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UK Withdrawal from the European Union (Continuity) (Scotland) Bill [2020] Parts 1 and 3- Consideration prior to Stage 3

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This briefing looks at parliamentary consideration of Parts 1 and 3 of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill prior to Stage 3 which is scheduled to take place on 22 December 2020.



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Summary

- The Scottish Government introduced the [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Bill](#) on 18 June 2020.
- Part 1 (section 1(1)) of the Bill provides for the introduction of a power to enable Scottish Ministers to continue to keep Scots law aligned with EU law. Part 3 includes general sections including on the purpose and effect of the Bill and commencement.
- The Finance and Constitution Committee considered Parts 1 and 3 of the Bill at Stage 1. The Committee supported the general principles of the Bill. However, it expressed concerns about how the keeping pace power might be used, the duration of the power and the opportunities for parliamentary oversight of use of the power.
- The Environment, Climate Change and Land Reform Committee considered Part 2 of the Bill at Stages 1 and 2.
- The Delegated Powers and Law Reform Committee considered all the powers in the Bill at Stage 1. The Delegated Powers and Law Reform Committee reported that the section 1(1) power "is a significant delegation of the Parliament's legislative power, wide enough to enable regulations on matters which would normally be contained in primary legislation."
- The [Stage 1 debate](#) took place on 29 October 2020. Following the Stage 1 debate, the Parliament approved the general principles of the Bill by 87 votes to 27 votes with no abstentions. The Conservative Party members of the Committee voted against the Bill.
- Part 1 of the Bill was amended at Stage 2 by the Finance and Constitution Committee at its meeting on 25 November 2020. In total the Committee considered 49 amendments though not all were moved to a vote.
- Key amendments made to the Bill at Stage 2 focussed on:
 - Duration of the section 1 power (section 3 of the Bill)
 - Policy statement on the section 1(1) power (new section 4A of the Bill)
 - Explanatory statements (section 6 of the Bill)
 - Reports relating to the exercise of the section 1(1) power (section 7 of the Bill)
- A number of amendments were withdrawn at stage 2 with a view to the Scottish Government reflecting on the issues raised ahead of stage 3. These included:
 - Purpose of the keeping pace power
 - Regulations that authorise any Scottish public authority to delegate functions
 - Pre-laying scrutiny of regulations - a sifting mechanism
- Stage 3 will take place on 22 December 2020.

About the Bill

The Scottish Government introduced the [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Bill](#) on 18 June 2020. SPICe published two briefings on the Bill as introduced.

- [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Bill: Parts 1 and 3](#)
- [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Bill - Part 2 -Environmental Principles and Governance](#)

Some areas of law have always been determined at a UK level. For areas of law which are derived from the European Union (EU), the UK must continue to comply with that EU law until the end of the implementation period (also called the transition period) on 31 December 2020. From 1 January 2021, the UK will no longer need to comply with EU law. Responsibility for policy in areas which were previously dealt with at EU level will lie with the UK Government and/or the devolved governments.

Part 1 of the [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Bill](#) (the Continuity Bill) is concerned with continued alignment with EU law following the end of the implementation period (i.e. the point at which Scotland as part of the UK no longer needs to comply with EU law).

Part 1 (section 1(1)) of the Bill provides for the introduction of a power to enable Scottish Ministers to continue to keep Scots law aligned with EU law. The power allows Ministers to keep pace with EU law 'so far as appropriate' following the end of the implementation period (31 December 2020). As such, the power conferred by section 1(1) will be used at the discretion of Scottish Ministers to align Scottish laws to the laws of the European Union.

Consideration at Stage 1

The Finance and Constitution Committee and the Delegated Powers and Law Reform Committee considered Parts 1 and 3 of the Bill at Stage 1.

Finance and Constitution Committee

Parts 1 and 3 of the Bill were considered by the Finance and Constitution Committee over the course of 4 evidence sessions. The committee heard from the following witnesses:

19 August 2020: The Committee [took evidence](#) from-

- Emma Lopinska, Constitutional Policy Manager, Charles Stewart Roper, Head of Environmental Strategy, Lorraine Walkinshaw, Solicitor, SGLD and Francesca Morton, Solicitor, SGLD.

26 August 2020: The Committee [took evidence](#) from-

- Professor Michael Keating, University of Aberdeen; Professor Aileen McHarg, Durham University and then from Kenneth Cambell QC, Faculty of Advocates; Michael P Clancy OBE, Law Society of Scotland.

2 September 2020: The Committee [took evidence](#) from -

- Lloyd Austin, Scottish Environment LINK and Jonathan Hall, NFU Scotland and then from Councillor Steven Heddle, Convention of Scottish Local Authorities and Mhairi Snowden, Human Rights Consortium Scotland.

9 September 2020: The Committee [took evidence](#) from -

- Michael Russell MSP, Cabinet Secretary for the Constitution, Europe and External Affairs, Scottish Government.

The Committee published its [Stage 1 report](#) on 7 October 2020 ¹. The Committee supported the general principles of the Bill. In its report, the Committee highlighted a number of areas where it believed the Bill could be amended. These included that the use of the 'keeping pace' power should not be entirely at the discretion of Scottish Ministers and that there needs to be much greater clarity on how Ministers propose to use the power.

The Committee also recommended that the Bill should be amended to require the Scottish Government to provide guidance setting out the criteria which will apply to the use of the 'keeping pace' power. The Committee recommended that guidance should also clearly set out how the keeping pace power will interact with other sources of regulation which will impact on people and businesses in Scotland. This should, the Committee concluded, include the impact of trade deals, [common frameworks](#) and the operation of the UK internal market.

Finally the Committee recommended that the Bill should provide a clear scrutiny role for the Scottish Parliament in relation to the use, or otherwise, of the keeping pace power. .

The Committee welcomes the commitment from the Cabinet Secretary to work with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. It is, therefore, essential that the Parliament gives serious consideration to the level of scrutiny of the keeping pace power which would be both appropriate and proportionate.

Specifically, what role should the Parliament, stakeholders and wider public have in relation to—

- the decision on whether or not to keep pace;
- early engagement in the policy development process especially where there are opportunities for ministerial discretion in how to keep pace.

The Parliament also needs to consider what level of information the Scottish Government should be required to provide to support the scrutiny process. Section 7(1) of the Bill requires the Scottish Government to provide a report to Parliament, on at least an annual basis, on how it has used the keeping pace power.

The Committee notes that if the Parliament wishes to have a more proactive role in influencing the use of the keeping pace power then this requirement is likely to be insufficient. One alternative option could be to amend the Bill to require Ministers to provide an annual report setting out its —

- assessment of EU legislative priorities for the coming year;
- own priorities for the use of the keeping pace power including areas where it does not propose to keep pace.

The Committee recognises that until now the Parliament has had a very limited role in the relation to the EU policy development process. The critical question for the Parliament and its committees is the extent to which that now needs to change in the context of the proposed decision-making framework discussed above.

Other issues highlighted in the Committee's report include:

- How the keeping pace power will actually be used and specifically whether the extent of the secondary powers in the Bill are appropriate.
- The extent to which the keeping pace power may be subject to statutory and non-statutory constraints such as the UK Internal Market Bill and common frameworks.
- The resources required to monitor EU legislative developments and to scrutinise the Scottish Ministers' use of the keeping pace power.
- The sunset clause provision in the Bill

The Scottish Government response to the Committee's report

On 27 October 2020, the [Scottish Government responded](#) to the Finance and Constitution Committee's stage 1 report. In the response, the Government made the following commitments:

- That it will publish the guidance which will be used to inform decisions on the use of the keeping pace power.
- This will include guidance on how Scottish Ministers intend to approach consultation when considering regulations under section 1(1).
- The Scottish Government will engage with the Scottish Parliament about what mechanisms might be best put in place to ensure an appropriate role for the Parliament and others in developing a decision making framework for the use of the keeping pace power.
- The Scottish Government will provide a regular report addressing the EU's upcoming legislative priorities, and how they may impact on devolved interests.

Delegated Powers and Law Reform Committee consideration

The delegated powers contained in the Bill were considered by the Delegated Powers and Law Reform Committee. The Committee agreed at its meeting on 8 September 2020 to draw a number of themes relating to the keeping pace power in section 1(1) of the Bill to the attention of the lead committee in writing. Those themes were:

1. the appropriateness of the power in principle;
2. the general constraints on the exercise of the power in practice;
3. sub-delegation;
4. scrutiny procedures;
5. engagement; and
6. the sunset clause.

According to the Committee's Stage 1 report, the first three themes focus on the width of the power and its effect in practice. The final three themes concentrate on how the Parliament could ensure appropriate oversight of the power.²

In its [Stage 1 report](#) the Committee concluded that the section 1(1) power was a very wide power:

“ The power to keep pace with EU law in section 1(1) is a significant delegation of the Parliament's legislative power, wide enough to enable regulations on matters which would normally be contained in primary legislation. It is available for use across the full range of policy areas currently governed by EU law, and affords the Scottish Ministers a choice as to whether or not to keep pace with individual developments in EU law following the UK's exit from the EU.”

Scottish Parliament Delegated Powers and Law Reform Committee, 2020²

In relation to the section 1(1) power, the Committee reached the following conclusions:

“ The Committee recognises the Scottish Government’s position that it would be impracticable to require that changes to domestic law to keep pace with EU law were exclusively made by primary legislation. However, it considers that a distinction can be drawn between provision made under the keeping pace power which seeks to refine retained EU law after the end of the implementation period to ensure that it continues to work effectively, and more fundamental provision keeping pace with significant new policy developments in future EU law where there is no equivalent in retained EU law. The Committee remains uncertain as to whether the width of the power to keep pace with EU law in section 1(1) of the Bill is appropriate. It suggests that the power might be limited by only being available to ensure that existing standards in retained EU law keep pace with evolving EU standards in technical areas. The Committee considers that primary legislation is the most appropriate vehicle for domestic law to implement significant new policy proposals that have no equivalent in retained EU law. This applies particularly to EU Directives, which confer discretion as to how to achieve a particular result and which commonly have long implementation deadlines.”

Scottish Parliament Delegated Powers and Law Reform Committee, 2020²

The Delegated Powers Committee also highlighted that section 1 of the Bill allows Scottish Ministers to sub-delegate the section 1(1) power to make an instrument of a legislative character or provide funding to a Scottish public authority (whether or not established for the purpose), or to any person whom the authority authorises to carry out functions on its behalf.

“ The Committee recognises that powers to legislate contained in EU delegated and implementing acts may in some circumstances be technical in nature. However, it considers that the ability to sub-delegate legislative or funding powers to a Scottish public authority, or such an authority’s nominee, is particularly significant. While a similar ability to sub-delegate formed part of the power to correct deficiencies conferred on UK and Scottish Ministers under the 2018 Act, that applies in the context of deficiencies in existing EU law, rather than future EU law which may or may not be implemented in full.”

Scottish Parliament Delegated Powers and Law Reform Committee, 2020²

The Committee concluded that this issue should be addressed at stage 2 by the lead committee:

The Committee also considered the procedure that would be used for considering regulations made under the section 1(1) power. Noting that the Bill includes scrutiny procedures that apply to regulations made under the keeping pace power in section 1(1) of the Bill that are different than those that applied to the equivalent power in the 2018 Continuity Bill ([more information on the previous Continuity Bill is included in the SPICe briefing on Parts 1 and 3 of this Bill](#)), the Committee concluded that:

“ The Committee agrees with the Scottish Government’s position that parliamentary scrutiny should be proportionate and accepts its rationale for including a choice of procedure (known as an “either-way provision”) that would apply to keeping pace regulations. The Committee considers that it would be disproportionate to apply a sifting mechanism to allow committees to change the parliamentary procedure that applies to regulations laid under the keeping pace power. Instead, the Committee considers that the Parliament should focus on early engagement in the policy process, rather than debating the parliamentary process that applies once policy proposals have been finalised in regulations. Further observations on this point are made under the engagement theme below. The Committee reiterates its position stated at paragraph 39 above, in relation to the appropriateness of the power in principle, that primary legislation is the appropriate vehicle for keeping pace with significant new policy developments in future EU law with no equivalent in retained EU law. However, in the event that the power is not amended to that effect, the Committee recommends that the choice of procedure is expanded to include the super-affirmative procedure. This would allow Ministers to apply a super-affirmative procedure where keeping pace regulations would implement significant new policy proposals from EU law that do not exist in retained EU law. In addition, the Bill could also be specifically amended to require that a super-affirmative procedure applies to keeping pace regulations that implement EU Directives in new policy areas where there is no equivalent in retained EU law. The Committee considers that the chosen form of super-affirmative procedure should include a requirement for a pre-scrutiny draft of the instrument to be laid before the Parliament together with an explanatory note. The period for comments should be at least 60 days and should be accompanied by a requirement for the Scottish Government to formally consult publicly. The Government should be required to consider any representations made and to outline in an accompanying statement whether or not any amendments have been made to the draft instrument in light of them. A final version would then be laid before the Parliament for approval under the affirmative procedure.”

Scottish Parliament Delegated Powers and Law Reform Committee, 2020²

On the duration of the power, the Committee concluded that consideration should be given to amending section 3 of the Bill to reduce the length of the expiry provisions that apply to the keeping pace power.

Stage 1 debate

The [Stage 1 debate](#) took place on 29 October 2020. At the beginning of the debate, the Cabinet Secretary for the Constitution, Europe and External Affairs made two commitments in terms of the Scottish Ministers' use of the power:

“ The power in section 1 is intended to give ministers an appropriate way to recognise in domestic law the high standards that are represented by EU law. I have, of course, heard the calls for greater clarity on the principles that underpin how that power will be exercised, and I agree with those who say that the nature and breadth of EU law makes trying to define those in the bill almost impossible. However, if the bill passes at stage 1 today, I will commit to publishing guidance on the factors that ministers will have to consider. I have also heard calls for the Parliament to reflect on the role that it and stakeholders should play in scrutinising regulations. That is, of course, an important issue with every bill. Some people have suggested that primary legislation should be required instead, and there is a role for primary legislation in areas of major innovation, but to make all legislative changes, however small and technical, through primary legislation would be, and always is, disproportionate.”

Scottish Parliament, 2020³

In terms of giving Parliament a role in the process of deciding what the keeping pace power should be used for, the Cabinet Secretary said:

“ Subject to Parliament’s agreement, I will engage further to agree a way of working together that not only addresses the point that Liz Smith has made but gives Parliament as early a role as possible. That could involve regular reporting by ministers on forthcoming EU legislation and its interaction with devolved areas, as well as a discussion on the most appropriate procedure for any legislation. I will also lodge an amendment that requires ministers to make a statement to accompany regulations under this power, which will set out the consultation that has taken place with local government and others.”

Scottish Parliament, 2020³

The Cabinet Secretary also committed to introducing an amendment to require a further statement to accompany regulations made under the keeping pace power. Such a statement would explain the effect of any regulations on human rights.

Speaking after the Cabinet Secretary, the Convener of the Finance and Constitution Committee, Bruce Crawford MSP, set out the Committee's view on the Bill reflecting the contents of the Committee's Stage 1 report:

“ My committee—with the exception of our Conservative colleagues—supports the principle of the keeping pace power as it exists in the bill, but the committee does not accept that the use of the power should be entirely at the discretion of the Scottish Government. The committee recommends that the bill should be amended to require the Scottish Government to provide guidance setting out the criteria that will apply to the use of that power. The guidance should also set out clearly how the keeping pace power interacts with other sources of regulation that will impact on people and businesses in Scotland. That should include the impact of trade deals, common frameworks and the operation of the UK internal market. The committee welcomes the commitment from the cabinet secretary to work with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. I am therefore pleased that the cabinet secretary has committed to publishing such guidance. However, given that future Governments might not always be as accommodating as the current one, there might still be room for further discussion on the matter. It is therefore essential that the Parliament gives serious consideration to the level of scrutiny of the keeping pace power that would be appropriate and proportionate. Specifically, what role should Parliament, stakeholders and the wider public have in relation to the decisions on whether to keep pace and to early engagement in the policy development process, especially when there are opportunities for ministerial discretion in how to keep pace?”

Scottish Parliament, 2020³

The Finance and Constitution Committee Convener also addressed the question of when use of the keeping pace power would be appropriate, telling the Parliament:

“ A key question for the committee is whether the extent of the secondary powers in the bill is appropriate. As colleagues will be aware, the keeping pace regulations in the bill are subject to either the affirmative or the negative procedure. The committee recognises that it might be necessary and acceptable for minor and technical amendments to be made quickly by subordinate legislation to refine retained EU law. However, the committee’s view is that further consideration is needed in relation to the implementation of significant new policy proposals that have no equivalent in retained EU law. The committee therefore recommended that the Scottish Government give serious consideration to the Delegated Powers and Law Reform Committee’s view that primary legislation is the most appropriate vehicle for domestic law to implement significant new policy proposals that have no equivalent in retained EU law, and that that applies particularly to EU directives. In the event that the power is not amended to that effect, the committee recommends that the choice of procedure is expanded to include the superaffirmative procedure.”

Scottish Parliament, 2020³

Speaking in opposition to the Bill, Conservative member Dean Lockhart MSP, told the Parliament:

“ The context for the debate is that Scotland is now facing an unprecedented recession, with its economy declining by 20 per cent and unemployment increasing rapidly. Following the additional restrictions that were announced earlier today, the Parliament’s priorities must be to protect jobs and livelihoods and to rebuild Scotland’s economy. However, instead, we are debating a continuity bill that will do the opposite—a piece of legislation that will impose barriers to trade, increase the cost of doing business and ultimately, I am afraid, cost jobs and livelihoods across Scotland. There is no doubt that this bill will damage Scotland’s trade with the rest of the UK and beyond. Those are not just my views; they are concerns that were raised by stakeholders who gave evidence to the Finance and Constitution Committee.”

Scottish Parliament, 2020³

Dean Lockhart MSP also said that an implication of the keeping pace provision would be confusion for Scottish business, required to comply with multiple different regulations:

“ By keeping pace with some—but not all—future EU laws, the bill will require firms in Scotland to comply with myriad divergent regulations, including: devolved law that keeps pace; devolved law that does not; and different regulations in other parts of the UK that no longer follow EU regulations. The committee heard evidence that that would lead to Scotland becoming a “regulatory no man’s land”, with the inevitable consequence of the proposals being that they will increase the expense and complexity of doing business, increase costs for consumers and, at the end of the day, cost jobs and livelihoods—all at a time when thousands of businesses across Scotland are already struggling to survive under Covid restrictions.”

Scottish Parliament, 2020³

Mr Lockhart also highlighted evidence heard by the Finance and Constitution Committee that EU legislation is, in many cases, based on reciprocal arrangements between member states . As the UK would no longer be a member state, adoption by Scotland could lead to practical difficulties with keeping pace. . The Conservative member also highlighted the view of a number of witnesses who suggested the keeping pace power is a “substantial Henry VIII power”ⁱ that is:

“ a power that will enable Scottish ministers to introduce new laws, including significant new policies, by means of secondary legislation without any parliamentary scrutiny or consultation with stakeholders.”

Scottish Parliament, 2020³

Scottish Labour MSP Alex Rowley told the Parliament that the Labour Party supported the general principles of the Bill, but echoed the calls of the Finance and Constitution Committee by adding that where future changes in EU law involve substantial policy considerations it was important that the Parliament and stakeholders have the opportunity to scrutinise and influence. He also made the case for guidance on the use of the keeping pace power, stating that:

“ The Government must set out detailed guidance on how those powers would be used and alternative processes for when consultation would be required.”

Scottish Parliament, 2020³

Speaking for the Scottish Liberal Democrats, Liam McArthur MSP indicated the party's

ⁱ Henry VIII clauses or powers enable Ministers to amend or repeal provisions in any Act using secondary legislation.

support for the general principles of the Bill. However, he added that the Bill should not leave Scottish Ministers to decide when and when not to keep pace with EU law. Mr McArthur said:

“ Another problem that the Government will have to address at stage 2 stems from the power that the bill gives ministers to keep pace while not requiring them to do so. Nobody else is allowed to insist that ministers keep pace; as things stand, only ministers can choose to do so. I was struck by the fact that Mr Russell told the Finance and Constitution Committee that “those who are opposed to any keeping pace could frustrate the legitimate will of the Scottish people to keep pace with high standards.”—[Official Report, Finance and Constitution Committee, 9 September 2020; c 6.] However, he then spent the rest of his time saying that he would not keep pace with everything, for a whole series of reasons. Therefore, it turns out that he might yet find himself in the position of frustrating the legitimate will of the Scottish people.”

Scottish Parliament, 2020³

Some other key issues raised during the debate include:

- The importance of Scotland having the power to keep pace with EU law where it wishes to.
- The potential for the use of the keeping pace power to be subject to a lack of effective parliamentary scrutiny.
- The fact that as drafted the Bill allows Scottish Ministers to decide when to keep pace with EU legislation - legislation which Scotland has had no influence in the development of.
- That more information on how the power will be used by Ministers and how it will be scrutinised by the Parliament is necessary.

Following the Stage 1 debate, Parliament approved the general principles of the Bill by 87 votes to 27 votes with no abstentions. The Conservative members voted against the Bill.

Consideration at Stage 2

Part 1 of the Bill was amended at Stage 2 by the Finance and Constitution Committee at its meeting on 25 November 2020.⁴ In total the Committee considered 49 amendments though not all were moved to a vote⁵.

Key Amendments made at Stage 2

The Finance and Constitution Committee agreed a number of amendments at Stage 2. These focussed on:

- Duration of the section 1 power (section 3 of the Bill)
- Policy statement on the section 1(1) power (new section 4A of the Bill)
- Explanatory statements (section 6 of the Bill)
- Reports relating to the exercise of the section 1(1) power (section 7 of the Bill)

Duration of the section 1 power

The Bill as introduced provided that the Scottish Ministers' power to keep pace expired ten years from the date it came into force. In addition, Scottish Ministers could, on a rolling basis, extend that 10-year period by periods of up to five years. There was no limit on the number of times the power could be renewed for further periods of up to five years.

Government amendments 15 and 16 proposed a restriction on the maximum duration of the keeping pace power. Moving amendments 15 and 16, the Cabinet Secretary explained their purpose:

“ Amendments 15 and 16 are intended to restrict the maximum duration of the section 1(1) power to a total of 10 years from commencement, while reducing the initial duration of that power to a period of six years. I am not going to get involved in speculation about what might happen within the 10-year period that might affect that; I am simply going to address the legislation as it is now and as it might be. Amendment 16 allows the initial six-year period to be extended, subject to the approval of Parliament, on one or more occasions. That power may not be used to extend the duration of the section 1(1) power so as to exceed the overall maximum of 10 years. That means that no single extension, or combination of extensions, may amount to more than four years in total. That will afford the incoming 2026 Parliament, if it remains a devolved Parliament, the opportunity to decide in its first year whether the power to align is still necessary. It will also ensure that the power is available to the 2021 Parliament, and will therefore provide the stability that was sought by introducing the power. I invite the committee to support amendments 15 and 16.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

Both amendments were agreed without a division.

The Bill as amended at Stage 2 provides that the sunset provisions that apply to the keeping pace power do not begin until the day section 1(1) comes into force. This compares to the Delegated Powers and Law Reform Committee's Stage 1

recommendation that the sunset provisions should apply from when the Bill receives Royal Assent.

Policy statement on the section 1(1) power

Amendment 41 proposed by Tom Arthur MSP proposed new Section 4A titled "Policy statement on the section 1(1) power". Introducing his proposed amendment, Mr Arthur outlined the purpose of his amendment:

“ There have been different suggestions as to how we might make it [the need for Parliament to be sighted on the potential uses of the power to align] happen, but the danger in writing those into the bill in great detail is that, however well intentioned that approach might be, it ends up creating a restrictive provision that does not function properly and overburdens both Parliament and Government. Amendment 41 seeks to get to the heart of the matter in a way that is proportionate. We are concerned with understanding the Government’s intentions. We want to know how it will approach questions of alignment and the factors that it will take into consideration and we want to be able to measure its actions against that framework. The amendment requires ministers to “publish ... a statement of their policy on the factors to be taken into account when considering whether to use the power” to align “under section 1(1).” It deliberately does not go into specific detail about the precise contents of that statement because if the past few years have shown us anything it is that circumstances can change and change quickly. What seems to be a pressing issue today might be a footnote tomorrow, and vice versa. For that reason, the amendment also allows the Government to amend its policy statement whenever it is appropriate to do so and does not tie it to particular periods of time. I appreciate that the cabinet secretary has indicated that he is very happy to agree a way of working that gives Parliament an early involvement in consideration of any potential alignment and I see the policy statement as being part of that process. I know that colleagues will not be shy in letting the Government know if they do not think that the approach is right. The policy statement required by amendment 41 is a key means of facilitating that in a way that does not tie the Parliament up in overly bureaucratic processes. In conclusion, I see amendment 41 as a proportionate response to the concerns raised. It will allow Parliament to be sighted on the Government’s intentions in a way that does not render the bill inoperable and, on that basis, I ask colleagues to support it.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

The amendment was agreed by 10 votes to 1 with Patrick Harvie MSP voting against the amendment.

Explanatory Statements

Five amendments (four of which were Government amendments) were agreed on Section 6 on 'explanatory statements' . Amendment 17 proposed placing a requirement on Scottish Ministers to set out specifically what effect regulations made under section 1(1) might have on human rights. Moving the amendment, Cabinet Secretary Michael Russell MSP told the Committee:

“ We are proud of the close and constructive working relationship that exists between Government and civil society. Our shared commitment to making human rights real and to delivering equality for everyone is at the heart of what we do. I am glad that the consortium has raised the issue, and I am grateful for the time and assistance that it has afforded my proposals in preparing amendment 17. I invite the committee to support it.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

Amendments 18, 19 and 21 were minor technical amendments to change the word “equalities” to “equality” where it appears in the Bill.

The Scottish Government's other amendment (number 20) in this section placed a further requirement on Scottish Ministers to report. New section 6(5A) of the Bill requires Scottish Ministers to make an additional statement as to whether, in relation to the instrument or draft, the Scottish Ministers have consulted such persons appearing to them to be representative of the interests of local authorities, and any other person. If they have, the statement must set out details of the consultation that was carried out.

Although, Patrick Harvie MSP indicated he would support the amendment, he added that:

“ I want to be clear that the requirement in that amendment to report on consultation is not the last word on the matter. We will probably return to that at stage 3 as well, and there may be a majority to go further than the Government has gone with amendment 20. For the time being, however, I will support the amendments.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

Dean Lockhart MSP indicated that the Conservative members of the Committee would not support the amendment because:

“ it does not go far enough. It contains only a duty to report on whether a consultation has been carried out. It does not impose a duty to consult, and for that reason we do not believe that it is sufficient.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

The five Government amendments were agreed by the Committee.

Amendment 43 in the name of Murdo Fraser MSP, suggested a requirement be placed on Scottish Ministers to publish a statement that explains the likely financial implications of the regulations when laying before Parliament a draft instrument under section 1(1) . Explaining the amendment, Mr Fraser told the Committee:

“ The amendment came out of something that the committee heard in its stage 1 evidence, which was that some uses of the keeping pace power in section 1 could have cost implications—for example, the transfer of regulatory functions to existing public bodies in Scotland, and the creation of new public bodies. My amendment will require the Scottish ministers to add a financial statement to regulations to allow the Scottish Parliament to adequately scrutinise them. I welcome the Cabinet Secretary's comment that he has no objection to the proposal, which is helpful.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

The Cabinet Secretary argued that such an amendment would be unnecessary, "given that a business and regulatory impact assessment would be published to provide the Parliament with the effects of the provision for business and regulation". However, he

added the Scottish Government would not oppose the amendment which was subsequently agreed by the Committee.

Reports relating to the exercise of the section 1(1) power

A number of amendments were lodged in relation to Section 7 on "Reports relating to the exercise of the section 1(1) power".

The amendments proposed placing additional requirements on Scottish Ministers to set out to the Parliament how the section 1(1) power has been used and how Ministers intend to use it in the future. The timescale for the reporting period also came under scrutiny with a proposal to reduce it from 12 months to six months.

Government amendments 22 and 23 were agreed. The effect of the amendments being that Scottish Ministers must report on how they intend to use the section 1(1) power in the future.

Amendments 44, 45, 47, 48 and 49 proposed by Patrick Harvie MSP suggested significant changes to the requirements and reporting period set out in section 7 of the Bill.

Amendment 44 proposed that Scottish Ministers lay a report before Parliament setting out both Scottish Ministers' intended use of the power under section 1(1) in the next reporting period, and any use of the power under section 1(1) that has been considered, or is being considered, by the Scottish Ministers during the reporting period.

Amendment 45 proposed that a first forward-looking report be prepared and laid within two months of the power to align being commenced. Citing timing issues, the Cabinet Secretary explained why the Scottish Government opposed this amendment:

“ The problem with that is that the usual processes that need to be completed following stage 3 proceedings mean that commencement is not expected until March 2021. Scottish Parliament elections are scheduled for 6 May 2021, and the usual pre-election period restrictions will apply during the period leading up to that. Therefore, there would be a collision between a requirement of legislation and what will be happening electorally.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

Amendments 47 and 48 provided for the reporting period to be reduced from 12 months to six months. The reporting period sets the period of time in which Scottish Ministers must report to Parliament on the past and future use of the section 1(1) power.

Amendment 49 proposed that the Scottish Ministers lay each report on the way the section 1(1) power is used before the Parliament no later than 2 months after the end of the reporting period to which it relates.

All five of Patrick Harvie MSP's amendments passed by 6 votes to 5 with the votes against coming from the SNP members of the Committee.

Following on from the amendments to reduce the reporting period length to 6 months, the Cabinet Secretary moved amendment 25 to ensure the first reporting period would end on 31 August 2021. Amendment 25 was agreed. Government amendment 26 was also agreed by the Committee. This technical amendment sets out when the final reporting

period will take place stating that it will begin with the day after the end of the last period of one year and end with the day on which the power to make regulations under section 1(1) expires.

Withdrawn amendments at Stage 2

A number of amendments were withdrawn at stage 2 with a view to the Scottish Government reflecting on the issues raised ahead of stage 3.

These included:

- Purpose of the keeping pace power
- Regulations that authorise any Scottish public authority to delegate functions
- Pre-laying scrutiny of regulations - a sifting mechanism

More details on each of these amendments is provided below.

Purpose of the keeping pace power

Amendment number 6 in the name of Angela Constance MSP proposed a new section to the Bill setting out that the purpose of the Bill was to maintain alignment with EU law primarily in 6 policy areas:

- Environmental protection.
- Animal health and welfare.
- Plant health.
- Equality, non-discrimination and human rights.
- Social protection.
- Judicial cooperation.

Speaking to the amendment Angela Constance MSP said:

“ As things stand, there is no direction for ministers as to the power’s use, and transparency and accountability could be improved. Most of us want Scotland to align with the best of what comes out of the European Union. The Scottish Government shares that commitment. The concern is that, on leaving the EU, we take a step backwards and Scotland becomes the poor man of Europe on rights or the dirty man of Europe on the environment. It seems reasonable, therefore, to give ministers a clear indication that the keeping pace power should be used to deliver on the Government’s commitment and allay such concerns. Keeping pace powers are not the whole answer, but I believe that they could be part of the solution. By putting such a purpose in the bill, we would provide more certainty, predictability and clarity for businesses, public agencies and others. Of course, we must be careful to ensure that, in putting a purpose in the bill, we keep the flexibility that will be needed to deal with future uncertainties. I agree with the committee’s observation in its stage 1 report that making the keeping pace power into a simplistic duty would create an “inflexible” and “inoperable” approach. However, I think that we can achieve flexibility and clarity in the bill if we work hard to strike the right balance. Amendment 6 seeks to provide that clear sense of direction in the form of a statutory purpose that ministers must seek to achieve in their use of the power in section 1. Members should note that amendment 6 does not seek to limit the power’s use for other reasons.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

The Government asked that the amendment be withdrawn, raising concerns about its potential to 'skew priorities'. Speaking against the amendment, Cabinet Secretary Michael Russell MSP told the Committee that:

“ There are some technical concerns about amendment 6 that worry me. The list is non-exhaustive and it requires ministers to exercise the power in certain ways, but it remains silent on others. It could lead to a skewing of priorities. I am also concerned that the wording in amendment 6 on maintaining and advancing standards is problematic. It will mean different things to different people. I would like the bill to be more specific so that the opportunity to damage it, which its enemies will take, is not exploited, and I want to know what action will be required of ministers in a situation in which advancing one right or standard might directly reduce or conflict with a different standard. We need to consider whether there is an inherent contradiction in the wording that we can get rid of. I would like Angela Constance not to press amendment 6. I am very clear that we have work to do on purpose and implementation.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

The amendment was withdrawn with the Scottish Government agreeing to consider the matter ahead of stage 3 .

Regulations that authorise any Scottish public authority to delegate functions

Amendment 7 in the name of Alex Rowley MSP proposed deleting section 1(4) of the Bill . Section 1 (4) allows Scottish Ministers when making keeping pace regulations that modify EU law to authorise a Scottish public authority that already exercises functions under EU instruments to delegate those functions to another person or to arrange for any of those functions to be carried out by another person, or by another Scottish public authority. Speaking to the amendment, Alex Rowley MSP said:

“ Paragraphs 69 to 72 of the Finance and Constitution Committee’s stage 1 report noted that the Delegated Powers and Law Reform Committee had raised the issue of whether that “power to sub-delegate is ... appropriate when there is no equivalent” provision in section 2(2) of the European Communities Act 1972. The power of delegation will apply to future EU law, the content of which would be unknown, and is therefore inappropriate given the uncertainty about what that law might be. Amendment 7 is therefore a probing amendment to remove the power from the bill. It allows the Scottish Government the opportunity to explain the need for that provision.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

Speaking in response, Cabinet Secretary Michael Russell MSP told the Committee:

“ Section 1(4) sets out some of the things that can be done using the power to amend existing EU law implementation. That aspect of the power was drafted on the basis of a potential future need to amend domestic legislation as a consequence of existing EU requirements, rather than as a consequence of necessarily reflecting any developments in EU law. I will give a general example. In implementing EU obligations, member states are often allowed a degree of discretion in determining how to implement a particular measure. It is possible that the Scottish ministers might, in the future, consider that they want to exercise a discretion differently. For example, ministers might have previously decided to appoint body X as a competent authority under an EU directive or regulation but, as a result of changing circumstances, might later consider it to be more appropriate to appoint body Y. The power under section 1(4) is about enabling ministers to make that type of refining provision without the need for primary legislation. That sort of provision does exist elsewhere. It has recently been taken forward under the draft Feed (Transfer of Functions) (Miscellaneous Amendments) (Scotland) Regulations 2020, which were laid in Parliament in draft form on 9 November using the power that we have under the 1972 act. That draft Scottish statutory instrument transfers competent authority functions under EU law in the field of the enforcement of animal feed law in Scotland from local authorities to Food Standards Scotland. The SSI also takes powers to administratively sub-delegate those functions to certain local authorities where that is appropriate. That is the sort of provision that could be made in accordance with section 1(4) of the bill. If that section is deleted and no other delegated powers are available, primary legislation would be required to take that sort of provision forward. That would not be a good use of parliamentary or Government time. For those reasons, although it is useful to probe amendment 7 and to discover whether there is support for it in legislation, I do not believe that that amendment is appropriate. I ask Alex Rowley, having heard me explain the situation, not to press amendment 7 to a vote.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

The amendment was not moved to a vote with Mr Rowley telling the Committee he may revisit the issue at stage 3:

“ I hear what the cabinet secretary said and I will want to look at that further. The concern is still there and I reflect on what the Delegated Powers and Law Reform Committee said. At this stage, I will not press amendment 7. If there is still a concern when I have looked at the issue again, I can always come back with a stage 3 amendment”

Scottish Parliament Finance and Constitution Committee, 2020⁴

Pre-laying scrutiny of regulations - a sifting mechanism

Amendments 33, 38, 39,40 and 42 in the name of Dean Lockhart MSP sought to include pre-laying scrutiny of regulations by way of a sift mechanism. The 'sift' Mr Lockhart argued would "increase parliamentary and stakeholder scrutiny of the keeping pace powers" ⁴ . The proposed sift mechanism would allow the Parliament to seek a different procedure (from negative or affirmative to a form of super affirmative) for considering secondary legislation introduced under the keeping pace power. The sift would also allow the Parliament to object to the provision being made by regulations. In effect, this would require Scottish Ministers to introduce primary legislation if they wished to pursue their proposal.

Explaining the purpose of the amendments, Dean Lockhart MSP said:

“ Amendment 38 seeks to increase parliamentary scrutiny by providing that the Parliament has the ability to consider the relevant procedure that should apply to regulations that are brought forward by the Scottish ministers and, should the Parliament consider it necessary, agree that a different procedure should apply to those regulations. In particular, the Parliament would be able to require that regulations be subject to the negative procedure, as set out in the bill, the affirmative procedure or the super-affirmative procedure, or that the proposals should instead be subject to primary legislation. Amendments 39 and 42 set out the additional procedures that would apply if the Parliament decided that the super-affirmative procedure should apply. They include the requirement to undertake impact assessments and stakeholder consultations. Those amendments are based on submissions from the NFUS and other stakeholders. I remind members that a duty to consult was included in section 15 of the previous EU continuity bill, as drafted. I simply aim to restore the duty to consult... ..Amendments 38 and 39 seek to address those concerns and restore power back to the Scottish Parliament to choose the appropriate level of scrutiny for regulations that the Scottish ministers bring forward under section 1. My other amendments in the group are consequential to those amendments.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

Dean Lockhart MSP moved amendment 33 to "understand the views of Committee members" ⁴ . The amendment was rejected by 8 votes to 3 with the Conservative members of the Committee providing the votes in favour. Related amendments 38,39, 40 and 42 were not moved with Mr Lockhart taking up the Cabinet Secretary's offer to discuss the possibility of some form of sifting mechanism ahead of stage 3.

In a similar vein, Alex Rowley MSP chose not to move amendments 8 and 9 which would have required instruments to be considered under a form of super-affirmative procedure, i.e. subject to certain pre-laying consultation requirements before being laid in draft under the affirmative procedure..

In response to amendments 8 and 9, the Cabinet Secretary offered to consider the matter of procedure ahead of Stage 3 and added that he believed it could be addressed in an appropriate decision-making framework agreed with Parliament:

“ As I set out this morning, we are committed to working with the Parliament to agree an appropriate and proportionate decision-making framework. That is a work in progress, and I think that we are all indicating that we want to get to stage 3 having done that. It remains the Government’s view that using such a framework to provide for an appropriate level of consultation at the earliest stage of policy development is preferable to devising and prescribing procedural requirements to take effect at the end of the process. We are committed to publishing information on the factors that will be considered when deciding whether alignment is appropriate.”

Scottish Parliament Finance and Constitution Committee, 2020⁴

The possibility of some form of sifting mechanism was considered by both the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee at Stage 1. Both Committees expressed views in opposition [suggesting that the Parliament should focus on early engagement in the policy process](#). The [Delegated Powers and Law Reform Committee concluded that "that it would be disproportionate to apply a sifting mechanism."](#)

Delegated Powers and Law Reform Committee consideration at Stage 2

The [Delegated Powers and Law Reform Committee published its Stage 2 report](#) on 11 December 2020 ⁶ . The Committee reported on the delegated powers in the Bill at Stage 2.

In relation to the amendments considered at Stage 2, some of the key conclusions highlighted by the Committee came under the following headings:

Width and effect of the power in practice

- The Committee welcomes the inclusion of new section 4A, which requires Ministers to publish, in such manner as they consider appropriate, a statement of their policy on the factors to be taken into account when considering whether to use the keeping pace power. (paragraph 15)
- The Committee recommends that the Scottish Government considers including in this policy statement a commitment not to use the keeping pace power in section 1(1) of the Bill in areas where the EU has gained new competencies, or in areas of major innovation; i.e. where there are significant new policy developments in future EU law. Further recommendations on the policy statement in new section 4A of the Bill are set out under the heading of “Engagement” below. (paragraph 16)

Sub-delegation

- The Committee noted the clarification made by the amendment to section 1(5)(c) of the Bill. However, the Committee observed that its concerns were focussed on section 1(3), which has not been amended at Stage 2. It appears from section 1(3) that it is still possible for keeping pace regulations to sub-delegate the making of an instrument of a legislative character, or to provide for funding, to a Scottish public authority, or such an authority’s nominee. (paragraph 22)

- In the absence of clarification on the necessity of this aspect of the power to allow sub-delegation, the Committee reiterated its conclusion in its Stage 1 report that it considers that the ability to sub-delegate legislative or funding powers to a Scottish public authority, or such an authority's nominee, is particularly significant. (paragraph 23)
- Accordingly, the Committee recommends that the Scottish Government considers lodging an amendment at Stage 3 omitting the words "(including making an instrument of a legislative character or providing funding)" from section 1(3) of the Bill. (paragraph 24)

Technical scope of the power

- The Committee welcomes the Scottish Government's clarification that the qualification in section 1(2)(f)(ii) is intended to make clear that, like section 1(2)(a), the functions and restrictions in an EU Directive must have some practical application in Scotland. (paragraph 30)
- In light of this clarification, the Committee considers that it is not clear why the form of words used in section 1(2)(a) is not substantially repeated in section 1(2)(f)(ii). The Committee repeats its view that the words "it is appropriate to retain" appear to be wider than the power in section 1(2)(a) to omit anything which has no practical application in relation to Scotland or is otherwise redundant or substantially redundant. (paragraph 31)
- The Committee recommends that the Scottish Government considers lodging an amendment at Stage 3 to omit the words "it is appropriate to retain" in section 1(2)(f)(ii) and replace them with wording similar to section 1(2)(a), such as "have practical application in relation to Scotland and are not otherwise redundant or substantially redundant". (paragraph 32)

Ensuring appropriate oversight

- The Committee notes the statement of the Cabinet Secretary for the Constitution, Europe and External Affairs at Stage 2 that the Scottish Government is "committed to working with the Parliament to agree an appropriate and proportionate decision-making framework. That is a work in progress, and I think that we are all indicating that we want to get to stage 3 having done that. It remains the Government's view that using such a framework to provide for an appropriate level of consultation at the earliest stage of policy development is preferable to devising and prescribing procedural requirements to take effect at the end of the process." (paragraph 39)
- The Committee recommends that the Scottish Government considers lodging an amendment to section 4(3) of the Bill at Stage 3 to expand the choice of procedure to include a form of super-affirmative procedure. (paragraph 40)
- The Committee reiterates the position in its Stage 1 report that it would be disproportionate to apply a sifting mechanism on the face of the Bill to allow committees to change the parliamentary procedure Ministers choose to apply to regulations under the keeping pace power. Instead, the Committee refers to the further recommendations suggested under the "Engagement" heading below. (paragraph 41)

Engagement

- The Committee recommends that the Scottish Government considers lodging an amendment to section 4A(1) of the Bill at Stage 3 to insert an additional requirement that the policy statement should also set out when it would be appropriate for Ministers to choose to apply the super-affirmative procedure as recommended at paragraphs 38 to 40 above, and when primary legislation would be more appropriate. The Committee also recommends that the Bill should explain how Ministers intend to approach consultation when considering keeping pace regulations. The Committee considers that the policy statement (and any revision of it) in section 4A should be laid in draft and approved by resolution of the Parliament. (paragraph 47)
- However, the Committee recommends that the Scottish Government considers lodging an amendment to section 6 of the Bill at Stage 3 to further implement paragraphs 81 and 82 of its Stage 1 report. In particular, the Committee recommends that such an amendment should require a statement explaining the practical implications of the regulations, including the social benefits and costs, and whether an alternative approach would demonstrably deliver the same, or more ambitious outcomes, than the relevant EU measure. (paragraph 49)
- Amendments have also been made to the reporting requirements in section 7 of the Bill. In order to pursue the recommendation in paragraph 80 of the Committee's Stage 1 report, the Committee recommends that the Scottish Government considers lodging an amendment to section 7 of the Bill at Stage 3 to include a requirement to identify the parliamentary procedure Ministers expect would apply either where they are considering using the keeping pace power in the reporting period, or in respect of any intended use of the power in a future reporting period. This could also identify any areas where Ministers intend, or are considering whether, to introduce primary legislation to keep pace with EU law rather than secondary legislation. (paragraph 50)

Conclusions

Consideration of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill at both Stage 1 and Stage 2 saw concerns expressed about the how the keeping pace power in the Bill might be used and sought further information from the Scottish Government on how it would seek to ensure continued alignment with EU law.

A further concern expressed centred on the information provided by the Scottish Government to inform the Parliament's consideration of the use of the keeping pace power to enable effective scrutiny. This included considering the information that is to be provided to the Scottish Parliament to support its scrutiny of the keeping pace power along with ensuring appropriate oversight of the use of the power.

Amendments agreed at Stage 2 have reduced the duration of the keeping pace power and placed new requirements on Scottish Ministers in terms of the information they will be required to provide on a six-monthly basis in relation to the operation of the keeping pace power. Explanatory statements to accompany regulations introduced under the power were also amended with Scottish Ministers now required to provide information on how use of the power might impact on human rights and provide details of the financial implications of any new regulations made under the keeping pace power.

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