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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Legislative Consent Memorandum: Immigration and Social Security Co- ordination (EU Withdrawal) Bill



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 19 March 2019, the Committee considered the provisions in the UK Government's Immigration and Social Security Co-ordination (EU Withdrawal) Bill ("the Bill") that confer power on the Scottish Ministers to make subordinate legislation.ⁱ
2. The Bill was introduced by the UK Government in the House of Commons on 20 December 2018 and is currently at Report stage.
3. The provisions of the Bill extend to the whole of the United Kingdom and the provisions in relation to social security co-ordination trigger the requirement for legislative consent to be sought from the Scottish Parliament. Full details of the Bill can be found on the [UK Parliament's website](#).
4. This report refers to the clauses as numbered in the latest version of the Bill.

ⁱ The Bill is available [here](#).

Legislative Consent Memorandum

5. The Scottish Government lodged a legislative consent memorandum (“LCM”) on 8 March 2019.ⁱⁱ
6. The lead committee in respect of the LCM is the Social Security Committee. The Scottish Government said in the LCM that it "does not currently intend to lodge a legislative consent motion in relation to the Bill."
7. While the Scottish Government may decide not to ask the Parliament to consider a legislative consent motion in relation to the Bill, the lead committee must still report to the Parliament on the LCM.
8. Paragraph 6 of Rule 9B.3 of the Standing Orders provides that where the Bill that is the subject of a legislative consent memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions.
9. Due to the compressed timescale for considering this LCM, the Committee has not been able to take evidence from the Scottish or UK Governments.
10. As the Bill is still progressing through the UK Parliament and so is still subject to amendment, the Committee may require to look at a supplementary LCM in due course.

ii The Legislative Consent Memorandum is available [here](#).

Overview of the Bill

11. The primary purpose of the Bill is to end free movement of persons into the UK. The Bill makes EU, EEA and Swiss nationals and their family members subject to UK immigration controls. It makes provision in relation to Irish citizens. It revokes legislation concerning cross-border co-operation and information-sharing in relation to migrants. The immigration provisions are Part 1 of the Bill. This subject matter is reserved to the UK Parliament.
12. The Bill also gives power to make regulations to amend the law which, on the UK's exit from the EU, will become the retained EU law governing social security co-ordination, as currently set out in five EU Regulations ("the SSC Regulations"). The SSC Regulations are the reciprocal framework for protecting the social security rights of people moving between EEA States (and Switzerland): they require equal treatment in access to benefits, allow certain benefits to be "exported" and allow periods of social security insurance in different states to be aggregated. They cover specific benefits including unemployment, sickness, disability, family and old age.

Description of the power

13. The Bill gives the power to amend the SSC Regulations to the UK Government and/or, as appropriate, to the Scottish Ministers and the other devolved authorities. This is Part 2 of the Bill. Some aspects of the SSC Regulations (which Part 2 gives the power to modify) are reserved and some are devolved. It is the devolved social security aspects that are the subject of the LCM.

14. The delegated power can be summarised as:

Clause 5: power to modify retained direct EU legislation relating to social security co-ordination

- **Power conferred on: Secretary of State or the Treasury; the Scottish Ministers; or a Minister of the Crown acting jointly with the Scottish Ministers.**
- **Power exercised by: regulations made by statutory instrument**
- **Parliamentary procedure: affirmative**

15. The power to make regulations includes:

- power to make different provision for different categories of person to whom they apply, for example to define categories by reference to a person's date of arrival in the UK, their immigration status or nationality (clause 5(3)(a))
- power to make supplementary, incidental, consequential, transitional, transitory or saving provision (clause 5(3)(c)), which includes power to modify any provision made by or under primary legislation and other retained direct EU legislation beside the SSC Regulations (clause 5(4))
- power to provide for a person to exercise a discretion in dealing with any matter.

16. The clause also provides that any directly effective rights and remedies etc. which will become domestic law on EU withdrawal under section 4 of the European Union (Withdrawal) Act 2018 will cease to apply in so far as they are inconsistent with, or are otherwise capable of affecting the interpretation or application of, provision made by the regulations (clause 5(5)).

Purpose of the power

17. As is normal for UK Bills, there is no delegated powers memorandum by the Scottish Government available for the Committee's consideration. The UK Government has published a delegated powers memorandum for the Bill as a whole (the 'UK DPM')ⁱⁱⁱ. The UK DPM sets out the purpose of the power, why the UK Government considers that a delegated power is appropriate, and the parliamentary procedure.
18. The Explanatory Notes to the Bill state that the power will allow the UK Government/Scottish Ministers "to reflect its preferred policy if no agreement is reached with the EU on social security co-ordination matters, or alternatively, to make changes to the regime covering those persons who fall outside the scope of any agreement that is made."^{iv}

iii The UK Government's Delegated Powers Memorandum is available [here](#).

iv [Explanatory Notes](#) to the Bill, paragraph 15.

Scope of the power

19. The Committee notes that the power is very wide. It is restricted in scope only by the scope of the SSC Regulations themselves. The UK Government acknowledges in the UK DPM that the power is broad, and states that it is necessarily broad so as to enable an appropriate authority to make suitable legislative provision for a range of post-exit scenarios that may arise.^v
20. The UK Government justifies the breadth of the power on the basis that it can only be used to modify retained direct EU legislation relating to social security co-ordination and to make consequential (etc.) provision to primary legislation or retained direct EU legislation.
21. The UK DPM suggests, as examples of the subject matter that may be under consideration in developing a framework for future social security co-ordination:
 - what access EU nationals will have in the future to certain UK benefits and pensions;
 - the extent to which UK nationals can “export” certain benefits and pensions if they move to an EU Member State; and
 - the administration and rules which govern entitlement and obligations when people live and work in more than one country.
22. The Committee notes that there is no sunset provision, so this power can be used without limit of time to make any provision in the field of social security co-ordination. This is significantly wider than the power to correct deficiencies arising on EU exit in section 8 of the European Union (Withdrawal) Act 2018 (“EU(W)A”), which is limited to making technical fixes and can only be used for two years after exit day.
23. In relation to the provision that EU-derived rights which are inconsistent with (or are otherwise capable of affecting the interpretation of) regulations made under this power will “cease to be recognised and available in domestic law” (clause 5(5)), the Committee considers that it would be useful to know which directly effective rights etc. this will apply to in the devolved social security context.^{vi}

^v UK DPM, paragraph 26.

^{vi} This provision is mentioned, without elaboration, in the [Explanatory Notes](#) to the Bill, paragraph 42. There is a similar provision in the immigration context, in Schedule 1, Part 3, paragraph 9 of the Bill, which disapplies directly effective rights where they would be inconsistent with domestic immigration legislation. The Explanatory Notes contain more information in relation to the latter provision, including an example and a list of directly effective rights which are relevant (paragraphs 76 and 77).

Who will exercise this power, and how will this be decided?

24. The Committee notes that under the Bill there are three routes under which the power may be exercised within devolved competence to amend the retained SSC Regulations:
- Regulations made by the Scottish Ministers acting alone and laid in the Scottish Parliament;
 - Regulations made by UK Ministers acting alone and laid in the UK Parliament;
 - Regulations made by UK Ministers and Scottish Ministers acting jointly and laid in both Parliaments.
25. The Bill does not regulate how decisions are to be made as to which Ministers should exercise the concurrent powers. Nor do the LCM and the accompanying documents to the Bill explain how the Scottish and UK Governments anticipate making those decisions.
26. The Committee considered each of these three legislative routes to exercise of the powers in turn.

Route 1: Regulations made by the Scottish Ministers acting alone and laid in the Scottish Parliament

27. Clause 5 of the Bill gives the Scottish Ministers the power to make regulations modifying the SSC Regulations and to make consequential etc. provision.
28. This power is exercisable only within devolved competence (Schedule 2, paragraph 1). This is defined in the Bill as either (i) provision that would be within the legislative competence of the Scottish Parliament or (ii) provision that the Scottish Ministers, First Ministers or Lord Advocate acting alone could make in other subordinate legislation.^{vii}
29. The power can therefore be exercised by the Scottish Ministers in relation to those aspects of social security which were devolved by the Scotland Act 2016 and which are covered by the SSC Regulations, which includes disability living allowance and carer's benefit.
30. There are restrictions in Schedule 2 which require the Scottish Ministers to (i) consult the UK Government, (ii) obtain its consent or (iii) act jointly with the UK Government if the Scottish Ministers would be required to do so in order to make the same provision by other means.

^{vii} In determining what is within devolved competence, the restrictions preventing Scottish Ministers from acting incompatibly with EU law (sections 29(2)(d) and 57(2) of the Scotland Act 1998) are to be ignored (Schedule 2 of the Bill, paragraphs 2 and 8).

Committee consideration

31. The Committee notes that this is an unusually wide power with no sunset provision, but accepts that the explanation in the UK DPM provides justification for this proposed power in principle in the context of preparing for a potential ‘no deal’ exit from the EU.
32. The Committee is content that the affirmative procedure is appropriate for all regulations made by the Scottish Ministers under this power, given the importance of the subject matter.
33. **The Committee finds this power to be acceptable in principle (in so far as it is delegated to the Scottish Ministers), and is content that the affirmative procedure is appropriate.**

Route 2: Regulations made by UK Ministers acting alone and laid in the UK Parliament

Committee consideration

34. The power is capable of exercise within devolved competence by the Secretary of State or Treasury, acting alone. The Scottish Parliament has power to legislate for matters within devolved competence. The Committee emphasises that as a matter of principle the Scottish Parliament should have the opportunity to scrutinise exercise of its powers by the executive. However it notes that the Scottish Parliament has no formal role in relation to the scrutiny of secondary legislation passed by UK Ministers acting alone.
35. Neither the LCM nor the accompanying documents for the Bill explain why it is appropriate for the power to be conferred concurrently on UK and Scottish Ministers, nor under what circumstances it will be appropriate for UK Ministers to exercise the power.
36. The Committee also notes that no provision is made on the face of this Bill for consent of the Scottish Ministers to be obtained prior to exercise of the power within devolved competence by the relevant UK Minister or Treasury. As noted in the Committee’s report on the Bill for the European Union (Withdrawal) Act,^{viii} the Committee considers that “UK Ministers should only be able to legislate in devolved areas with the consent of the devolved administration”.
37. However as the Committee continued in that report^{ix}:

“While the Committee believes that the Bill would be strengthened by requiring the consent of the devolved administrations before UK Ministers can legislate in devolved areas, the Committee believes that there needs to be a process for the Scottish Parliament to scrutinise the Scottish Ministers’ decision to consent before consent is given.”

viii Reported in [DPLRC 54th Report](#), 2017 (Session 5), paragraph 107

38. The Committee reaches the same conclusion on this point of principle in relation to the current Bill. It recommends that there should be a process whereby the Scottish Parliament has the opportunity to scrutinise any decision by the Scottish Ministers to consent to regulations being made by the UK Minister, in advance of that decision being made.

Recommendations

39. **The Committee emphasises that as a matter of principle the Scottish Parliament should have the opportunity to scrutinise exercise of legislative powers within devolved competence.**
40. **Had the Committee more time, it would have sought an explanation of why the power has been conferred on UK and Scottish Ministers concurrently, and the circumstances in which it is envisaged that it will be appropriate for the power to be exercised by the relevant UK Minister, as opposed to by the Scottish Ministers.**
41. **The Committee recommends that, where it is appropriate for the power to be exercised by the relevant UK Minister acting alone:**
- **the power should only be exercised where the consent of the Scottish Ministers has been obtained;**
 - **a process should be put in place to enable the Scottish Parliament to scrutinise any proposal by the Scottish Ministers to consent to the exercise of the powers by the relevant UK Minister, in advance of the consent being given.**

Route 3: Regulations made by UK Ministers and Scottish Ministers acting jointly and laid in both Parliaments

42. The Bill does not regulate how decisions are to be made as to where it would be appropriate for a Minister of the Crown and Scottish Ministers to act jointly, and there is no formal role for the Scottish Parliament to scrutinise the choice made.
43. A similar concurrent power was given in the EU(W)A, also without rules for when it would be used. In evidence to this Committee on the LCM for the EU(W)A Bill, Charles Mullin of the Law Society of Scotland highlighted that the circumstances in which this approach would be adopted were unclear, in contrast with the Scotland Act 1998 which makes clear when concurrent powers are to be exercised.^x
44. Chris Skidmore MP explained why provision had been made for it in the EU(W)A Bill^{ix}:

^{ix} At paragraph 113.

^x Reported in [DPLRC 54th Report](#), 2017 (Session 5), paragraph 140 onwards.

“At the moment, it provides a mechanism for allowing the devolved legislatures to scrutinise legislation. It is likely to be used when a devolved Administration requests that the UK Government legislate on its behalf but the appropriate change in order to retain EU law is so significant that we agree that it would be appropriate for the relevant devolved legislature to scrutinise the regulations, too.”

45. The Committee can see a similar value in having this procedure for modifications to retained EU social security law which are of such significance that joint scrutiny is appropriate. However, the Committee would have welcomed further clarity on the circumstances in which this procedure might be used, as there appears to be a risk that it may not be used.

Recommendation

46. **The Committee considers it appropriate that the power is capable of being exercised subject to joint procedure, for matters of such significance that scrutiny of the regulations in the Scottish Parliament is appropriate. The Committee would welcome further clarity on the circumstances in which it is envisaged the joint procedure would be used.**

