidance for the courts were they to consider CJEU decisions as persuasive.

That is because 'persuasive authority' is a recognised aspect of the doctrine of stare decisis or precedent. Persuasive decisions are not technically binding but the courts can pay special attention to them. Legal sources that currently have persuasive authority include:

- (a) Decisions of the Judicial Committee of the Privy Council.
- (b) Decisions of higher level foreign courts especially in England, Commonwealth and other similar jurisdictions;
- (c) Decisions of the European Court of Human Rights which under the Human Rights Act 1998 must be taken into account by a UK court.

Section 14 - Scrutiny of regulations under sections 11, 12 and 13

We note the addition of Section 14A **Additional scrutiny of proposed regulations** and 14B **Consultation on draft proposals**.

We believe that these additional scrutiny mechanisms will enhance the consideration by the Parliament of such regulations.

Section 15 - Consultation on draft proposals

We agree with the general proposition that Scottish Ministers should consult with interested parties before making regulations under section 14(5). However Scottish Ministers must ensure that there is adequate time to consider such draft regulations.

Section 17 - Requirement for Scottish Ministers' consent to certain subordinate legislation

There is no general requirement to obtain the consent of the Scottish Parliament in relation to delegated legislation made in respect of Scotland by UK ministers although such orders or regulations may sometimes require the consent of Scottish ministers before they can be made (see Himsworth and O'Neil paragraph 7.19). However under section 9 of the UK Public Bodies Act 2011 an order in terms of sections 1-5 of the Act requires a consent motion by the Scottish Parliament where the order would be within the legislative competence of the Scottish Parliament if it were contained in an Act of the Parliament, or modifies the functions of the Scottish Ministers.

So far the qualification of the order making power of UK Ministers has been contained in Acts of the UK Parliament. Section 17(1)(c) raises the question whether it is competent for a provision in an ASP to seek to attach conditions upon the exercise of subordinate legislative powers, even in relation to devolved matters, which are conferred upon UK Ministers by a subsequent enacted Act of the UK Parliament.



Section 28 - Meaning of “exit day”

We agree with the amendment to Section 28(1) which improves the clarity of the bill.



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