



RESPONSE

by

THE FACULTY OF ADVOCATES

to

**the CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE
COMMITTEE consultation on “How is Devolution Changing Post-EU?”**

The Faculty of Advocates is the independent referral Bar in Scotland. The Faculty is pleased to have the opportunity to respond to this consultation, although should make it clear at the outset that the Faculty does not seek to comment upon issues of policy.

We respond to the Committee’s Questions in turn:

Question 1: How devolution is now working following the UK’s departure from the EU including your experience of the policy-making and legislative processes?

So far as Scotland is concerned, devolved competence has been affected by the UK’s departure from the EU in different ways:

- Scotland no longer operates in the context of the European internal market, but explicitly within a UK internal market: we will return below to the United Kingdom Internal Market Act 2020.
- Prior to 31 December 2020 (i.e., the end of the transition period which followed the UK’s withdrawal from the EU), there was a body of EU law which applied in Scotland and which limited the ability of the Scottish Parliament to legislate. This limit applied from the passage of the Scotland Act 1998 until 30 December 2020. For the period 31 December 2020 until 30 March 2022, there was effectively a prohibition on the Scottish Parliament from modifying retained EU law, insofar as any such modification would have been outside legislative competence before 31 December 2020. That restriction was then repealed. Restrictions on the legislative competence of the Scottish Parliament in areas formerly regulated by EU law, including in areas which, as between the

Scottish and UK administrations, are devolved, are now contained in other statutes, primarily the United Kingdom Internal Market Act 2020.

- As the Committee are aware, the Retained EU Law (Revocation and Reform) Bill is currently being considered by the UK Parliament. The Faculty would refer to its evidence to this Committee on the subject of that Bill, and its possible impact upon the devolution settlement.

With specific reference to policy-making, the Faculty necessarily will have limited experience in this area, but might usefully make two points, one general, and one specific:

- The general point is that whilst it is welcome when bodies in Scotland, Wales and Northern Ireland are consulted by the UK Government on possible devolution aspects or considerations arising from pan-UK legislation, this should not be to the exclusion of those bodies' input on policy-making in reserved matters. Such bodies will equally have valuable experience and views with regard to reserved matters, and it should not be thought that their input has to be confined to the devolution aspect.
- The specific point relates to the Domestic Advisory Group which was set up by the UK Government as a consultative body to enable the UK Government to hear from those affected by the operation of the UK-EU Trade and Cooperation Agreement. Members of this Group include the Bar Council of England & Wales, and the Law Society of England & Wales. However, thus far, the equivalent Scottish bodies (the Faculty of Advocates and the Law Society of Scotland) have been denied membership of the Group. The Faculty cannot see any logical justification for this exclusion.

Question 2: How should devolution evolve post EU exit, to meet the challenges and opportunities of the new constitutional landscape?

The Faculty cannot comment on policy issues. However, from a legal perspective, it may be said that it must be recognised that the UK's withdrawal from the EU has impacted the UK's constitutional landscape, and hence the operation of devolution within that landscape; both in terms of the general constitutional context, and in the detailed interaction of the new legal architecture with the pre-existing devolution settlement.

Question 3: How much scope there is for regulatory divergence in areas such as environmental standards, food standards and animal welfare between each of the four parts of the UK?

One of the key issues to consider in this regard is the United Kingdom Internal Market Act 2020. The 2020 Act sets out ‘the mutual recognition principle’ and ‘the principle of non-discrimination’ which, together, disapply conditions which could limit the sale of goods in Scotland when those goods have been produced in another part of the UK and meet requirements for such goods in that part. Analogous restrictions apply in the provision of services, whereby authorisation or regulatory requirements are of no effect if they contravene the principles of mutual recognition or non-discrimination. With its broad exemptions for public policy objectives, the ‘single market’ regime to which the Scottish administration was subject when the UK was a member of the EU had wider scope for divergence than is now the case under the 2020 Act. In the Faculty’s response to the White Paper which preceded the 2020 Act, we suggested that there was scope for inclusion of a further principle to protect the ability of the devolved administrations to pursue specific objectives for their territories. This would have been in line with the stated position of the UK Government that ‘Every decision that a devolved administration could make before exit day they can make afterwards’,¹ and the recognition of the value of ‘the same degree of flexibility for tailoring policies to the specific needs of each territory as was afforded by the EU rules’.² At present, no such additional principle exists within the UK Internal Market regime. This affects the capacity of the devolved administrations to adopt measures directed, for example, at improving the health of the population within their territory or the environment within which people there live and work

Question 4: Are there sufficient safeguards to allow regulatory divergence across the four parts of the UK in areas where there are disagreements between governments?

We refer to the answer to Question 3.

Question 5: Are there sufficient safeguards to ensure an open and transparent policy-making and legislative process in determining the post-EU exit regulatory environment?

We refer to the answers to the preceding Questions.

¹ Department for International Trade website, Guidance dated 20 March 2020 <https://www.gov.uk/government/publications/trade-bill/trade-bill>

² Internal Market White Paper, 2020, paragraph 89.

Question 6: Is there sufficient clarity regarding the post-EU exit regulatory environment within Scotland and how it relates to the rest of the UK?

We refer to the answers to the preceding Questions.