The Scottish Parliament—Written evidence (LEG0043)

Following the result of the EU referendum, the Scottish Parliament’s Culture, Tourism, Europe and External Relations Committee launched a wide ranging inquiry into the potential implications of withdrawal from the EU for Scotland. As part of this work, the Committee commissioned Alan Page, Professor of Public Law at Dundee University to conduct research into the implications of withdrawal for the devolution settlement.

I attach [a web link ] to Professor Page’s report and I would, in particular, draw your attention to paragraph 13 of the report in which Professor Page states—

“… as with the transposition of EU obligations since the UK joined the EU in 1973, it is difficult to see the relationship between EU law and UK law being unpicked without heavy reliance on subordinate legislation. Under the Scotland Act the power to make such legislation will be exercisable by the Scottish Ministers in areas of devolved competence (SA 1998, s 53(1)). The question that will arise is whether it should be exercisable by UK Ministers as well, as is currently the case with the transposition of EU obligations in the devolved areas (SA 1998, s 57(1)). This would then open up the possibility of relying on UK subordinate legislation in disentangling UK law from EU law, which in turn raises the question of Scottish parliamentary control over such legislation. At the moment there is no requirement of the Scottish Parliament’s consent to UK subordinate legislation transposing EU obligations in the devolved areas; nor is the Parliament routinely informed about such legislation. Were obligations to be transposed by UK Act of Parliament the Scottish Parliament’s consent would be required, but if they are transposed by subordinate legislation its consent is not required. The situation could thus arise in which the UK legislated extensively in areas devolved to Scotland without seeking the consent of the Scottish Parliament as there would be no requirement of its consent in relation to subordinate legislation altering the effects of EU law in the devolved areas. In my view, this represents a significant potential gap in the framework of Scottish parliamentary control over UK law making in the devolved areas, which the Scottish Parliament should be alert to the need to close should UK Ministers be given the power to revise EU law in the devolved areas.

Professor Page also comments on the impact of withdrawal on the Scottish Parliament, observing--

“As well as the withdrawal negotiations, UK matters that will be of particular interest to the Parliament will include the withdrawal legislation as well as legislation providing for the legal consequences of any future relationship with the EU. The Parliament itself will need to put in place new regulatory regimes for agriculture and fisheries. And then there will be the legislation, UK as well as Scottish, much of it secondary, disentangling UK law from EU law, where the scale of the challenge will depend in part on the approach adopted by the Scottish Government - will it be content to follow the UK or EU approach or will it prefer to devise its own approach?”

I would invite you to consider Professor Page’s report as part of your inquiry into the creation, use and scrutiny of delegated powers, in advance of the introduction next year of a ‘Great Repeal Bill'