



The Scottish Parliament
Pàrlamaid na h-Alba

Conveners Group

Agenda

9th Meeting, 2022 (Session 6) Wednesday 30 November 2022

The group will meet at 12.30pm in Committee Room 2.

- 1. Minutes**
- 2. Post-Legislative scrutiny Session 6 strategic priority for CG: a new approach for session 6**
- 3. Post-EU scrutiny Session 6 strategic priority for CG: next steps in meeting scrutiny challenges**
- 4. Diversity, inclusion and participation Session 6 strategic priority for CG: oral update on public participation inquiry**

Next meeting – Wednesday 21 December

The papers for this meeting are as follows –

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| 1. Minutes of last meeting | CG/S6/22/8/M |
| 2. Post-legislative scrutiny: a new approach for session 6 | CG/S6/22/9/1 |
| 3. Post-EU scrutiny: update | CG/S6/22/9/2 |

Committee debates this Parliamentary year

1	22/09/2022	Standards, Procedures & Public Appointments Committee	Debate its report on future procedures and practices
2	01/11/2022	Social Justice and Social Security Committee	Robbing Peter to pay Paul: Low income and the debt trap
3	10/11/2022	Health, Social Care & Sport Committee	Inquiry into alternative pathways to primary care
4	17/11/2022	Constitution, Europe, External Affairs & Culture Committee	The impact of Brexit on devolution
5	15/12/2022	Health, Social Care & Sport Committee	Debate on its health inequalities inquiry
6	20/12/2022	Citizen Participation & Public Petitions Committee	Petition PE:1865 Suspend all surgical mesh and fixation devices
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The Scottish Parliament
Pàrlamaid na h-Alba

Conveners group

Minutes

8th Meeting, 2022 (Session 6) Wednesday 26 October 2022

Present:

Liam McArthur MSP, Convener
Clare Adamson MSP, Constitution, Europe, External Affairs and Culture Committee
Claire Baker MSP, Economy and Fair Work Committee
Siobhian Brown MSP, COVID-19 Recovery Committee (virtual)
Ariane Burgess MSP, Local Government, Housing & Planning Committee
Finlay Carson MSP, Rural Affairs, Islands & Natural Environment Committee
Joe FitzPatrick MSP, Equalities, Human Rights & Civil Justice Committee
Kenneth Gibson MSP, Finance & Public Administration Committee
Richard Leonard MSP, Public Audit Committee
Stuart McMillan MSP, Delegated Powers & Law Reform Committee
Audrey Nicoll MSP, Criminal Justice Committee
Sue Webber MSP, Education, Children and Young People Committee
Martin Whitfield MSP, Standards, Procedures & Public Appointments Committee
Elena Whitham MSP, Social Justice and Social Security Committee

Apologies were received from:

Jackson Carlaw MSP, Gillian Martin MSP and Edward Mountain MSP

- 1. Minutes:** The Conveners Group agreed the minutes of the last meeting.
- 2. UK Climate Change Committee (UKCCC):** The Group held a virtual evidence session with Chris Stark, Chief Executive of the UKCCC. The group reaffirmed its commitment to make this an annual event.

Date of Next Meeting: 30 November 2022

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Conveners Group

9th Meeting 2022, Wednesday 30 November 2022

Post-legislative scrutiny: a new approach for session 6

Purpose

1. At its meeting of 26 January 2022, the Conveners Group discussed and endorsed a paper ([CG/S6/22/1/2](#)) setting out the principles to underpin a new approach to post-legislative scrutiny (PLS) in this parliamentary session.
2. Officials were tasked with developing practical recommendations that would take forward this new approach in line with the principles agreed to.
3. It is clearly for individual committees to take forward this work in practice, but the Conveners Group also has a role in supporting this work. As well as the role of individual committees, this paper considers ways in which CG can take a leadership role in this area through encouraging, facilitating and supporting the work of individual committees, with consistency of approach and support across committees.

Action

4. The Conveners Group is invited to discuss the paper and agree what recommendations it wishes to take forward.

A reminder

What is post-legislative scrutiny?

5. Parliaments have a responsibility both to pass new laws and to monitor whether the laws they have passed are implemented as intended and have the expected impact. PLS is now increasingly recognised as an important dimension within the oversight role and the legislative role of a parliament and an integral part of the legislative cycle in many jurisdictions.
6. The broad act of reviewing and evaluating laws that a parliament has passed is known as PLS. There are various reasons why having more systematic PLS can be of value:
 - to see whether legislation is working out in practice, as intended;
 - to contribute to better regulation;
 - to improve the focus on implementation and delivery of policy aims; and,

- to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by this scrutiny work.
7. In addition, PLS can be useful to review if there have been adverse effects of new legislation on fundamental rights, as well as, for instance, gender equality, the environment and climate, or on economic and social welfare.
 8. In terms of a working definition, PLS consists of an inquiry whose sole or main purpose (from the outset) is to review an Act of the Scottish Parliament (or, exceptionally, two or more related ASPs) to see how well it is (or they are) working. That can (and probably should) include looking not just at the provisions in the Act itself, but the subordinate legislation made under it, and the way in which it has been implemented, the funding provided etc.
 9. As such, PLS in the Scottish Parliament would not cover scrutiny of current bills, scrutiny of Acts of the UK Parliament, scrutiny of subordinate legislation (i.e. SSIs that are in force), other than as part of PLS of the parent Act of the Scottish Parliament or incidental scrutiny of an Act of the Scottish Parliament as part of a larger inquiry.
 10. PLS can also be seen as part of a continuous process of scrutiny and follow-up. That is, PLS can begin when an Act comes fully into force and can be seen as having different stages involving different forms of scrutiny. For example:

Initially:

- ensuring that all relevant provision is brought into force
- ensuring that relevant subordinate legislation is laid
- ascertaining early views on the experience of users/those advising on the Act's provisions

Further down the line:

- looking at implementation – is further guidance required?
- are there ambiguities in the legislation that require Act to be tweaked?
- are more fundamental legislative changes required?
- has the Act delivered on its policy objectives? What outcomes has it delivered/achieved?

Principles underpinning a new approach for PLS in session 6

11. At its previous meeting, the Conveners Group endorsed the view that any new approach for PLS would be built around the following principles:

- That PLS can take many different forms and is part of a continuous process of scrutiny and follow-up work.
- That we make efforts to more clearly 'label' some of the work we undertake in the Parliament as PLS to make it more visible and easier to

find, thereby making any successes more transparent. Capturing this information in committee annual reports might be one idea.

- That there should be a 'light-touch' approach to PLS and not one that requires a certain number of PLS activities by each committee each year. This is unlikely to be successful as subject committees usually want to set their own priorities.
- That standing order changes are, for the moment anyway, not considered necessary to "make PLS happen".
- That the approach to encouraging PLS should allow for flexibility by a committee and not be confined strictly to one where a committee reviews a single piece of primary legislation.
- That the subject committee 'buys in' to the need for PLS is important, given it will then conduct the scrutiny itself as it has the specialist knowledge and contacts, and knows its own work programme.
- However, there is a role for the new Citizen Participation and Public Petitions Committee to think about how it can use its new remit and new tools for citizen's participation and deliberative democracy to inform subject committees of possible ideas. Equally, subject committees could request work or advice from the Citizen Participation and Public Petitions Committee on how to use these tools themselves to gauge public interest/support for any piece of PLS work.
- That we explore how other resources in the Parliament, such as the academic engagement activities or budgets for commissioned research can be used by committees to help them identify or carry out PLS work.
- That we think about how we can incorporate aspects of data gathering and review mechanisms into our scrutiny of a Bill to make it easier to conduct PLS in later years. This is an important point in enabling future PLS to occur more easily. So, for example:
 - Clarifying with the minister/member in charge what outcomes they expect the Bill to deliver.
 - Asking what data/evidence government intends to use/gather to measure that
 - Perhaps encouraging committees to think about including something on this in their stage 1 reports (and if necessary, seeking amendments to the Bill to ensure that relevant data/evidence is collected)
- That we explore with Scottish Government officials and then the Minister for Parliamentary Business how the government can 'buy in' to being involved in taking forward recommendations, or at least seriously considering them.

- That we consider how the Conveners Group can play a role in encouraging committees to consider PLS as a core part of their role and how that can be built into work planning (e.g., at business planning days).

12. It is worth noting that some post-legislative scrutiny work has been carried out. Examples of this includes—

- A review by the Finance and Public Administration Committee into the early learning and childcare provisions in the Financial Memorandum on the Children and Young People (Scotland) Bill, which makes recommendations which should help the Committee to better hold the Scottish Government to account in future and enhance scrutiny of FMs.
- A review in 2013 by the then Justice Committee into the effectiveness of the provisions in the Title Conditions (Scotland) Act 2003, which led to subsequent legislative changes and changes in policy practice on the ground.
- Similarly, PLS of the Police and Fire Reform (Scotland) Act 2012 by the then Justice Committee in session 5 led to major changes in the governance by the Scottish Policy Authority and, after a further independent review by Dame Elish Angiolini, to a commitment from the current government to bring forward legislation to change the police complaints system.
- The provision in the High Hedges (Scotland) Act 2013 which provided for a review of the operation of the Act to take place within a specific timeframe led to a PLS inquiry in session 5 by the Local Government and Communities Committee. Although some tightening up of practice occurred, no substantive changes to the law were put through by government.
- The Climate Change (Scotland) Act 2009 contains provisions which require regular scrutiny of government policies and proposal documents, which itself involves detailed PLS by a range of committees on a cross committee basis.
- The Public Audit and Post-Legislative Scrutiny Committee conducted a PLS inquiry into the Control of Dogs (Scotland) Act 2010, which has now led to newly introduced changes via SSI to the statute book and agreement to a further review by government of the provisions of the Dangerous Dogs Act 1991 insofar as they relate to Scotland.

13. Conveners are invited to share their experience of PLS in this Session or from previous Sessions to inform what actions should be prioritised to facilitate PLS in Session 6.

Recommendations for a new approach to PLS in session 6

14. The following paragraphs set out possible actions for the Group to consider. These include the role of CG in encouraging this work and the role of committees in taking this work forward.
15. Going forward, in order to boost the prominence of this work, the processes and systems that generate agendas, minutes, inquiry titles etc will be reviewed to ensure that “post-legislative scrutiny” can be included in items of business to increase transparency of PLS activity within the business of the Parliament.

A. Role of committees

Business planning days and committee work programmes

16. One of the principles endorsed by the Conveners Group is that committees should not be mandated to carry out PLS and must be free to decide upon their own work programmes.
17. It is still important that we encourage subject committees to think about PLS work alongside other priorities when considering their work programmes. A key point in the year for that to occur would be during business planning days.
18. The clerks and SPICe could bring forward ideas and incorporate them in the relevant papers for the consideration of MSPs. This does not necessarily mean any PLS work will be prioritised, but it will at least be considered on an equal footing. Officials could generate ideas for such work after consulting key stakeholders across their remit.
- 19. Recommendation: The Group is invited to encourage all subject committees, from summer 2023, to consider possibilities for PLS of previous legislation when looking at possible priorities during a business planning day (or some review of their work programme if a business planning day is not held).**

Linking scrutiny of bills with the potential for increased PLS activity

20. Part of the difficulty with stimulating PLS activity is that it must sit alongside the existing work of committees and that, once a particular bill has been passed and some years have passed, the institutional memory of whether there is merit in reviewing its implementation fades unless there are obvious problems that are apparent to MSPs.
21. As such, we need to think about how we keep the importance of reviewing Acts of the Scottish Parliament as high as that of considering new bills. One way is to build this into the scrutiny of the bill in the first place, where merited, and not as an afterthought that must compete with the other work of committees.
22. One approach to this can be found in the [Stage 1 report of the Criminal Justice Committee on the Fireworks and Pyrotechnics Articles \(Scotland\) Bill](#) (page 61). This resulted in an agreed amendment to the Bill at stage 2 which now requires a post-legislative review of the Act.¹ Note, however, that this is not the only means of achieving PLS and we are not suggesting that all Acts should contain a statutory review clause as these could end up further restricting committees' abilities to shape their own work programmes.

¹ Section 50: [Fireworks and Pyrotechnic Articles \(Scotland\) Act 2022 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

23. The benefits of this approach would be:

- The need for PLS in later years would be an integral part of the scrutiny by MSPs of new bills when it is appropriate to do so;
- Recalling what was needed in later years would be easier to find and consider as this would be documented in Stage 1 reports, including what data would be needed by a committee undertaking subsequent PLS and what indicators would signal whether the Act was having the desired effect as envisaged when it was first passed.

24. An alternative approach is for committees to encourage the inclusion of a section on reporting mechanisms into certain bills, thereby placing the onus on the government to provide committees with feedback on how an Act has been implemented.

25. **Recommendation:** It is recommended that the clerks and SPICe build in consideration of how a bill could be reviewed, what data would be needed and what would be the main criteria that would indicate the success or otherwise of how the legislation was working etc. into the Stage 1 scrutiny and reports of committees.

26. It is worthwhile noting that Audit Scotland will be a useful resource as it undertakes a lot of work on data collection and measurement of outcomes.

Improving the data and information available to MSPs

27. **Recommendation:** Committees should be encouraged to be clear with the Scottish Government as to what data they may need subsequently to carry out PLS work if they or their successors wish in later years. Stage 1 reports should set out recommendations on what is needed.

28. Part of the information required, may be covered by the Scottish Government's National Performance Framework and the detailed indicators and outcomes that sit within this, or may need to be collected on a more bespoke basis. It should be noted that the Group is due to consider national outcomes at a future meeting.

Transparency of PLS in the Scottish Parliament: Committee annual reports and legacy reports, leading to a 'register' of PLS activity and

29. Identifying and quantifying how much PLS activity takes place across committees in the Scottish Parliament is difficult as much of the work has not been 'badged' or 'labelled' as such and it is difficult to then find and quantify activity.

30. **Recommendation:** The Group is invited to agree that committee annual reports, where appropriate depending on the committee, should contain a section on PLS identifying what work, if any, has been carried out. This will make it easier to identify, quantify and promote what is happening on PLS in the Parliament. Additionally, subject committees should cover what PLS

they consider to be necessary for legislation they have considered during a session in their legacy reports.

31. It will be important to encourage committees not to populate these parts of their reports through a desire to be seen to be doing something and to only capture activities that are PLS in nature so that we have a fair picture of what is going on.
32. The clerks/SPICe will then be able to collate information from these annual and legacy reports to pull together some form of 'register of PLS activity' which will help the CG gauge how much PLS happens in practice.

B. Role of Conveners Group

33. While the responsibility for conducting PLS clearly lies with the committees, the Conveners Group has a key role in encouraging and facilitating this work. There are a number of proposed ways that this can be achieved which are set out below. The intention is not to instruct committees on their work programmes. Instead it is intended to provide a means to support this work.

34. The Group is invited to consider these measures.

Oversight of progress

35. **Recommendation: Building on the earlier recommendations on reporting on PLS work being carried out, it is recommended that the Conveners Group consider a collation of the information from the individual committee annual reports on an annual basis. This would allow the Group to review progress on the implementation of this work.**
36. This process does need to recognise that some committees will not have been able to find time for PLS alongside other work, so this should not be a process of compiling a 'league table'.
37. With this oversight of the information, the Conveners Group would then have a role in promoting best practice.

International benchmarking and research

38. The Conveners Group could also benefit from the work that officials are doing as part of the international benchmarking project on PLS with the Westminster Foundation for Democracy which the Scottish Parliament is involved in². CG members could help promote the PLS work in the Scottish Parliament to other legislatures (e.g., at conferences) and consider best practice ideas from other jurisdictions. One further opportunity would be to reach out, for example, to other jurisdictions such as the Parliament of Uganda to share information on how to promote PLS and share ideas given their expressed interest in more PLS in their legislature³.

² <https://www.wfd.org/accountability-and-transparency/post-legislative-scrutiny>

³ https://twitter.com/Parliament_Ug/status/1533857953240981504?s=20&t=bzpfpcveSMDVOfVn0000A

39. The Conveners Group could also benefit from the research that officials are taking forward with [Dr Tom Caygill](#) of Nottingham Trent University. This will explore the model for PLS used in the Scottish Parliament in session 5 and track developments in session 6 to see if there is an improving situation.

40. Recommendation: The Group is invited to agree to engage in this work.

Programme for Government – incorporation of PLS recommendations from committees

41. One of the challenges after a committee has reported on, for example, PLS of a particular Act is how to affect that change legislatively if that is what has been recommended. Outwith taking forward their own committee bill – which is time-consuming – the only real option is to convince the Scottish Government to bring forward any changes recommended as part of its own programme for government or workload more generally.⁴

42. Whilst it is right that the Scottish Government should be free to decide its own legislative priorities, a failure to take forward the recommendations for change from a committee as part of a PLS inquiry can lead to disillusionment from those who took part in the review if, after all that work, nothing changed.

43. Recommendation: The Group is invited to explore this matter with the Minister for Parliamentary Business to see what options there may be to improve the likelihood of PLS recommendations being taken forward by the Scottish Government without impacting severely on its own legislative plans. The Minister is due to attend the next meeting of the Group on 21 December.

Role of the Citizen Participation and Public Petitions Committee

44. The Citizen Participation and Public Petitions Committee is currently conducting an inquiry into public participation in the Parliament. This work is looking at how the Parliament reflects, involves, and meets the needs of all the communities it represents.

45. The inquiry is focused on groups that are less likely to participate or engage in the work of the Parliament to understand why, to identify barriers to engagement and to listen to what groups say they need, rather than asking people to fit in with our existing ways of working. The Committee will be considering different forms of engagement in the scrutiny of policy and legislation, including PLS, and the role of participative and deliberative engagement.

46. Recommendation: the Conveners Group could invite the Convener of the Citizen Participation and Public Petitions Committee to report back in due course on PLS matters once the inquiry is finished. This could include how

⁴ Committee Bills are of course an option, but they can be time consuming to take forward. Taking such a bill forward may be easier at the start of a session than the end.

the Citizen Participation and Public Petitions Committee could help provide expertise and advice to other committees on PLS and the benefits of participative and deliberative engagement with assistance from officials in the Participation and Committees Team (PACT).

Role of ombudsmen and other statutory bodies as drivers of PLS activity

47. Organisations such as Audit Scotland, the Scottish Public Sector Ombudsman and others could play a role in providing information to committees through their own annual reports on issues they have identified with legislation that has been passed by the Scottish Parliament. This would be one means by which committees could be informed about possible subjects for PLS inquiries.
48. **Recommendation: the Conveners Group is invited to consider writing to relevant bodies to encourage them to comment on issues with the implementation of legislation in any annual reports that are laid in Parliament or sent to committees.**

Support tools – SDIA, EQIAs, academic research, commissioned research etc

49. Finally, there are several tools and initiatives that are available to parliamentary committees to help them with their scrutiny work of legislation and inquiries, and as part of identifying issues for their work programmes. Not all of these are well known by all committees or used as frequently as they could be.
50. For example, the Sustainable Development Impact Assessment tool (SDIA) which has been developed by SPICe is designed in part to help to improve the drafting and development of bills and their scrutiny. The aim of the SDIA tool is to pose questions about the kind of issues that can affect the ecosphere, society, and individuals, and thus make an impartial, politically neutral assessment of the provisions in any given bill and their impact on SD. This information can then be used to advise MSPs when they consider any bill. This information, in turn, can then be used in PLS inquiries to see if the bill had the impacts on SD that were originally envisaged.
51. A similar tool – Equalities Impact Assessments (EQIAs) – can be used to assess bills for impacts on equalities and protected characteristics (sex, age, disability, race etc.) and again, they could be used in PLS work to see if the bill had the impacts on equalities that were originally envisaged.
52. Expertise within SPICe could be used to inform which Acts would be ripe for PLS because of gaps in implementation. Additionally, the commissioning of research through SPICe could be used for PLS - to take away some of the heavy lifting for the committee and make best use of resources by providing a piece of research which the committee could use to help them inform scrutiny.
53. **Recommendation: the Conveners Group should ask Committee Office staff and SPICe to consider ways to better promote the availability and use of these tools and initiatives across committees.**

Recommendation

54. The Conveners Group is invited to consider this paper and agree what recommendations it wishes to take forward.

**Conveners Group clerking team
November 2022**

Conveners Group

9th Meeting, 2022 (Session 6), Wednesday 30 November 2022

Cross-committee working: Post-EU Scrutiny

Introduction

1. The purpose of this paper is to invite the Conveners Group to give further consideration to the scrutiny of post-EU issues.

Background

2. Conveners will recall that the Group identified scrutiny of post-EU scrutiny as a strategic priority this session within the context of cross-committee working.
3. This raises complex issues and the Constitution, Europe, External Affairs and Culture (CEEAC) Committee has the lead role in seeking to develop new post-EU scrutiny processes.
4. The Group has also noted that other committees will primarily deliver this work once the processes are agreed. The committees who will be most engaged are the subject committees whose remits include significant policy areas previously within EU competence, such as environment, agriculture and fisheries, but that market access principles apply to all devolved policy areas. Post-EU scrutiny is therefore a matter which is the responsibility of all committees to a greater or lesser extent.
5. The Conveners Group has a leadership role to provide support to committees in their scrutiny role and maintain an oversight of the issues in co-operation with CEEAC. It has previously agreed that its role would be to maintain a watching brief of the issues and it would become involved as and when required. To that end, it has received a number of briefings from the Convener of the CEEAC Committee.

Developments

6. In the attached note, the Convener provides an update for the Group on the work the CEEAC Committee has been taking forward in this area and the challenges it has encountered. The note also provides suggested action in response to this.
7. The Group is invited to consider these issues and to consider further action to be taken in this area.

Next steps

8. The Convener of the CEEAC Committee will provide the Group with an update at the meeting. Officials will also be present to respond to any queries the Group may have.

Recommendation

9. **The Conveners Group is invited to consider the contents of this paper.**

**Conveners Group clerking team
November 2022**

Post-EU Constitutional Issues: Update from the Convener of the Constitution, Europe, External Affairs and Culture Committee

Introduction

1. The Committee has published three reports this session in relation to post-EU constitutional issues:

[UK Internal Market Inquiry \(azureedge.net\)](#)

[The Impact of Brexit on Devolution \(azureedge.net\)](#)

[Legislative Consent Memorandum for the Northern Ireland Protocol Bill \(UK Parliament legislation\) | Scottish Parliament](#)

2. There are consistent themes emerging from our work which the Committee has asked me to share with the Conveners' Group and which can be summarised as follows –

- Tension within the devolution settlement;
- Tension in the balance of the relations between the Executive and the Legislature.

Tension Within the Devolution Settlement

3. The Committee has noted that there are substantive differences between the views of the UK Government and the Scottish and Welsh Governments regarding future alignment/divergence with EU law.
4. This raises a number of fundamental constitutional questions for the Committee and the Parliament –
 - to what extent can the UK potentially accommodate four different regulatory environments within a cohesive internal market and while complying with international agreements;
 - whether the existing institutional mechanisms are sufficient to resolve differences between the four governments within the UK where there are fundamental disagreements regarding alignment with EU law and while respecting the devolution settlement;
 - how devolution needs to evolve to address these fundamental questions.

5. The Committee examined two significant areas in which devolution has begun to evolve following the UK's departure from the EU: the operation of the Sewel Convention and the use of delegated powers.

Sewel Convention

6. Following our inquiry on the impact of Brexit on Devolution the Committee agrees that the Sewel Convention is under strain following Brexit for two main reasons—

- Concerns about the number of post-EU related UK Bills where the UK Parliament has legislated in relation to devolved areas without the consent of the Scottish Parliament;
- Concerns about the lack of engagement at an inter-governmental level prior to LCMs being lodged in relation to a number of post-EU related UK Bills.

Delegated Powers

7. The UK Government has stated that powers for the UK Ministers to make SIs in devolved areas “are not new and have been used across a wide range of policy areas since the advent of devolution.”
8. However, prior to the UK leaving the EU, UK Ministers would principally make secondary legislation in devolved areas that implemented EU obligations and with the consent of Scottish Ministers. The UK Government did not generally have powers to make secondary legislation in devolved areas and did not often do so.
9. Our view is that there is a considerable difference between delegated powers being conferred on Ministers to deliver a legal obligation to comply with EU law and delegated powers in the same policy area without this constraint.
10. The Committee's view is that the post-EU extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change. We have considerable concerns that this has happened and is continuing to happen on an ad hoc and iterative basis without any overarching consideration of the impact on how devolution works.

Tensions in the Balance of Power Between the Executive and the Legislature

11. The primary risk for the Scottish Parliament and other UK legislatures arising from the impact of post-EU constitutional change is that the level of transparency and Ministerial accountability which existed while the UK was a Member State of the EU is either intentionally and/or unintentionally diluted post-exit.

Inter-Governmental Working

12. There is a risk that the increasing shift towards inter-governmental working, as a consequence of the UK leaving the EU, may result in reduced democratic oversight of the Executive and a less consultative policy-making process. For example, in relation to the operation of common frameworks and the EU-UK Trade and Co-Operation Agreement and how they may constrain the use of the Parliament's legislative powers.

Delegated Powers

13. One of the key issues the Committee has considered is the scope of delegated powers being conferred on UK Ministers in devolved areas and on Scottish Ministers where these powers are concurrent. The DPLRC has also considered this issue.
14. Our view is that the scope of the delegated powers in the NI Protocol Bill, some of which may be sub-delegated to the Scottish Ministers, need to be viewed within the wider context of the scope of delegated powers in other Bills related to the UK leaving the EU. Taken together, this presents a significant risk to the balance of power between the Executive and the Legislature both at a UK and devolved level.

EU Alignment

15. The Committee's view is that the current approach to reporting on the Scottish Government's commitment to align with EU law is unsustainable. While the commitment to provide further information on the Scottish Ministers' intentions to align is welcome there is also an urgent need for a reporting mechanism which provides detailed information on actual legislative and non-legislative alignment including the effect of this in comparison with the acquis.
16. The Committee's view is that we do not have sufficient transparency with regards to the Scottish Ministers' decision-making process on EU alignment especially where decisions are taken not to align and the reasons for that.

EU Tracker

17. The Committee asked SPICe to commission research to set out a baseline of EU policy and law in devolved areas which are potentially within the scope of the Scottish Government's commitment to align with EU law:
[research-by-dr-whitten-on-alignment-with-eu-law.pdf \(parliament.scot\)](https://research-by-dr-whitten-on-alignment-with-eu-law.pdf)
18. Relevant subject committees have been asked for views on whether there are any additional EU policy areas which they would like monitored as part of the tracker.
19. Dr Whitten's research notes that "while instances of divergence to date are limited in terms of policy impact, procedural and technical changes to UK

and Scottish legislation, when read together with the evolution of EU legislation underline the challenge of ‘keeping pace’ because in the post-Brexit context the default setting of UK and Scottish law and EU law is towards divergence.” Dr Whitten provides three examples to demonstrate this and these are attached as **Annexe A**.

20. The Committee has agreed to commission an external body to provide the Parliament with an EU Law tracker. The primary purpose of the tracker is to provide transparency and allow the Parliamentary Committees, stakeholders including business and the public to track relevant developments in EU law. This will allow business and civil society in Scotland to continue to be aware of EU legislative developments which may affect them.

Next Steps

21. **The Group is invited to consider how post-EU constitutional issues can be mainstreamed into existing policy and legislative scrutiny. One option could be to invite the clerks, Legal Services and SPICe to develop a toolkit and guidance which will support Members and the Committees in addressing these issues as appropriate in carrying out regular scrutiny.**
22. **The Group is also invited to note that Scottish Parliament officials continue to work with Scottish Government officials in considering the appropriate level and timing of information to be provided to the Parliament in relation to the Ministerial policy to align with EU law.**

**Clare Adamson
Convener, CEEAC Committee**

Case Study: Procedural Changes involved in ‘Keeping Pace’ with Animal Health Law

Under the Trade and Cooperation Agreement, the UK in respect of Great Britain (UK(GB)) and the EU have separate regimes for managing human, plant, and animal health – this means sanitary and phytosanitary (SPS) checks and controls are now required on imports and exports of animals and animal products moving between GB and the EU. Under the 2021 Act ‘animal health and welfare’ is an area for which Scottish Ministers are to have ‘due regard’ in any use of the power to ‘keep pace’ with EU law and policy.

Since the end of the UK Transition Period, EU rules on animal health and welfare have changed. Evidence so far, outlined below, indicates that Scotland has kept pace with some changes in secondary EU legislation (regulations, directives, decisions) but not all aspects of change in EU legislation, including tertiary legislation, related to animal health.

EVOLUTION of EU LEGISLATION

Regulation (EU) 2016/429 on transmissible animal diseases (the ‘Animal Health Regulation’) was adopted by the EU on 9 March 2016, however, many of its provisions did not apply until a transition period provided for in the Regulation ended on 20 April 2021, after the end of the UK transition period.

Under Article 270 of the Animal Health Regulation (AHR), when it came into full application in April 2021, several acts that previously set out EU rules on animal health and disease control would be repealed; among these 11 were within Scottish devolved competence during the UK’s EU membership.

The eleven acts that are now repealed in EU law are: Council Directives 2006/88/EC, 77/391/EEC, 78/52/EEC, 2003/85/EC, 2005/94/EC, 2001/89/EC, 92/35/EEC, 2002/60/EC, 92/66/EEC, 92/119/EEC, 2000/75/EC.

Since the new AHR entered fully into force in April 2021, a considerable number of amendments have been made via EU implementing legislation: 12 Commission Delegated Regulations and 194 Commission Implementing Decisions have been adopted between 1 January 2021 and 31 October 2022. The majority of these implementing EU acts make provisions related to the control and management of specific diseases (notably related to the recent outbreak of highly pathogenic avian influenza (HPAI) and African swine fever).

EVOLUTION of UK and SCOTTISH LEGISLATION

A retained EU law version of Regulation (EU) 2016/429 exists on the UK statute book.¹ When the UK left the Transition Period, the 2016 Animal Health Regulation was not, however, fully operational across the EU.

In preparation for UK withdrawal and after the UK left the EU, several Scottish Statutory Instruments (SSIs) have amended retained EU law in the area of animal health. Two SSIs were passed prior to UK withdrawal which made minor, technical changes to ensure domestic legislation that implements EU animal health legislation continued to function effectively:

- The Animal Health (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/71)

¹ It is worth noting that there is no record of the AHL Regulation on the UK government ‘dashboard’ of retained EU law which, in its own terms, is not comprehensive either in regard to areas of policy that are devolved or indeed that are DEFRA responsibility.

- The Animal Health and Welfare and Official Controls (Agriculture) (EU Exit) (Scotland) (Amendment) Regulations 2020 ([SSI 2020/380](#))

On 10th March 2021, just weeks before the EU's new AHR would be fully applicable, the Animal Health (Notification and Control Measures) (Miscellaneous Amendments) (Scotland) Order 2021 ([SSI 2021/130](#)) was made, under the Animal Health Act 1981, to "ensure that ongoing trade with Northern Ireland and with the European Union [was] not disrupted" ([SSI 2021/130 Policy Note](#)) due to the implementation of the AHR on 21st April 2021. The policy note accompanying the SSI states that the amendments did not alter Scottish Government policy while also noting that: "full impact assessments have not been prepared... as the instrument is urgently required to ensure that ongoing trade with NI and the EU is not disrupted".

Further technical changes to legislation in the area of animal health, made by The Animal Health (Notification and Control Measures) (Miscellaneous Amendments) (Scotland) (No.2) Order 2021 ([SSI 2021/456](#)), a key aim of this SSI was to give Scottish Ministers "greater flexibility" to exercise powers to introduce control measures in the event of any outbreaks of foot and mouth disease (see [policy note](#)). Provisions in [SSI 2021/456](#) echo similar changes brought in under The Import of Animals and Animal Products and Approved Countries (Amendment) Regulations 2022 ([SI 2022/735](#)) to give new powers to UK Ministers in GB to carry out "functions previously carried out by the European Commission to protect human and animal health" (Explanatory Memorandum, [para 6.2](#)). Previously, any change of this nature in UK-wide or Scots law would have required authorisation via specific secondary legislation.

Taken together, the provisions noted above underline, on the one hand, the frequent evolution of EU rules related to animal health and, on the other, the UK approach post-Brexit to strengthen Ministerial powers to enact measures which were previously implemented at EU level.

Case Study: Technical Changes regarding Organics Products and

Under the Trade and Cooperation Agreement there are provisions for mutual recognition between the UK and the EU in respect to organic products. As set out below, however, the parallel evolution of UK (UK-wide and/or Scots law) and EU legislation in this area has resulted in some divergence of a technical nature.

Classification

EVOLUTION of EU LEGISLATION

[Regulation \(EU\) 2018/848](#) on organic production and labelling of organic products became law in the EU on 2 June 2018, however, under Article 61 of this 2018 Regulation, its provisions would only apply from 1 January 2021. Due to the COVID-19 pandemic, its application was postponed by one year meaning it only became fully applicable on 1 January 2022, after the end of the UK Transition Period.

The 2018 Regulation on organics provides for the repeal of [Council Regulation \(EC\) No 834/2007](#) – while both instruments of EU law now exist as retained EU law in the UK in respect of Great Britain, it is the provisions of the earlier 2007 Regulation that apply in the domestic UK(GB) context. The result is divergence between UK(GB) retained EU law on organics and EU (plus UK(NI) under the Protocol on Ireland / Northern Ireland) law on organics.²

² For reference see UK government 'Explanatory Memorandum for European Union Legislation within the scope of the UK/EU Withdrawal Agreement and Northern Ireland Protocol' [17 March 2022] on related matter of GB-NI

EVOLUTION of UK and SCOTTISH LEGISLATION

A series of UK-wide statutory instruments have been made in relation to organic production and labelling of organic products in preparation for, and subsequent to, the end of the UK Transition Period. Primarily, changes have been made via statutory instrument passed in Westminster but applicable across England, Scotland, and Wales (EU legislation on organics applies in Northern Ireland under the Protocol). Measures brought into law through these UK SIs have amounted to divergence, of a technical nature, with measures in EU law.

Under The Organic Production (Amendment) Regulations 2022 ([SI 2022/360](#)) a derogation to retained EU law version of Council Regulation (EC) No 834/2007 was extended to allow a non-organic food additive – gellan gum – to form part of the production of organically reared pullets (young chickens) for egg production in the GB market. The SI 2022/360 [Explanatory Memorandum](#) notes that ‘targeted consultation’ was carried out via a meeting of the ‘organics Four Nations Working Group’ during which Scotland and Wales expressed support for the measure (para. 10.1).³

Under The Organics Equivalence and Control Bodies Listing) (Amendment) Regulations 2021 ([SI 2021/1266](#)) (see [SI 2021/1266 Explanatory Memorandum](#)) changes the mechanism for amending and updating lists of countries or control bodies whose standards are recognised as equivalent for the purposes of organic production and labelling. While the UK was an EU Member State, changes of this nature required authorisation via specific statutory instrument, following this new SI, officials will be empowered to make relevant amendments under Ministerial direction and online lists will be updated accordingly.

An Expert Group on Organic Production ([EGOP](#)) has been set up to provide advice to the Four Nations Working Group (FNWG) on the development of UK(GB) policy on organics post-Brexit. The [EGOP terms of reference](#) note that both the FNWG and EGOP replace EU bodies that served a similar purposes and states that, post-Brexit presents “an opportunity for the UK to develop its own policy tailored to the needs of the domestic market and consumers”.

At present, the TCA provisions for mutual recognition of organics and organic products between the EU and UK mitigates the policy impact of specific examples of divergence. If the two regimes continue to evolve separately, maintaining equivalence arrangements is likely to become more difficult with consequential impact on efforts to ‘keep pace’ in Scotland.

divergence arising as a result of the example used above. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_2018.150.01.0001.01.ENG&toc=OJ%3AL%3A2018%3A150%3ATOC accessed 29 October 2022.

³ EM also states: “This amendment to retained Regulation (EC) No 889/2008 will not apply to Northern Ireland. This is because Regulation (EU) No 2018/848 came into force in NI on 1 January 2022, repealing Regulation (EC) No 889/2008” (para. 10.1).

Case Study: Procedural Changes related to Official Controls on Plants

Under the Trade and Cooperation Agreement, the UK(GB) and the EU have separate regimes for managing human, plant, and animal health – this means sanitary and phytosanitary checks and controls are now required on imports and exports of animals and animal products moving between GB and the EU. Under the 2021 Act, ‘plant health’ is an area for which Scottish Ministers are to have ‘due regard’ in any use of their powers to ‘keep pace’ with EU law and policy.

Since the end of the UK Transition Period, EU rules on checks and controls required on plants and plant products have changed; at the same time, UK rules regarding plant health and related checks, as they apply to Great Britain, have also changed. The parallel adoption of new and divergent approaches to control measures for plant health in the EU and UK(GB) makes alignment more difficult to achieve and maintain as the example below demonstrates.

EVOLUTION of EU LEGISLATION

Regulation (EU) 2017/625 on official controls related to food and feed law, animal health and welfare, plant health and plant protection products became law in the EU on 4 April 2017, however, under Article 167 of this 2017 Regulation, most of its provisions only became applicable from 14 December 2019, at which point several previous EU acts were repealed, including 6 that were within the competence of the Scottish Government during membership.

Since the end of the UK Transition Period, 57 Commission Implementing Regulations and 15 Commission Delegated Regulations have been made under the 2017 Regulation. While many of these are technical in nature, they do have implications for alignment of standards between Scotland and the EU in the area of plant (and animal) health. If changes are not monitored and, potentially, applied to Scotland, the default setting is divergence.

EVOLUTION of UK and SCOTTISH LEGISLATION

A series of UK(GB) statutory instruments and Scottish statutory instruments have been passed in relation to plant health and related controls, including some that amend the retained EU law version of the 2017 Regulation. Several SIs/SSIs have been passed to introduce, then delay the coming into force of the full remit of checks and controls required on goods entering UK(GB) under the 2017 Regulation (due in October 2021, then delayed to January 2022, then phased in throughout this year).⁴

Other SIs/SSIs have made more changes that are more significant in light of the ‘alignment commitment’ in Scotland. In particular, the Official Controls (Plant Health) (Frequency of Checks) Regulations 2022 (SI 2022/739) makes provision for a new UK(GB) approach to determining the frequency of physical and identity checks on consignments of plants and plant products entering Great Britain and to give appropriate authorities powers to modify the frequency of rates. Under the EU regime, plant and plant products intended for final users are subject to 5-10% rate of physical checks and those not intended for final users are subject to 100% rate of physical and identity checks; under the new UK regime, the

While this is a technical and procedural change and may therefore seem insignificant, when viewed in light of the evolution of EU legislation (including 2017 Regulation) in the area of plant health and official controls, the new UK(GB) approach reliant on the exercise of Ministerial powers and risk-assessments, such changes will make ‘keeping pace’ in the area of plant health more difficult.

⁴ See Cabinet Office 2021 ‘Government sets out pragmatic new timetable for introducing border controls’ UK government <<https://www.gov.uk/government/news/government-sets-out-pragmatic-new-timetable-for-introducing-border-controls>> accessed 14 September 2021.

rate of checks could be reduced to 0% in both cases or increased if Ministers/Departments decide to do so.