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

UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 2



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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.



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Overview of the Bill

1. The stated purpose of the Bill, as set out in the [Policy Memorandum](#), is to:
 - ” ...enable the Scottish Ministers to make provision in secondary legislation to allow Scots law to be able to 'keep pace' with EU law in devolved areas, where appropriate; to ensure that there continue to be guiding principles on the environment in Scotland; and to establish an environmental governance body, Environmental Standards Scotland, to continue the role and functions of the European institutions in ensuring the complete and effective implementation of environmental law.
2. The Committee considered the delegated powers in the Bill at Stage 1 in light of the Scottish Government's [Delegated Powers Memorandum](#). The [Committee's Stage 1 report](#) dated 25 September 2020 made a number of recommendations in relation to the delegated powers in the following sections of the Bill:
 - Section 1(1) – Power to make provision corresponding to EU law
 - Section 3(2) – Duration of the section 1(1) power
 - Section 10(4) – Power to specify matters or circumstances where the duties in sections 10(1) and (2) are not to apply
 - Section 39(5) – Power to provide that legislation is not environmental law
3. The Scottish Government [responded](#) to the [Finance and Constitution Committee's Stage 1 report](#) on 27 October 2020. As part of that response, the Government also responded to points raised by the Committee.
4. The Environment, Climate Change and Land Reform Committee and the Finance and Constitution Committee considered Stage 2 amendments on 24 and 25 November respectively.

Delegated Powers

5. The Scottish Government has produced a [Supplementary Delegated Powers Memorandum \("SDPM"\)](#) which describes the provisions in the Bill conferring power to make subordinate legislation which were introduced at Stage 2. The SDPM supplements the Delegated Powers Memorandum on the Bill as introduced. There are no new delegated powers in the Bill although some of the existing delegated powers have been amended and one power has been removed. The Committee also considered some of the powers in the Bill which were not substantially altered at Stage 2 so were not included in the SDPM.

Section 1(1) – power to make provision corresponding to EU law

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative where provision is made that falls within section 4(2); otherwise negative unless Ministers lay in draft under affirmative procedure

Bill as introduced

6. In summary, section 1(1) of the Bill confers power on the Scottish Ministers by regulations to make provision corresponding to EU law as it has effect after IP completion day. IP completion day is the day when the implementation period agreed under the Withdrawal Agreement between the UK and the EU ends on 31 December 2020 at 11pm. This is referred to as the “keeping pace power”, and regulations made under it as “keeping pace regulations”, in this report.

Committee's Stage 1 report

7. The Committee made recommendations in its Stage 1 report on the width and effect of the power in practice. In particular, these recommendations covered the appropriateness of the power in principle, wider constraints on the power, sub-delegation and the technical scope of the power. The Committee also made recommendations about ensuring appropriate oversight in relation to scrutiny procedures and engagement.
8. With one exception, recommendations are set out further below on each of these areas in light of the Scottish Government's Stage 1 response and the Bill as amended at Stage 2. The exception is in relation to constraints, where the Committee highlighted to the lead committee the Scottish Government's response to the Committee's questions at Stage 1 on statutory and non-statutory constraints to the exercise of the power to keep pace with EU law in section 1 of the Bill. These observations were considered at pages 12 to 15 of the lead committee's report, and at pages 5 to 7 of the Scottish Government's response.

Bill as amended at Stage 2

9. A number of amendments have been made to Part 1 of the Bill (alignment with EU law) at Stage 2:

- **Sub-delegation:** Section 1(5) of the Bill provides that keeping pace regulations may make provision for the charging of fees or other charges in connection with the exercise of a function (“the relevant function”) which a Scottish public authority has by virtue of keeping pace regulations. As introduced, section 1(5)(c) stated that this includes conferring power on the Scottish public authority to make, by subordinate legislation, any provision that the Scottish Ministers may make under section 1(1) in relation to the relevant function.
- Section 1(5)(c) was amended so that this power can only be conferred on a Scottish public authority to make provision that Scottish Ministers can make by virtue of section 1(5) (rather than provision that could be made under section 1(1)). This has the effect of limiting the specific power to sub-delegate in section 1(5) to fees/charges. This is considered further below in relation to the Committee’s Stage 1 report on sub-delegation.
- **Limitations:** As introduced, section 2(1) of the Bill provided that the keeping pace power may not be used to modify the Equality Act 2006 (the “2006 Act”) or the Equality Act 2010 (the “2010 Act”). There was a technical exception in section 2(2) that these Acts could be modified, or have a protection removed, if alternative provision is made in the regulations that is equivalent to the protection being removed or the provision being modified. The Bill as amended at Stage 2 provides that this exception now only applies to the 2010 Act. Accordingly, the 2006 Act is now completely protected from modification by regulations made under the keeping pace power. Although a relatively minor change, it further limits the use of the keeping pace power.
- **Policy statement on factors for use of the keeping pace power:** New section 4A 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. Ministers may from time to time revise the policy statement and publish it. It is not necessary for a policy statement to have been published before the keeping pace power may be used. This is considered further below in relation to the Committee’s Stage 1 report on the appropriateness of the power in principle and in relation to scrutiny procedures and engagement.
- **Explanatory statements:** Sections 5 and 6 make provision for written explanatory statements to be made when an instrument or draft under the keeping pace power is laid before the Parliament. This does not apply where an equivalent instrument or draft has previously been laid before the Parliament.
 - New section 6(2A) requires an additional statement explaining the effect (if any) of the instrument or draft on the European Convention on Human Rights and other human rights contained in any international convention, treaty or other international instrument ratified by the UK.
 - New section 6(5A) requires 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.

- New section 6(5B) requires a statement setting out the likely financial implications of the provision contained in the draft instrument. This only applies to keeping pace regulations subject to the affirmative procedure.
- **Reports:** Section 7 of the Bill was amended at Stage 2 to increase the frequency of the reporting obligation from an annual requirement to a requirement to report every six months. Each report must be laid before the Parliament as soon as practicable, and no later than two months, after the end of the reporting period to which it relates. In addition to explaining how the keeping pace power has been used, the reports must also now set out:
 - how Ministers intend to use the power in the period (of such length as they may determine) following the reporting period;
 - Ministers' intended use of the power in the next reporting period; and
 - any use of the power that has been considered, or is being considered, by Ministers during the reporting period.
- As soon as practicable (and no later than two months after section 1(1) comes into force), Ministers are also now required to prepare and lay before Parliament a report setting out how they intend to use the power during the first reporting period. The report must also set out any use of the power that has been, or is being, considered by Ministers during that period.
- **Duration of the power:** This is considered separately in relation to the delegated power in section 3(2). In summary, the initial duration of the power is reduced from 10 years to six years, and the six-year period may not be extended by regulations beyond the end of the period of 10 years beginning with the day on which section 1(1) comes into force.

Width and effect of the power in practice

Appropriateness of the power in principle

10. At paragraph 33 of its Stage 1 report, the Committee highlighted the following points to the lead committee under the theme of the appropriateness of the power in principle:
 - “Fundamentally, it is for the Parliament to legislate. Where it agrees to delegate that role to the Scottish Government, there should be good reasons for doing so, and the limits of the delegation should be strictly defined. As a matter of principle, delegated powers should not be taken as a substitute for policy development.
 - Unlike the power to implement EU law in section 2(2) of the ECA [the European Communities Act 1972], the keeping pace power would allow Scottish Ministers to decide whether or not to keep pace with EU law in circumstances where it has no formal ability to influence that law given that the UK is no longer an EU member state.
 - Furthermore, the keeping pace power can be used across the full range of policy areas currently governed by EU law and affords discretion as to whether

and how to implement particular aspects of chosen EU laws – for example, to omit functions of EU entities or provide for them differently.

- The Scottish Government stated in its written response to the Committee that it “cannot predict in which specific areas the power is likely to be used in future”.
- Various bills in relation to the UK leaving the EU considered by the Scottish Parliament under the legislative consent procedure confer more tailored and specific delegated powers, including in some instances power to implement international obligations, in devolved areas such as fisheries, agriculture, and the environment.”

11. In its Stage 1 report, the Committee made the following recommendations in relation to the appropriateness of the power in principle, in addition to reiterating the points above from its themes letter to the lead committee dated 8 September 2020:

” 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.

More widely, the lead committee may wish to encourage the Scottish Government to seek tailored powers in specific policy areas to allow the Parliament to conduct closer scrutiny. Examples of this approach already exist in UK Brexit bills, and in the Agriculture (Retained EU Law and Data) (Scotland) Bill to amend or replace the European Union Common Agricultural Policy elements of retained EU law in Scotland.

12. The Scottish Government’s response to the lead committee responded to these points:

- ” The Scottish Government would always use primary legislation where that is the most appropriate vehicle for legislative proposals. Possible examples might be when the EU were to bring forward law in an area in which it had gained new competencies, or in areas of major innovation. However, the Government is of the view that flexibility should be maintained as primary legislation would not necessarily be appropriate in every situation.

Attempting to limit the scope of the power in section 1(1) to exclude “significant new proposals” would not be practical given the significant legal difficulties involved in defining that on the face of the Bill. It is likely that any such amendment could lead to uncertainty and possibly challenge.

Both the concept of ‘existing standards in retained EU law’ and the concept of ‘technical areas’ would be extremely difficult to define in statute and could reasonably be interpreted differently by different people. The concept and content of retained EU law is already complex and such a limitation risks creating uncertainty and inflexibility over the ability of Ministers to exercise the power.

The Government considers such a limitation would undermine the purpose of this provision as it would lead to considerable legal doubt and risk of challenge about any exercise beyond the most minor and technical updating.

The power in the Bill is intended for circumstances which fall short of justifying primary legislation, and recognises the overall limit of legislative time available to the Parliament to align with EU law that would previously have been achieved by the European Communities Act 1972. The Bill therefore provides flexibility so that the most appropriate legislative vehicle can be used, depending on specific circumstances, while allowing alignment with EU law where that is in the best interests of Scotland.

The Scottish Government would expect that early engagement with the Parliament on proposals to align would provide an opportunity for the proposed legislative route to be discussed.

13. **The Committee re-emphasises its position in its Stage 1 report that, as a matter of principle, the limits of delegated powers should be strictly defined, and should not be taken as a substitute for policy development.**
14. **The Committee recognises that it would be difficult in law to exclude significant new proposals from the scope of the keeping pace power, or to limit it to existing standards in retained EU law or to technical areas. However, these difficulties emphasise the exceptionally wide nature of the keeping pace power. The Committee considers that powers of this nature require to be justified by exceptional circumstances, and that the process of EU withdrawal should not lead to such wide powers becoming the norm.**
15. **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.**

16. **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.**

Sub-delegation

17. Section 1(3) of the Bill allows the Scottish Ministers, when exercising the power to make keeping pace regulations in section 1(1)(a)(i), (ii), or (iii), to sub-delegate the 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.
18. The Committee’s Stage 1 report contained the following recommendations in relation to sub-delegation:

” As the Committee did in its themes letter to the lead committee dated 9 September 2020, 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.

53. Given the uncertainty over the potential use of this significant power, the Committee recommends that the lead committee asks the Scottish Government to give further consideration in advance of Stage 2 to the necessity of this aspect of the power to allow sub-delegation through subordinate legislation.
19. The Scottish Government’s Stage 1 response said that it would give further consideration to the points raised by the Committee in advance of Stage 2.
20. [At Stage 2 in the lead committee on 25 November](#), consideration was given to paragraphs 69 to 72 of the lead committee’s Stage 1 report, which noted the concerns raised by this Committee at paragraphs 47 to 53 of this Committee’s Stage 1 report. The discussion in the Stage 2 debate focussed on the rationale for section 1(4) of the Bill. This provides that regulations under section 1(1)(a)(iv) of the Bill (i.e. keeping pace regulations modifying retained EU law) may provide for functions in EU instruments that are already exercisable by a Scottish public authority to be delegated, carried out by a different person, or conferred instead on another Scottish public authority. Although section 1(4) is relevant, the Committee’s concern was focussed on the ability by virtue of section 1(3) to sub-delegate the power to make an instrument of a legislative character or provide funding to a Scottish public authority, or to any person whom the authority authorises to carry

out functions on its behalf.

21. Section 1(3) and (4) of the Bill have not been amended at Stage 2. Instead, section 1(5)(c) of the Bill has been amended to clarify that the ability (conferred by section 1(5)) of Scottish Ministers to use the keeping pace power in section 1(1) to sub-delegate the power to make subordinate legislation only relates to the specific power to make fee-charging provision in consequence of functions conferred on a Scottish public authority under the keeping pace power. In other words, it does not relate to any other aspect of the power to make keeping pace regulations under section 1(1).

22. **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.**
23. **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.**
24. **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.**

Technical scope of the power

25. Section 1(2) and (3) set out the permitted adaptations to EU law made under keeping pace regulations to ensure EU law operates effectively in Scots law despite the UK no longer being a member state of the EU.
26. In particular, section 1(2)(f) provides that keeping pace regulations may confer functions and impose restrictions which are in an EU Directive and in force and which it is “appropriate to retain”. This seems 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.
27. The Committee's Stage 1 report made the following recommendation in this area:

” The Committee calls on the Scottish Government to provide further clarification on when it would not be considered “appropriate” in terms of section 1(2)(f) to retain a function or restriction in an EU Directive which is in force.
28. The Scottish Government's Stage 1 response said:

- ” Section 1(2) is intended to ensure that regulations made under part 1 function properly in Scotland, outside of the European Union. This should be viewed through a similar lens to regulations made under section 8 of the European Union (Withdrawal) Act 2018 which address deficiencies in retained EU law.

Whilst section 1(2)(a) allows for provisions in EU law which have no practical application in Scotland to be omitted entirely from domestic regulations, and section 1(2)(b) allows for functions of EU entities to be omitted from domestic regulations, section 1(2)(f), by contrast, addresses the situation where Ministers are not merely omitting these functions, but conferring them, or imposing restrictions as the case may be. The qualification at section 1(2)(f)(ii), like that in section 1(2)(a), is intended to make clear that those functions and restrictions must have some practical application in Scotland. Functions and restrictions which might not be appropriate are likely to be those which relate by definition to the functioning of the European Union and which serve no purpose outside of it.

29. Section 1(1) to (4) of the Bill has not been amended at Stage 2.

30. **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*.**
31. **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.**
32. **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”.**

Ensuring appropriate oversight

Scrutiny procedures

33. Under the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (the “2018 Continuity Bill”), the affirmative procedure applied to regulations made under the keeping pace power in section 13 of that bill unless a 60-day super-affirmative procedure applied in certain circumstances. For example, the super-affirmative procedure applied where the regulations abolished a function of an EU entity or public authority in a member State without providing for an equivalent function to be exercisable by any person. A sifting mechanism would have allowed parliamentary committees to require keeping pace regulations laid in draft under the affirmative procedure to instead proceed under the super-affirmative procedure.

34. In contrast, despite the keeping pace power being similar under the current Bill, only keeping pace regulations that contain similar types of provision are subject to the affirmative procedure. All other regulations under section 1 of the Bill are subject to the negative procedure unless Ministers decide to lay them under the affirmative procedure. There is no provision made for a sifting mechanism.
35. The Committee's Stage 1 report made the following recommendation in this area:

” As the Committee did in its themes letter to the lead committee dated 9 September 2020, the Committee notes that the scrutiny procedures that apply to regulations made under the keeping pace power in section 1(1) of the Bill are different than those that applied to the equivalent power in the 2018 Continuity Bill.

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.

36. The Scottish Government's response to the lead committee dealt with these points as follows:

” Similar objections [to those quoted at paragraph 12 of this report above] apply to the DPLRC proposal to amend the Bill to apply a super-affirmative procedure where regulations under section 1(1) implement significant new policy proposals from EU law that do not exist in retained EU law or implement EU Directives in new policy areas where there is no equivalent in retained EU law. The difficulties in drafting definitions for “significant new policy proposals” or “new policy areas”, which such an amendment would require, would be significant and the likely effect of this proposal would be to proliferate unnecessarily and disproportionately the number of super-affirmative instruments to avoid legal risk, with undesirable implications for the resources of both the Government and the Parliament.

The Scottish Government considers the scrutiny procedures chosen for the power in section 1(1) represent a good balance between allowing for effective and thorough scrutiny of the use of the power whilst also ensuring there is sufficient flexibility to allow the Government, where appropriate, to respond quickly where legislative changes are needed.

As the Committee notes, the Scottish Government is committed to working with the Parliament to agree an appropriate and proportionate decision-making framework for future alignment with EU law. It is 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 far preferable to devising and prescribing procedural requirements to take effect at the end of the process.

37. The relevant provisions on scrutiny procedures are in section 4 of the Bill. This section has not been amended at Stage 2. Further consideration is given to early engagement in the context of the policy statement introduced in new section 4A and the amended reporting requirement in section 7 under the “Engagement” heading below.

38. **The Scottish Government raised concerns about the difficulties of defining the application of a form of super-affirmative procedure to “significant new policy proposals” or “new policy areas” made under keeping pace regulations. However, the Committee highlights that its recommendation at paragraph 70 of its Stage 1 report was that the Scottish Ministers’ choice of procedure is expanded to include a form of super-affirmative procedure. This would not require any wording on the face of the Bill defining the circumstances when the super-affirmative procedure should apply. Instead, the Parliament would be able to hold Ministers to account for their choice of whether or not to apply the super-affirmative to proposals for keeping pace regulations containing significant policy provision.**

39. **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."

- 40. Accordingly, 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.**
- 41. 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.**

Engagement

- 42. The Committee's Stage 1 report made the following recommendations in relation to engagement:**

” The Committee considers that the Parliament may wish to concentrate its scrutiny not just on the areas where decisions are to be taken to keep pace with EU law in devolved areas, but also where decisions are taken not to keep pace. This is in the context of the significant width of the power, which would enable proposals to be brought forward that would otherwise be expected to be contained in primary legislation.

The Committee welcomes the Cabinet Secretary’s commitment to work with the Parliament to allow it to be engaged at the earliest stage of the policy development process. In the Committee’s view, this is appropriate where Scottish Ministers can decide whether or not to keep pace with EU law when the UK is no longer a member of the EU and the ability to influence the development of EU law is likely to be reduced.

The Committee agrees that there is merit in the Faculty of Advocate’s suggestion that it may be helpful for the Scottish Government to issue forward guidance about the manner in which it anticipates exercising the new power.

The Committee suggests that further consideration is also given to the annual reporting obligation in section 7. In particular, the Committee recommends that the reporting requirement should be quarterly for the first two years then, if the Parliament decides that reporting can become less frequent, twice yearly thereafter. The Committee also considers that the report should not just look back but also forward to anticipate EU legislation, particularly to identify any key pieces of future legislation that the Scottish Government anticipates it may wish to keep pace with. The report could also set out whether the Government intends to keep pace with identified EU laws or not, and the parliamentary procedure it expects would apply to regulations under section 1(1) where a decision is made to keep pace by subordinate rather than primary legislation.

The Scottish Government’s written response to the Committee stated that decisions to keep pace with EU law will be based on factors such as practical implications; economic and social benefits and costs; resource implications of both budget and Government / parliamentary time; and whether an alternative approach would demonstrably deliver the same, or more ambitious outcomes, than the relevant EU measure.

The Committee recommends that the explanatory statements required under section 6 to accompany regulations made under the power in section 1(1) could be expanded to include these more specific indicators of whether there are good reasons for making the provision contained in the keeping pace regulations.

43. In summary, the Scottish Government’s main responses to the lead committee’s recommendations in these areas were:

” The Scottish Government is happy to commit to publishing the guidance which will be used to inform decisions on the use of this power. We anticipate that this guidance will set out the factors which should be considered prior to Ministers deciding whether to make regulations under section 1(1) of the Bill. This will also incorporate guidance on how Scottish Ministers intend to approach consultation when considering regulations under section 1(1). The Scottish Government does not therefore believe that the Bill needs to be amended to require this.

The Scottish Government commits to providing a regular report addressing the EU's upcoming legislative priorities, and how they may impact on devolved interests. The Scottish Government anticipates that this could be agreed as part of the Parliament's involvement in the decision-making framework on alignment, and that an amendment to the Bill is unnecessary. We would also note that the most appropriate moment in time to provide any such report may depend on publications at an EU level, for example of the European Commission's work programme, and that these do not necessarily reflect fixed commitments at an EU level, but often evolve over time after publication.

44. As highlighted in the Committee's previous recommendation, in the Stage 2 debate the Cabinet Secretary said:

...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. I have made clear the Government's support for amendment 41, in the name of Tom Arthur, which will require us to publish a statement” [i.e. what is now new section 4A of the Bill as amended at Stage 2]

45. As set out in more detail earlier in this report, the following amendments were made to the Bill at Stage 2:

- New section 4A requires Scottish 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 in section 1(1).
- Section 6 was amended to include requirements for explanatory statements on compliance with human rights, consultation with local authorities and others, and on the financial implications of keeping pace regulations subject to the affirmative procedure.
- Section 7 was amended at Stage 2 to increase the frequency of the reporting obligation from an annual requirement to a requirement to report every six months. In addition to explaining how the keeping pace power has been used, the reports must also now set out:
 - how Ministers intend to use the power in the period (of such length as they

may determine) following the reporting period;

- Ministers' intended use of the power in the next reporting period; and
- any use of the power that has been considered, or is being considered, by Ministers during the reporting period.

46. The Committee welcomes new section 4A amended into the Bill at Stage 2.

47. However, 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.

48. The Committee welcomes the further explanatory statements required under section 6 of the Bill as amended at Stage 2.

49. 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.

50. 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.

Section 3(2) – duration of the section 1(1) power

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Bill as introduced

51. Section 3 of the Bill as introduced limited the duration of the keeping pace power to 10 years. The delegated power contained in section 3(2) of the Bill as introduced allowed the Scottish Ministers by regulations to extend the duration of the keeping pace power) by up to five years and to also extend any period of extension under such regulations by further periods of up to five years. Such regulations are subject to the affirmative procedure.

Stage 1

52. The Committee's Stage 1 report made the following recommendations in relation to the provisions on the duration of the keeping pace power:

” The Committee highlighted the expiry provisions in section 3 that apply to the power to keep pace with EU law in section 1(1) of the Bill under the “sunset” theme in its letter to the lead committee dated 9 September 2020.

The Committee again recognises that there are differences between the context surrounding the choice of time limit that applied to the keeping pace power in section 13 of the 2018 Continuity Bill and the current circumstances regarding the time limit that should apply to [the] power in section 1 of the Bill.

However, the Committee reiterates that the expiry provisions in section 3 apply for an initial period of 10 years, amounting approximately to two full parliamentary sessions, with an unlimited option to extend by further periods of five years if approved by affirmative regulations. In the Committee's view, the power in its current form cannot properly be described as “temporary” in nature.

The Committee recently considered the Agriculture (Retained EU Law and Data) (Scotland) Bill where there was originally no sunset clause, despite the intention that the provisions would only be temporary in nature. It recommended a sunset clause and the Bill was subsequently amended to include a sunset provision to May 2026, or roughly equivalent to one parliamentary term.

The Committee recommends that consideration is given to amending section 3 of the Bill to reduce the length of the expiry provisions that apply to the keeping pace power. It considers that it should be for future Scottish Parliaments to agree through affirmative regulations at the start of each parliamentary session whether the keeping pace power should continue to be available, subject to a maximum duration of 10 years from the Bill receiving Royal Assent.

53. The Scottish Government's Stage 1 response to the lead committee did not address the expiry provisions in section 3 of the Bill as introduced.

Bill as amended at Stage 2

54. Section 3 of the Bill was amended at Stage 2 to reduce the duration of the keeping pace power from 10 years to six years.
55. The power to extend the duration has been retained. New subsection (2A) clarifies

that the power may be exercised more than once. However, new subsection (2B) provides that the six-year period may not be extended by regulations beyond the end of the period of 10 years beginning with the day on which section 1(1) comes into force.

56. The Committee noted that the Cabinet Secretary said at Stage 2 that the Bill was expected to be commenced in March 2021. The commencement date for section 1(1) is important as the duration of the keeping pace power is linked to the date when the Scottish Government commences section 1(1).

57. The Committee welcomes the amendments made to section 3 of the Bill following Stage 2.

Section 10(4) – power to specify matters or circumstances where the duties in sections 10(1) and (2) are not to apply

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Bill as introduced

58. Section 10 required the Scottish Ministers (subsection (1)) and UK Ministers (subsection (2)) to have regard to the guiding principles on the environment (defined in section 9) when developing policies, including proposals for legislation (for UK Ministers this applies so far as extending to Scotland). These duties do not apply in relation to any policy or proposal so far as relating to national defence or civil emergency, or finance or budgets (section 10(3)).
59. The delegated power was contained in section 10(4), which allowed the Scottish Ministers by regulations to make further provision about matters or circumstances where the duties on the Scottish Ministers and UK Ministers to have regard to the guiding principles on the environment do not apply. Regulations made under this power were subject to the negative procedure.

Stage 1

60. The Committee's Stage 1 report made the following recommendation in relation to this power:

” The Committee highlights to the lead committee that the Scottish Government has committed to considering whether it may be more appropriate that the power in section 10(4) is amended to only permit amendment to section 10(3) of the Bill as enacted, and is made subject to the affirmative procedure.

61. The Scottish Government's Stage 1 response to the lead committee did not address the Committee's observations on section 10(4) of the Bill.

Bill as amended at Stage 2

62. The Bill was amended at Stage 2 to remove the delegated power in section 10(4),

and the provision in subsection (5) that the power was subject to the negative procedure.

63. In moving the amendment to achieve this before the Environment, Climate Change and Land Reform Committee on 24 November, the Cabinet Secretary for Environment, Climate Change and Land Reform, Roseanna Cunningham, stated:

” On consideration of comments about the initial proposal, not least from the Delegated Powers and Law Reform Committee, I concluded that that power cannot really be justified, and ministers had no intention of taking any further matters out of the scope of the principles.

64. **The Committee welcomed the removal of this power in the Bill as amended at Stage 2.**

Section 39(5) – power to provide that legislation is not environmental law

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Bill as introduced

65. Section 39 defines environmental law for the purposes of Chapter 2 (Environmental Governance) of Part 2 (Environment) of the Bill. It is defined as any legislative provisionⁱ to the extent that it is “mainly concerned” with environmental protection, and is not concerned with disclosure of (or access to) information, national defence or civil emergency, or finance or budgets (“excluded matters”). By virtue of section 39(4), it does not include Parts 1 to 3 of the Climate Change (Scotland) Act 2009 (the “2009 Act”).
66. The delegated power is contained in section 39(5), which allows the Scottish Ministers by regulations to provide that a legislative provision specified in the regulations is, or is not, within the definition of “environmental law” in section 39(1). Such regulations may specify Parts 1 to 3 of the 2009 Act (or any provision of any of those Parts) as being within the definition of “environmental law” and may modify section 39(4) accordingly.
67. Regulations under section 39(5) are subject to the affirmative procedure. Before laying a draft of the regulations before the Scottish Parliament, the Scottish Ministers must consult Environmental Standards Scotland (“ESS”, established under section 15 of the Bill) and such other persons as they consider appropriate.

Stage 1

ⁱ “Legislative provision” is defined as any provision contained in, or in an instrument made under, an Act of the Scottish Parliament, and provision contained in any other enactment which, if contained in an Act of the Scottish Parliament, would be within the legislative competence of the Parliament.

68. The Committee's Stage 1 report made the following recommendation in relation to this power:

” The Committee is content with this power in principle on the basis that it is clarificatory in nature. The Committee considers that the affirmative procedure is appropriate to afford the Parliament the opportunity to conduct enhanced scrutiny of regulations that could determine the remit of a statutory body (i.e. ESS).

However, the Committee draws to the attention of the lead committee that the definitions of “environmental law”, “effectiveness of environmental law”, “environmental protection”, “environmental harm” and “the environment” in sections 39 and 40 of the Bill are very wide. With a view to ensuring greater certainty for ESS, those subject to enforcement by ESS, and the courts, the Committee calls on the Scottish Government to provide further details, such as an indicative list, of the legislation that would fall within the definition of “environmental law”.

69. The Scottish Government's Stage 1 response stated:

” The Scottish Government will give further consideration to these definitions in advance of Stage 2. However, it is the Scottish Government's intention that these definitions are framed in broad and general terms in order to encompass all aspects of environmental law in Scotland in respect of which ESS will have an enforcement role.

Bill as amended at Stage 2

70. While some of the definitions referred to above were amended at Stage 2, the regulation-making power itself in section 39 remains the same.

71. There was no specific discussion regarding the concerns highlighted by the Committee regarding the very wide nature of the definition of “environmental law”, or on an indicative list of legislation that would fall within that definition, to ensure greater certainty for ESS, those subject to enforcement by ESS, and the courts.

72. The Committee reiterates its concerns regarding the very wide nature of the definition of “environmental law” in sections 39 and 40 of the Bill. It therefore recommends that the Scottish Government considers publishing an indicative list of legislation that would fall within that definition, to ensure greater certainty for ESS, those subject to enforcement by ESS, and the courts.

