



Law Society  
of Scotland

# Public Administration and Constitution Committee Inquiry: Devolution and Exiting the EU

Response by the Law Society of Scotland

November 2017



## Introduction

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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 Public Administration and Constitution Committee Inquiry Devolution and Exiting the EU. The Sub-committee has the following comments to put forward for consideration.

### **1. What are the strengths and weaknesses of the provisions for the repatriation of powers in the EUW Bill, given the existing devolution settlements within the UK?**

Clause 11 amends the legislative competence provisions in section 29 of the Scotland Act 1998 by deleting the provision of section 29(2) (d) which provides that the Scottish Parliament has no competence to legislate incompatibly with EU law by deleting "with EU law" and substituting "a breach of the restriction in subsection (4A)". Subsection (4A) is provided for in clause 11(1) (b) which inserts the following into section 29 of the Scotland Act 1998:

*(4A) Subject to subsections 4(B) and 4(C) an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law.*

*(4B) Subsection (4A) does not apply so far as the modification would, immediately before exit day, have been within the legislative competence of the Scottish Parliament.*

*(4C) Subsection (4A) also does not apply so far as Her Majesty may by Order in Council provide.*

Similar provisions are made for the National Assembly for Wales (clause 11(2)) and the Northern Assembly (clause 11(3)).

Clause 11 also imports parts 1 and 2 of schedule 3 making corresponding provisions in respect of executive competence and other amendments to devolution legislation. The explanatory notes state that "The amendments will replace the former requirement with the provision which means that it is outside the competence of the Scottish Parliament to modify retained law in a way which would not have been

compatible with EU law immediately before exit. This legislative competence test is subject to any exceptions which may be prescribed by an order in Council (paragraph 130)".

At present, section 29(2)(b) of the Scotland Act 1998 provides that a provision in an ASP is "not law" if it is incompatible with EU law. Clause 11 does not simply replace the reference to EU law with a reference to retained EU law so that the Scottish Parliament would be required to legislate in conformity with retained EU law. What it does is to remove the current constraint on the Parliament's competence to legislate in conformity with EU law and to prohibit the Scottish Parliament from modifying or conferring power by delegated legislation to modify retained EU law. In our view, both repealing the requirement to legislate compatibly with EU law and legislating to prevent the Scottish Parliament from modifying that law are significant changes to the competence of the Parliament. These changes are likely to engage the legislative consent (or Sewel) convention.

Also it is not clear what the ASPs are to which this new provision will apply. It appears that it is not intended to be retrospective and that it will only apply to post exit ASPs but what is a post exit ASP? Arguably it is an ASP which is enacted on and after the exit day. But this would mean that the bill for such an ASP would require to comply with this restriction. This would apply even if it had been introduced months before exit day, and before the EU (Withdrawal) bill has been enacted, and even if it may have been passed by the Scottish Parliament before exit day. There is an argument that such legislation might be regarded as retrospective. It should be clear which ASPs are affected by this new provision.

We note the terms of schedule 8 paragraph 29 which provides that the amendments made by section 11 and by part 1 of schedule 3 (which apply the same legislation to Scottish Ministers) do not affect the validity of:

- (a) any provision of an Act of the Scottish Parliament made and in force before exit day or;
- (b) any subordinate legislation made, confirmed or approved and in force before exit day.

But paragraph 3 of schedule 1 would not appear to allow any challenge to be made on and after exit day, or allow any court to quash any ASP, on the grounds that it does not comply with the general principles of EU law. Schedule 8 paragraph 29(2) which provides that the validity of anything falling within paragraph 1(a) or (b) is to be decided by reference to the law before exit day. The effect of the proposed section 29(4A) is to remove from the legislative competence of the Scottish Parliament any matter in retained EU law (i.e. law which was subject to an EU competence) even although that matter, as such, would not have fallen within a reserved matter under schedule 5 of the Scotland Act 1998 e.g. agriculture, fisheries, environmental protection and the other areas contained in the list of 111 policy areas referred to later in this paper.

There are a number of alternative options in addition to the one in the bill for dealing with the complexities of retained EU law and the competence of the devolved jurisdictions. This is an area of political debate and we offer these options for consideration without endorsing any particular one:

- (a) Adopt the provisions in the bill on a transitional basis only and subject to a specific cut-off date. At the expiry of the transitional period, powers in devolved areas would revert to the devolved legislatures, unless specific alternatives had been put in place. This would allow the UK Government the opportunity to work out what has to be done in light of the UK's future relationship with the EU, but acknowledge that the devolved legislatures will obtain the additional powers within a defined timescale.
- (b) Repeal the EU law constraint leaving EU competences to fall as determined by schedule 5, and any new common frameworks to be established by agreement between the UK Government and the devolved administrations.
- (c) Replace the cross-cutting EU constraint with new cross-cutting constraints, for example to protect the UK single market and/or to comply with international obligations. These might be more or less extensive than the EU law constraint in practice, but would have the benefit of (a) an underpinning principle and (b) catering for unforeseen cases.
- (d) Repeal the EU law constraint and amend schedule 5 to re-reserve specific competences to the UK level to enable UK Government to establish common frameworks.

### **The Sewel Convention**

The Sewel convention was named after Lord Sewel, then a Scottish Office Minister of State in response to a proposed amendment moved by Lord Mackay of Drumadoon - a former Lord Advocate.

Lord MacKay's Amendments proposed to change Clause 27(7) (now section 28 of the Scotland Act 1998) the amendment was an attempt to provide that nothing in the Act would affect the power of the United Kingdom Parliament to make laws for Scotland.

Lord Sewel in responding to the debate said "*we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament*" (Lords Hansard 21 July 1998, vol 592 col 791).

Devolution Guidance Note 10 (DGN10) notes that the House of Commons Procedure Committee has indicated its support for the convention.

DGN10 provides that:

"any submission to the legislative Programme Committee for the inclusion of a Bill in a future programme should state clearly that the proposed Bill:

- I. either does not apply to Scotland at all; or has provisions which apply to Scotland but, in the words of the Scotland Act 1998, "relate to" reserved matters and do not alter Scots law on non-reserved matters;

- II. has provisions applying to Scotland and relating to reserved matters, but also contains provisions which make incidental or consequential changes to Scots law on non-reserved matters (i.e. which are for reserved rather than devolved purposes); or
- III. contains provisions applying to Scotland and which are for devolved purposes, or which after the legislative competence of the Parliament or the executive competence of the Scottish Ministers.

Only Bills in category III are affected by the convention and thereafter requires the consent of the Scottish Parliament. Although a Bill may be directed at reserved matters it could contain some provisions in this category.

Bills in category I or in category II do not require the consent of the Scottish Parliament".

The convention has been placed on a statutory footing in the Scotland Act 1998 section 28(8). However only the exact phraseology used by Lord Sewel has been stated in the bill rather than the more expansive interpretation as provided by DGN10.

Furthermore as we know from *Miller and Dos Santos v Secretary of State for exiting the EU* [2017] UKSC 5 the convention is not considered to be justiciable but rather can be enforced in a political manner.

*What are the advantages and disadvantages of the way powers are repatriated from the EU in the EUW Bill?*

By prohibiting the Scottish Parliament from modifying (or conferring power to modify) EU retained law, the Bill will remove from the competence of the Parliament matters which are not reserved matters and, even with the saving made by the proposed section 29(4B), this will affect the competence of the Parliament. Whilst there may be other views, in our view the Bill provisions will increase the complexity and uncertainty as to what is within the competence of the Parliament because it will be necessary to determine, in each case, what is meant by EU retained law and what matters would have been within that competence before the exit day. As we have explained above it is uncertain what the Bills and the ASPs are to which new provisions will apply and whether the provisions might be regarded as retrospective; and it is uncertain whether, or to what extent, any ASP which infringes the provisions in the Bill be invalid.

The method chosen in the bill has the disadvantage of being the focus for political contentions between the UK and Scottish Governments. As indicated in this paper we take the view that withdrawal from the EU should be completed on a Whole of Governance basis with the UK Government and the devolved administrations acting in concert to ensure that the legislative structure post withdrawal is effective and functional.

*To what extent are legislative consent motions required, at what stage should they be lodged and what are the implications if they are not passed by devolved legislatures?*

We consider that the Bill provisions will alter the competence of the Scottish Parliament and would therefore trigger the Sewel convention. We also note that, although the Scottish Government considers that the Bill would normally require the consent of the Scottish Parliament, they do not intend to lodge a legislative consent motion.

Furthermore under the Sewel convention, the UK Parliament would not “normally” pass the Bill without the consent of the Scottish Parliament which is obtained before the last stage when the Bill can be amended.

The absence of the consent of the Scottish Parliament does not prevent the UK Parliament from passing the Bill. The consequences of not obtaining consent would be political in nature rather than legal.

Legislative Consent Memoranda are lodged in the Scottish Parliament by the Scottish Government. They relate to Bills under consideration in the United Kingdom Parliament which contain what are known as “relevant provisions” concerning the legislative competence of the Scottish Parliament and the executive competence of Scottish Ministers as described above.

Under the Sewel Convention, the UK Parliament will not normally pass Bills that contain relevant provisions without first obtaining the consent of the Scottish Parliament. The consent itself is given through a motion (a Legislative Consent Motion) which is taken in the Chamber – but the detailed scrutiny is undertaken by a Scottish Parliament committee in the case of the European Union (Withdrawal) bill by the Finance and Constitution Committee on the basis of a memorandum. The motion must normally be decided on before the Bill reaches its final amending stage at the UK Parliament in the House in which it was first introduced. On occasion, a memorandum is lodged which invites the Parliament to note that the Scottish Government does not intend to lodge a legislative consent motion on a particular bill.

The procedure for scrutiny of Legislative Consent Memorandums and Motions is set out in [Chapter 9B](#) of the Scottish Parliament’s standing orders.

*Are the mechanisms for using Statutory Instruments (SI) appropriate for making changes to devolved legislation?*

The Scotland Act 1998 envisages that any changes to the competence of the Parliament should be made by an Order in Council under section 30(2) which would require the consent of both the UK and Scottish Parliaments. Accordingly, it would be contrary to the devolution settlement for changes to be made by SIs only made by the UK Government

Generally when dealing with devolved legislation which does not affect the competence of the Parliament but affects other legal issues SIs are not appropriate. The Sewel convention does not apply to such SIs and therefore the consent of the Scottish Parliament is not sought. Instead the practice has been either that Ministers agree that an SI can legislate on a matter within devolved competence or the Parliaments to enact to enact parallel SIs and Scottish Statutory Instruments (SSIs) which cover the same topic where this is required and the matter falls within devolved competence.

## 2. What arrangements could be put in place to repatriate, distribute and administer powers among the UK Governments?

A question arises as to whether EU law which is repatriated at the point of the UK's leaving the EU falls into the reserved or devolved areas and what mechanisms if any should be applied to properly transition EU law in devolved areas to the respective legislatures and executive arrangements throughout the UK.

The Scottish Government's paper *Scotland's Place in Europe* identified the following areas currently under EU competence which are not specifically reserved under the Scotland Act 1998.

- a) Agriculture, food and drink, in areas covered by the EU Common Agricultural Policy and EU law on food and drink, animal health and welfare, plant health, seeds, potatoes, pesticides and genetically modified organisms.
- b) Fisheries, aquaculture and the marine environment, which are subject to the EU Common Fisheries Policy and marine environment and planning laws
- c) Environmental protection, including laws on pollution, waste and recycling.
- d) Civil law.
- e) Criminal law and law enforcement.
- (f) Health, where for example protections afforded under the European Health Insurance Card scheme are at risk.
- (g) Higher education and research, where Scotland has benefited from EU mechanisms for collaboration and funding.

The Law Societies Brussels Office has conducted some research into the EU Competences concerning agriculture, fisheries, health cover and higher education.

This research discloses a large number of directives and the significant complexity of the EU legislation affecting these areas of the law.

In a letter dated 17 September 2017 Michael Russell MSP the Scottish Government Minister for UK negotiations on Scotland's place in Europe to Bruce Crawford MSP, Convener provided a list of 111 powers returning from the EU that intersect with the devolution settlement in Scotland.

Some of these may be dealt with in the context of the withdrawal agreement between the UK and the EU such as civil law and criminal law enforcement, but others will be effectively repatriated at the point of leaving the EU. The Prime Minister has stressed that "no decisions currently taken by the devolved administrations will be removed from them", but that devolution of repatriated powers would need to be

managed in such a way as to ensure no new barriers within the UK are created. The White Paper indicates that “As the powers to make these rules are repatriated to the UK from the EU we have the opportunity to determine the level best placed to make new laws and policies on these issues...”

What powers are devolved as a result of leaving the EU is a matter of political negotiation between the UK Government and the devolved administrations taking into account legal and stakeholder views. We refer to the recent communique issued by the JMC(EN); see page 10.

*What alternatives to arrangements set out in the Bill could be put in place to repatriate powers to both central and devolved Governments in the UK?*

Parliamentary, academic and professional discussions are evolving options which may be applied to determine the practicalities of how repatriated laws could 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.

These discussions have highlighted:-

1. A Constitutional Convention A Constitutional Convention was recommended in the Report by the Constitutional and Administrative Reform Committee *Do we need a Constitutional Convention for the UK?* Which was published in session 2012 – 2013 (HC371).

The House of Commons Political and Constitutional Reform Committee also suggested a Constitutional Convention to review how the Union and Devolution is functioning in its report *The future of devolution after the Scottish Referendum (HC700) para 110*.

2. A Commission with a similar composition to the Smith Commission or Calman Commission.
3. The JMC (EN) or another Sub-Committee of the JMC.
4. A new structure or grouping including UK, Scottish, Northern Irish, Welsh Ministers, subject experts and stakeholders.
5. There are a number of past and current arrangements which could advise the UK Government and the devolved administrations on how to achieve the distribution of powers in the most efficient and effective way. For example:
  - (a) The Standing Advisory Committee on Industrial Property which brought together industry, technical advisers and interested parties to advise Government on industrial property issues.
  - (b) The Farm Animal Genetic Resources Committee which gives advice to the government on the conservation and sustainable use of farm animal genetic resources.

Which option is chosen is a matter for discussion between the UK Government and the Devolved Administrations. In coming to a decision concerning the distribution of powers they should be guided by principles of subsidiarity, proportionality, legality, transparency and clarity. It will be necessary for the agreement between the Governments to take place within a reasonable timescale and for there to be good cooperation between the UK Government and the Devolved Administrations and broad consultation with stakeholders. We suggest the agreement be formalised in a Memorandum of Understanding between the UK Government and the Devolved Administrations.

- *What new provisions are needed to deal with the removal of the EU level of governance from the UK constitutional arrangements?*

The deconstruction of the Supranational legal order and its replacement in the national legal order and the legal systems in the UK will require significant change to the law to deal with "deficiencies" and to achieve certainty in the devolved legal systems. Research we have carried out indicates that more than 200 Acts of the Scottish Parliament will require amendment and an as yet unknown number of statutory instruments will also need changed. Changes will be needed to rules of court.

- *Are existing inter-institutional mechanisms and arrangements sufficiently robust and effective to deal with the likely increase of inter-governmental issues given a proposed increase in overlapping competencies?*

See our comments above.

- *What, if any, new inter-institutional arrangements could be established to better aid government across the UK and do these need to be formal mechanisms? What UK wide frameworks are needed, how should they be agreed and administered, and what principles should underpin these frameworks?*

See our comments below.

### **3. What implications and opportunities arise from EU exit for the long term settlement of the territorial aspects of the UK constitution?**

This is essentially a political question on which the Society has no view.

*How does leaving the EU change the constitutional and political landscape in which the devolved governments were established?*

We cannot comment on the changes to the political landscape. The most significant changes to the constitutional landscape include the removal of the UK from the EU supra-national legal system. This encompasses the non-application of the EU treaties and the rights that flow from them and the removal of the ongoing supremacy of EU law and the jurisdiction of the CJEU and other EU Institutions.

- *What opportunities does exiting the EU provide to fix the anomalies which have arisen as a result of an ad hoc approach to devolution in the UK?*

This is an essentially political question on which the Society has no view.

- *Where should powers and competencies rest in order to ensure a robust and stable UK constitutional settlement?*

This is a political question on which the Society has no view.

- *How can be inter-institutional relations be placed on a constitutional footing to better govern relations between UK governments and legislatures?*

We note the JMC(EN) communique <https://beta.gov.scot/publications/joint-ministerial-committee-communique-october-2017/> which indicated that the UK and Scottish Governments had reached agreement regarding the creation of frameworks for the discussion of a number of areas at the intersection of EU and devolved powers. This type of political agreement enhanced by the inclusion of knowledgeable stakeholders could lead to an approach to the Withdrawal which achieves certainty in the law and an effective legal structure for all the jurisdictions in the UK.

#### **4. How can the four UK Governments and Parliaments promote wider and deeper trust and understanding in their relationships?**

This is essentially a political issue however 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.

As Bernard Jenkin MP, the Chairman of Public Administration and Constitutional Affairs Committee stated in his note to the Cabinet Office on “Leaving the EU and the Machinery of Government”, this is a “Whole of Government project”.

The Whole-of-Government concept is important to recognise in terms of the negotiations with the EU because of the breadth, depth and scope of EU Law as it applies throughout the UK. In this context “Whole of Government” should be interpreted as “Whole of Governance” to include not only the UK Government and Whitehall Ministries but also the Scottish Government, the Northern Ireland Executive and the Welsh Government. This requires a revision of the October 2013 Memorandum of Understanding and Supplementary Agreements between the Government, Scottish Ministers, Welsh Ministers and the Northern Ireland Executive Committee. Lack of progress in the revision has been noted by the Scottish Parliament’s Culture, Tourism, Europe and External Relations Committee report, paragraphs 214 – 218. The revision should take into account the extraordinary circumstances which apply because of the UK’s exit from the EU and establish structures to help achieve the best outcome for the UK and its constituent nations. In particular Supplementary Agreement B which contains the “Concordat on Coordination of

European Union Policy issues” with Sections B1 relating to Scotland, B2 to Wales, B3 to Northern Ireland and B4 providing a common annex needs revision.

Relevant considerations are also contained in the Concordat on International Relations, Section D of the Memorandum of Understanding and its relevant Sections for Scotland, Wales and Northern Ireland and common annex. Revision of the Memorandum and the annex will enhance the UK response by full engagement with the devolved administrations.

A common approach will ensure that the “Whole-of-Government” concept is respected. It is crucially important that communications between UK Ministers and the devolved administrations are as transparent as possible. Whitehall departments must be fully apprised of the considerations which are of importance to the devolved administrations and fully cooperative with the devolved administrations, the Scottish Parliament and the Welsh and Northern Ireland Assemblies.

The Communiqué from the Joint Ministerial Committee on 24 October 2016 which publicised the agreement to form a new Joint Ministerial Committee on EU Negotiations is a step forward but it became clear over the course of 2016/17 that cooperation between the UK Government and the Devolved Administrations could be improved.

This has been reflected in recent parliamentary reports. The 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 concluded 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)).

The publication of the JMC(EN) communique in October 2017 referred to above indicates that progress in practical issues to ensure that the law and legal system and areas affected by EU law continue to work effectively in the post-withdrawal period. All parties to the JMC (EN) have a responsibility to ensure that the discussions are carried out in the best interests of the people who live in the UK irrespective of which jurisdiction they are in. No doubt Parliamentary Committees in the UK Parliament and the devolved legislatures will monitor the success of the JMC(EN) and issue further reports as we approach exit day.



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