

Minister for UK Negotiations on Scotland's Place in
Europe
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Dear Bruce

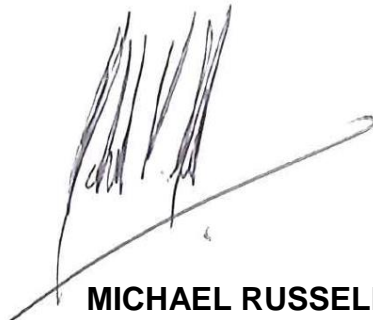
**EU (WITHDRAWAL) BILL – INTERIM REPORT ON THE LEGISLATIVE CONSENT
MEMORANDUM**

During the Parliamentary debate on the Committee's interim report on 23 January and in my evidence to the Committee on 31 January, I undertook to provide a more detailed response to the Committee's recommendations published on 9 January. I attach the Scottish Government's initial responses to the conclusions of the Committee and the report of the Delegated Powers and Law Reform Committee published on 17 November last year.

Both Committees' reports provide helpful analysis of the EU (Withdrawal) Bill, the Scottish Government's Legislative Consent Memorandum and the evidence received. Many of the Committees' conclusions look beyond the current legislative consent process to the implementation of the Bill, and wider issues on inter-governmental working, common frameworks and Parliamentary scrutiny of international negotiations. The responses in the Annex are the Government's first reaction; there will need to be much further discussion as the withdrawal negotiations, and whatever follows, proceed.

I thank the Committees for their work and I look forward to our continuing discussions on these issues.

I am copying this letter to Graham Simpson and Joe FitzPatrick.



MICHAEL RUSSELL

ANNEX

SCOTTISH GOVERNMENT'S RESPONSE TO THE FINANCE AND CONSTITUTION COMMITTEE AND THE DELEGATED POWERS AND LAW REFORM COMMITTEE REPORTS ON THE EUROPEAN UNION (WITHDRAWAL) BILL

F&C Committee conclusions on clause 11 and the devolution settlement

36. The Committee welcomes the recent progress which has taken place in negotiations between the Scottish and UK governments and notes the recent statement, on 6 December, by the Secretary of State for Scotland that the UK Government intends to table amendments to Clause 11.

37. The Committee concurs with the vast majority of the expert evidence it has received that Clause 11 represents a fundamental shift in the structure of devolution in Scotland. Regardless of whether the Scottish Parliament obtains additional powers or not the effect of Clause 11 will be to adversely impact upon the intelligibility and integrity of the devolution settlement in Scotland.

38. The Committee does not agree that Clause 11 is necessary to enable the agreement of common frameworks. The Committee notes that there are no provisions in the Bill that guarantee that Clause 11 is a temporary measure.

39. The Committee is of the view that Clause 11, as currently drafted, is incompatible with the devolution settlement in Scotland. The Committee considers further that even if Clause 11 is designed to be a transitional measure it fails to fully respect the devolution settlement. The Committee therefore will not be in a position to recommend legislative consent for the Bill unless Clause 11 is replaced or removed.

45. The Committee is not yet persuaded that any of these approaches to Clause 11 would be sufficient. The Committee reiterates that a resolution to the issue of Clause 11 requires to be found by the UK Government as a matter of priority regardless of whether the process of finding an agreed way forward on Common Frameworks has been arrived at.

Scottish Government response

The Scottish Government welcomes the clear view of the Committee on Clause 11. There is now consensus – from the Scottish and Welsh Governments, the Scottish Parliament and the National Assembly for Wales, and from across expert commentators – that this clause needs to be amended, both to protect devolved powers and to preserve the coherence of the current scheme of devolution.

The Scottish Government is seeking an agreed amendment to clause 11 with the Welsh Government and the UK Government. Discussions are continuing to secure such agreement, which will have to respect the principles of devolution, and be compatible with structure of devolution on the Scotland Act. The Government will keep the Committee and Parliament updated on the progress of discussions as these proceed.

F&C Committee conclusions on the Scottish Continuity Bill

40. In the event that the Scottish Government is unable to recommend legislative consent and decides to introduce a Continuity Bill then it is highly likely that there would be a reduced timetable for parliamentary scrutiny of such legislation. In such a situation the Committee recommends that the Scottish Government engages in early discussions with the Scottish Parliament regarding what mechanisms can be used to maximise the scope and time available for scrutiny of such legislation.

Scottish Government response

The Scottish Government's preference remains to work collaboratively with the UK Government on the legislative consequences of EU withdrawal, including the EU (Withdrawal) Bill. Discussions continue to agree amendments, but in the absence of these the Scottish Government has to prepare responsibly for the possibility of consent being withheld. The Government has therefore announced its plans for Continuity Bill for Scotland.¹

If a Continuity Bill for Scotland is introduced, the Scottish Government will work with the Parliament to agree an approach which balances the need for an expedited timetable whilst ensuring the Parliament can scrutinise the content of the Bill.

¹ <https://news.gov.scot/news/scottish-eu-bill-likely-to-be-introduced-in-february>

F&C Committee conclusions on common frameworks

99. The Committee welcomes the progress which has been made between the UK Government and the devolved governments in developing an approach to agreeing common UK frameworks and notes that this work is on-going. In particular, the Committee welcomes the commitment to respect the devolution settlement.

100. The Committee also welcomes the commitment from the UK Government that common frameworks will not be imposed. The Committee strongly believes that both the process for agreeing common frameworks and the actual content must be arrived at through agreement and not imposed. The Committee also strongly believes that this process is not solely a matter for governments but must be transparent and inclusive. The Committee therefore recommends the following—

- The Scottish Parliament must have the opportunity to consider the approach to common frameworks currently being negotiated at governmental level prior to being asked to give consent to the Bill;

- The Bill should be amended to include the approach to agreeing common UK frameworks, including the need for parliamentary consent and consultation with stakeholders;

- Where non-statutory arrangements are appropriate, such as Memorandums of Understanding and Concordats between governments, there must be opportunities for parliamentary oversight;

- Common frameworks, if binding, must apply equally to both UK and devolved governments;

- Clarity is required around which frameworks will be bilateral and which are multilateral and if the latter which are UK wide and which are GB wide.

101. The Committee also recognises that significant further work is required in relation to the scrutiny of developing and agreeing common frameworks. In particular, the Committee heard evidence on the application of the general principles of EU law to common frameworks including the principles of subsidiarity and proportionality. The Committee believes that this is a critically important area of work and will consider it further. The Committee will also be writing to relevant subject committees inviting them to begin considering what common UK frameworks may look like in areas covered by their respective remits.

102. The Committee also believes that significant further work is required in considering arrangements to replace the current EU policy-making processes across the UK. Consideration will also need to be given to addressing the governance gap in relation to the monitoring, implementation and enforcement of common UK frameworks. The Committee intends to return to this issue.

Scottish Government response

The Government strongly supports the Committee's view that determining common frameworks must be a matter of negotiation and agreement, not imposition, and the need for future arrangements to respect devolution, in line with the principles agreed at JMC (EN).

The Government agrees with the Committee's assessment of the progress which has been made between the Scottish and UK Governments in developing an approach to agreeing common frameworks. This also illustrates that the approach in Clause 11 of the Bill is unnecessary and disproportionate.

On scrutiny, by both the Scottish Parliament and wider stakeholders, the Government attaches great importance to appropriate oversight and consultation, and makes regular updates to committees and statements to Parliament. However, oversight and scrutiny must happen at the right time in the process and allow sufficient room for inter-governmental negotiations where these are required. The right balance needs to be struck between these two requirements.

The Government recognises the particular issues of Parliamentary oversight of non-legislative arrangements, such as protocols and Memorandums of Understanding. The Government believes that the Parliament should have the opportunity to scrutinise and agree such non-statutory arrangements for common frameworks, as well as legislative arrangements, in line with the provisions set out in the Inter-Governmental Relations Written Agreement between the Scottish Parliament and Scottish Government². The Government will consider, with the Parliament, appropriate procedures for such consideration.

The Government notes that Committee's recommendations that statutory provisions should underpin this process. The Government has not so far considered that such provision in this Bill would be appropriate given the wide range of possible models for UK frameworks, few of which are likely to require full legislative frameworks. The Government has considered that specific legislative arrangements would be provided in suitable vehicles, such as an Agriculture Bill, with legislative consent when required.

The Government will also will consider further, with the other administrations, the case for more general provision regarding frameworks in the Bill.

² <https://beta.gov.scot/publications/igr-agr-scotparl-scotgov/IGR%20Agreement.pdf?inline=true>

F&C Committee conclusions on international agreements

103. Consideration will also need to be given to the interaction between the Bill, common frameworks and the negotiation of new international agreements including trade deals. In the first instance it is anticipated that the Committee will have a role in scrutinising the Trade Bill LCM.

104. The Committee also intends to examine further the impact of the new international obligations including trade agreements on the devolved settlement with regard to the role of the devolved institutions, stakeholders and the wider public in influencing and informing the UK Government's negotiations.

Scottish Government response

The Government shares the Committee's view on the importance of international obligations and securing proper recognition of devolved interests in these negotiations, both for the Scottish Government and Parliament. The Government considers that there is an important gap in current UK constitutional arrangements for international agreements in taking account of the interests of devolved institutions and devolved competence.

The Government looks forward to working with the Committee further on these important issues.

F&C Committee conclusions on EU funding

105. Finally, further consideration is required in relation to the funding of devolved competences which are currently funded at an EU level. The UK's net contribution to the EU will revert to the UK Government. There are a number of options available as to how this funding will then be distributed across the UK and the Committee intends to consider this further including how the funding of obligations and commitments arising from common frameworks should be agreed. Again, the Committee intends to return to this issue.

Scottish Government response

The Scottish Government notes and welcomes the Committee's plans to undertake further work on this issue. It is crucial that repatriated powers transferred to the Scottish Parliament are accompanied by a sustainable funding package. This will ensure that decisions can be taken in the best interests of the Scottish economy and Scottish people. The Scottish Government is continuing to engage with HM Treasury regarding EU funding and related issues, and will continue its efforts to ensure that both the financial implications of EU exit and appropriate future funding arrangements for Scotland are fully considered, in order to ensure Scotland's public finances are protected.

F&C Committee conclusions on the breadth of UK Ministers' powers

118. The Committee is concerned by the breadth of the powers conferred by Clause 7 of the Bill and in particular by the apparent transfer to government (from the legislature) of such extensive law making powers.

119. The Committee supports the recommendation of the DPLR Committee that the powers in Clause 7 “should only be available where Ministers can show that it is necessary to make a change to the statute book, even if they cannot show that the particular alternative chosen is itself necessary.”

DPLR Committee conclusions on the breadth of UK Ministers' powers

47. The Committee reluctantly accepts that the unprecedented task of modifying domestic legislation to preserve the statute book on leaving the European Union, and the short timeframe in which it is to be done, necessitates broad powers. In any other circumstances the conferral of such wide powers would be inconceivable, but the Committee accepts that in these circumstances the taking of wide powers is unavoidable.

48. However, the Committee considers that the powers should only be available where Ministers can show that it is necessary to make a change to the statute book, even if they cannot show that the particular alternative chosen is itself necessary.

49. The Committee notes that Ministers confirmed that the powers are not to be used to make policy changes. The Committee welcomes this. The powers should not be used to make substantive policy changes.

50. The Committee acknowledges that Ministers need to be able to make choices between alternative options where a change is required in order to remedy a deficiency in EU law. It is the Parliament's role to scrutinise that choice.

51. However, the Committee recommends that Ministers consider further the suggestion made by other committees that the powers should be based on a necessity test rather than an appropriateness test. It anticipates that it should be possible to find some wording which would restrict Ministers to using the power only where necessary, while still enabling a choice to be made between competing solutions depending on which is most appropriate.

Scottish Government response

The Scottish Government shares the concerns that have been expressed about the breadth of the powers given to Ministers under the Bill, for example a necessity test for the use of the powers. However, the Scottish Government's primary concern in this section of the Bill has been to ensure that devolved Ministers should have the same powers under the Bill as UK Ministers. This is to avoid a situation where only UK Ministers can act in devolved areas, which is contrary to the principles of devolution, and to ensure that the powers can be used in the most flexible and pragmatic way by the two governments, with the necessary Parliamentary oversight. Scottish Government officials have also been working closely with their counterparts in the Parliament to consider arrangements for appropriate scrutiny of devolved provisions in instruments made under both UK and Scottish Ministers' powers.

F&C Committee conclusions on scrutiny of UK Ministers' powers

129. The Committee is deeply concerned that Clauses 7 to 9 in the Bill would allow UK Ministers to make statutory instruments in devolved areas without any statutory requirement to seek the consent of Scottish Ministers or the Scottish Parliament. The Committee considers that this cuts across the devolution settlement.

130. The Committee supports the amendments published by both the Scottish Government and the Welsh Government which require UK Ministers to seek the consent of the devolved administrations prior to making statutory instruments in devolved areas as provided for in Clauses 7 to 9 of the Bill.

131. The Committee also emphasises the need for parliamentary scrutiny of Scottish Ministers' proposals prior to consent being given to UK Ministers. The Committee, therefore, welcomes the commitment by the Minister to work with the Parliament to "set up a mechanism to ensure we do not exercise our own powers until we have consulted."

132. The Committee also welcomes the commitment by both the Secretary of State and the Minister to consider extending the Sewel Convention to the powers in the Bill which allow UK Ministers to make statutory instruments in devolved areas. The Committee recommends that the Parliament should be consulted as part of this process with a view to considering how this would work in practice.

133. The Committee supports the view of the DPLR Committee that there should be a process which provides an opportunity for the Parliament to scrutinise Scottish Ministers' proposals before they grant consent to the UK Government to make subordinate legislation in devolved areas.

134. The Committee notes that a working group of Scottish Government and Scottish Parliament officials is currently examining these issues including the Bill as amended and we look forward to considering their findings prior to the publication of our final report on the LCM.

DPLR Committee conclusions on scrutiny of UK Ministers' powers

97. Where there is scope for secondary legislation to be made following different routes there must be clarity on which route is being pursued and why. The Committee believes that co-operation and co-ordination between governments is essential to the effective delivery of secondary legislation under the Bill. Co-ordination and co-operation between governments should, however, be in addition to and not a substitute for effective scrutiny of secondary legislation by the UK Parliament and devolved legislatures. It is for the legislatures to scrutinise that co-ordination and co-operation, and the decisions which flow from it.

98. Essential to that effective scrutiny is co-operation and coordination between legislatures.

Regulations made by UK Ministers acting alone and laid in the UK Parliament

107. The Committee agrees that UK Ministers should only be able to legislate in devolved areas with the consent of the devolved administration.

112. The Committee is of the view that the section 57 process is insufficient for these purposes.

113. While the Committee believes that the Bill would be strengthened by requiring the consent of devolved administrations before UK Ministers can legislate in devolved areas, the Committee believes that there needs to be a process for the Scottish Parliament to scrutinise the Scottish Ministers' decision to consent before consent is given.

114. The section 57 process requires notification only after the consent has been given and accordingly is not appropriate for these circumstances.

115. The Committee recommends that there should be a process whereby the Parliament has an opportunity to scrutinise the Scottish Ministers' position before they grant their consent.

123. The Committee believes that there should be a meaningful role for the Scottish Parliament in scrutinising UK instruments making provision in devolved areas or with a significant impact on Scottish interests and that role should be capable of affecting the legislation. It urges the UK and Scottish Government to reflect further on how that can be achieved within the applicable time constraints, and to work with the Scottish Parliament to find appropriate solutions. This is an area which the Committee is likely to revisit in its further consideration of the Bill.

Scottish Government response

The Scottish Government welcomes the Committees' support for the proposals of the Government and the Welsh Government to amend the Bill to require that consent of Scottish Ministers is sought to the exercise by the UK Ministers of powers in devolved areas.

The Scottish Government also welcomes the support for the process underway to consider what arrangements can be developed to ensure there is appropriate scrutiny of decisions to consent to UK Ministers acting in devolved areas. The Government recognises the importance of ensuring that the Scottish Parliament is given the opportunity to scrutinise that consent, and of ensuring that scrutiny is proportionate and can be conducted within timescales which will enable instruments to proceed at a UK level or an alternative approach to be taken if necessary. It is the Government's intention that recommendations on how to proceed will be available to Committees for their final reports on the Bill. Discussions are also underway with UK Government departments with regards to their legislative proposals for EU withdrawal.

The Scottish Government also notes that the Committee has welcomed the commitment by both the Secretary of State and the Minister to consider extending the Sewel Convention to the powers in the Bill. The first step would be to accept the amendments to the Bill proposed by the Scottish and Welsh Governments.

F&C Committee conclusions on Scottish Ministers' powers

141. The Committee supports the principle that Scottish Ministers should have the same powers as UK Ministers in the Bill in relation to devolved competences. But we are also strongly of the view that these powers as currently drafted are too broad and must be subject to robust parliamentary scrutiny whether exercised in London or Edinburgh. The Committee, however, recognises that the Bill as amended during the Committee Stage in the House of Commons may or may not address some of these concerns. As noted above the Committee has not yet had the opportunity to consider these amendments but we will do so prior to the publication of our final report.

DPLR Committee conclusions on Scottish Ministers' powers

131. The Committee agrees with Professor Tierney that the Scottish Ministers should not be using the powers to make significant policy changes and the Parliament should be policing that.

132. The Committee also recognises that there is a strong probability that some instruments will be more than technical, tidying up instruments. There is the potential for large volumes of instruments to be laid and there needs to be a process for these significant instruments to be identified and submitted to greater scrutiny.

133. The Committee recognises the practical reality that, when dealing with high volumes of EU-related SSIs, Scottish Parliament committees may wish to have as clear an indication as possible of which instruments are likely to be most significant. Committees will also have to balance the consideration of legislation relating to EU withdrawal with the domestic legislative programme. The Committee considers that it would be valuable to lead committees for EU withdrawal instruments to be 'flagged' where the instruments meet certain criteria. This is a role which could be carried out by this Committee.

134. It is expected that the Scottish Government may wish to provide, in addition to the usual Explanatory and Policy Notes, an assessment of the way in which each instrument modifies EU law, and of whether in doing so it goes no further than necessary to deliver the policy intention of the Bill. The UK Government has already made a commitment to include such a statement in Explanatory Memoranda for SIs. With such information, the Committee could, when considering individual SSIs, provide an indication to lead committees of the extent to which this Committee agrees with the Scottish Government's assessment of the effect of the instrument. If the Committee identifies a discrepancy, lead committees could then decide what further scrutiny they would wish to undertake.

137. The Committee's position is that instruments should be accompanied by essential information (as noted below) to enable the subordinate legislation project for EU withdrawal to be delivered on time and with an appropriate level of scrutiny by the Parliament. It considers that each instrument should be accompanied by a succinct overview of the following matters (although this is not an exclusive list):

- an explanation of the existing EU law,
- the reasons for and effect of the proposed change,
- a summary of the consultation carried out,

- a statement explaining why the Minister considers the change appropriate (or necessary),
- an indication of how the instrument should be categorised in relation to the significance of the change proposed,
- the effect of the instrument in relation to Scotland.

138. It is also critical to the scrutiny of instruments that this Parliament has a clear indication of what is coming forward. To that end, the Committee reiterates its request to the Scottish Government to provide detailed and accurate information on forthcoming instruments as soon as it is in a position to do so.

139. The Committee also encourages the Scottish Government to take steps to ensure a steady flow of subordinate legislation to the Parliament, while recognising the challenges posed by the anticipated need in many cases for Westminster legislation to be laid first.

Stakeholder involvement

199. The Committee reiterates its recommendation that, wherever possible, regulations should be submitted for consultation as early as possible. While some regulations may need to wait on the outcome of exit negotiations others can be progressed now and should be, so as to enable that stakeholder engagement.

200. The Parliament should also do what it can to publicise opportunities to engage with secondary legislation as well as explaining the process for the scrutiny of secondary legislation to help people understand when the opportunities for engagement and influence exist.

Scottish Government response

The Scottish Government welcomes the amendments made by the UK Government to the extent that they address some of the concerns on the breadth of Ministerial powers under the Bill. The Government and Parliament will want to consider whether they are sufficient to address the concerns of the Committee in the joint work on procedures for scrutiny and approval of instruments made under the Bill.

The Government welcomes the Committee's support for the principle that Scottish Ministers should have the same powers as UK Ministers in the Bill in relation to devolved competences (including Clause 17). The Government believes that the amendment made by the UK Government on directly applicable EU law is important in recognising the principle that Scottish Minister should have powers over these important areas of devolved competence. However, the amendment relies on Clause 11 of the Bill as drafted. The Scottish Government is clear that it is unacceptable for only UK Ministers to have powers in devolved areas therefore a further amendments is required to reflect changes to Clause 11 if and when these are agreed.

The Government acknowledges the Committee's position that scrutiny in the Scottish Parliament of the Scottish Ministers is every bit as important as scrutiny of the UK Government. It is right and proper that how the Scottish Parliament scrutinises the decisions of the Scottish Government should be decided here.

The Scottish Government is committed to providing accompanying explanatory material to the Scottish Parliament, both when notifying the Scottish Parliament of an intent to consent to SIs being made in devolved areas and when laying SSIs related to withdrawal from the EU. The precise format of that information is to be determined, and the Government welcomes the Committee's recommendations as to what it might contain. The Government also considers that it is important that Parliament is given information about its assessment of the significance of an instrument to enable Parliament to determine how it should approach its scrutiny of the instrument. Discussions are continuing between officials about the information that would be most helpful, and the Government is also in early discussions with the UK Government about what information they will provide when sharing draft instruments.

The Scottish Government currently proactively shares with the parliamentary authorities a "horizon-scan" of future SSIs. This process will continue as preparations for EU withdrawal proceed, and it is intended that the horizon-scan will differentiate between SSIs relating to withdrawal from the EU and other SSIs.

In preparing for EU withdrawal, the Government is giving full consideration to the levels of consultation and stakeholder engagement that are conducted. The Government considers that a proportionate approach ought to be taken, to ensure that stakeholder time is dedicated to inputting in to instruments that are significant in their nature and may have impact upon stakeholder interests as opposed to instruments that are minor and technical in their nature.

DPLR Committee conclusions on scrutiny procedures

Joint procedure

146. The Committee notes the Minister's comments on the use of the joint procedure. The Committee notes, however, that this is not a new procedure for the Scottish Parliament and that one already exists in the Scotland Act 1998. The Committee can see value in a procedure for joint scrutiny where matters are of such significance. The Committee would welcome further clarity on the circumstances in which such a procedure might be used.

Affirmative vs negative procedure

157. The Committee notes the concerns expressed by the Delegated Powers and Regulatory Reform Committee about the insufficient range of matters that must be subject to the affirmative procedure. The Committee also notes that committee's suggestion that the affirmative procedure should be applied to regulations which transfer functions from an EU body to an existing UK body.

158. The Delegated Powers and Regulatory Reform Committee also recommended that regulations amending or repealing primary legislation should be subject to the affirmative procedure.

159. The Committee understands from the Delegated Powers Memorandum that changes to primary legislation using the secondary legislation powers in the Bill are intended to be minor and mechanistic. If that is the case then the negative procedure may be the right one. However the Bill as drafted, as the Committee has commented on already, also enables substantive changes to be made to primary legislation in instruments subject to the negative procedure.

160. The Committee considers that the starting point in considering delegated powers is that regulations amending primary legislation should be subject to the affirmative procedure. However it recognises that powers must be considered in the context of the Bill in which they arise. The context here is that the EU withdrawal project is likely to require numerous minor amendments to be made to primary legislation.

161. The Committee is of the view that the Scottish Parliament's processes for the scrutiny of secondary legislation are robust and allow for effective scrutiny of instruments irrespective of the procedure attached to them.

162. However, the Committee recognises that where Ministers have a choice as to which procedure to adopt they will most likely choose the procedure subject to a lower level of scrutiny. The Committee would be concerned if the powers were exercised to make substantive policy changes to primary legislation using the negative procedure.

163. The Committee suggests that further work should be done to identify further categories of significant actions or impacts which ought to attract the affirmative procedure, in addition to those in the Schedule 7 list. It may be possible for these to be identified on an informal basis, without the need to be written into the Bill.

Enhanced procedure

167. The Committee recognises that the timescales for making instruments prior to exit day may make the use of an enhanced scrutiny procedure deeply challenging from a practical perspective.

168. Nonetheless the Committee can see that if the powers continue to be as wide as currently drafted there could be an argument for making provision for such a procedure. The Committee also notes that this would have the benefit of enabling stakeholders as well as the Parliament to engage in the development of regulations.

169. The Committee also recommends that, in the interests of good scrutiny and allowing stakeholders to engage, the Scottish Government should publish drafts of regulations for consultation as soon as they are ready. The Committee encourages the Scottish Government to do so as soon as practicable.

Made affirmative procedure

179. The Committee considers that there could be merit in such a procedure being available for affirmative regulations laid in the Scottish Parliament. It appears that the Scottish Ministers are just as likely, if not more likely, to have to make urgent instruments as the UK Ministers. For example, there may be circumstances where the Scottish Ministers will have to wait to see an approach taken by UK Ministers before making instruments, due to the requirement for Scottish Ministers to legislate consistently with modifications made to certain retained EU law by UK Ministers. Accordingly the time for the Scottish Ministers to make instruments may be even more constrained.

180. However, the Committee notes the concerns expressed by the Constitution Committee about the use of this procedure.

181. The Committee suggests that bringing secondary legislation into force without prior parliamentary scrutiny should not become common practice. It considers that a case by case analysis of the appropriateness of procedures for making legislation without prior parliamentary scrutiny is needed.

182. In relation to this Bill, the Committee recognises that the need to plug gaps quickly in order to provide certainty and resolve problems which arise for stakeholders, may in some circumstances make the use of a made affirmative procedure suitable. Nonetheless, any such urgent procedures should only be used where necessary and should not be an alternative to thorough planning and timetabling.

Setting of the procedure

189. The Committee considers that Scottish Ministers should not be setting the procedure for instruments without the involvement of the Parliament.

190. The Committee believes that there should be a process to allow this Parliament to require the Scottish Government to lay a proposed instrument under the affirmative rather than the negative procedure. This reflects the principle that the Parliament should be consulted on significant issues before they can come into force, given that annulment of a negative instrument is not always an option, depending on whether the instrument has already taken effect.

191. On the basis of the information currently available, the Committee does not think it necessary to establish a new committee to undertake the function of considering the appropriate procedure for an instrument. However given the anticipated volume of instruments, the Parliament may need to apply its existing processes in new and flexible ways.

192. The Committee also encourages the Scottish Government to share information as early as possible about the instruments it intends to bring forward and the scrutiny procedure to be attached to them. The Committee recognises that this is impossible at the moment, but such information should be shared with the Parliament at the earliest possible opportunity to enable the Parliament to plan effectively for the laying of instruments and to identify any obvious anomalies in the proposed procedure to be attached to an instrument.

193. The Committee's recommendations here underline the importance of further work being done to agree categories of significant actions or impacts which ought to attract the affirmative procedure, as recommended above.

Scottish Government response

As set out above, further work is underway between the Scottish Government and Parliament to agree criteria to categorise instruments related to withdrawal from the EU in terms of their significance and impact, and to consider procedural issues raised in these recommendations. The aim is for the conclusions of that work to be available to Committees before their final reports on the Legislative Consent Memorandum on the Bill.

DPLR Committee conclusions on ancillary powers

69. The Committee recognises that ancillary powers of this nature have the potential to have far-reaching effects. The need for their inclusion in a bill has to be made out on a case by case basis.

70. At the same time, the Committee can see the potential for gaps to arise as a consequence of this Bill in areas of legislation which solely affect the Scottish Parliament or the powers of the Scottish Ministers. An example might be in the statutory codes of interpretation which apply to Acts of the Scottish Parliament and Scottish statutory instruments. These gaps may not become clear until after the Bill is in force.

71. The Committee recommends that further thought be given to the question of whether powers equivalent to those in clause 17 be conferred on the Scottish Ministers, to enable them to plug any gaps arising as a consequence of the Bill or in relation to transition to the new regime, within Ministers' extended legislative competence as conferred by this Bill. Such an approach would enable the exercise of these ancillary powers to be scrutinised in the Scottish Parliament.

Scottish Government response

The Scottish Government notes the Committee's recommendation about the Scottish Ministers being given powers equivalent to those in clause 17. As stated, the Scottish Government's view is that, while the powers in the Bill should be no broader than is necessary, in principle the same set of powers should be given to the Scottish Ministers in respect of their devolved responsibilities as UK Ministers in respect of reserved matters.

DPLR Committee conclusions on fees and charges

89. The Committee expresses its concern about the ability of Ministers to impose taxation measures in regulations made under Schedule 4.

90. It also agrees with the conclusions of the House of Lord's Delegated Powers and Regulatory Reform Committee regarding sub-delegation of this power. Ministers should not be able to sub-delegate the power to create fees or charges to a public body, enabling that body to impose those fees or charges administratively rather than by way of statutory instrument. It appears to the Committee that sub-delegating the power to charge fees in this way will not create the transparency and certainty which business is seeking following EU withdrawal.

91 The Committee also echoes the Delegated Powers and Regulatory Reform Committee's recommendation that the affirmative procedure should apply to all regulations under Schedule 4 which introduce or increase fees. This Committee has consistently in its various reports on delegated powers made the point that applying the affirmative procedure to the first use of a power, and the negative procedure to subsequent uses, is unacceptable in principle. In this case such an approach would allow an initially very small fee to be set by affirmative regulations, with a subsequent significant increase imposed by negative regulations.

Scottish Government response

The Scottish Government notes the view of the Committee about the appropriate level of scrutiny to be given to instruments fixing fees and charges. It is intended that the joint work between the Government and Parliament on procedures for scrutiny and approval of instruments made under the Bill should address this issue and other financial issues arising from the use of the powers in the Bill as far as devolved areas are concerned.

F&C Committee conclusions on the devolution Acts

145. The Committee recognises that the Northern Ireland Act 1998 is, in part, a product of an international agreement between the governments of the Republic of Ireland and the UK. Nevertheless, the Committee considers that the devolution acts are fundamental constitutional acts and should have an equal status in terms of the provisions in the European Union (Withdrawal) Bill.

146. The Committee is particularly concerned that the use of delegated powers to amend the Scotland Act 1998 would not engage the Sewel Convention, circumventing a key principle of the current devolution settlement whereby changes to the powers of the Scottish Parliament by Westminster will normally require the consent of the Scottish Parliament.

DPLR Committee conclusions on the devolution Acts

60. The Committee supports the concept of a constitutional protection clause. The Committee understands the justification for providing specific protection to the Northern Ireland Act, however, the Committee equally believes that protection should also be afforded to other constitutional statutes including the Scotland Act 1998.

61. At the same time, the Committee recognises that the Scotland Act 1998 is already amendable by way of secondary legislation. Significant amendments made to that Act by secondary legislation, such as changes to competence or to Ministers' functions are, however, subject to scrutiny in the Scottish Parliament.

62. It is not appropriate that matters of such constitutional import should be amendable by secondary legislation that is subject to scrutiny in the UK Parliament alone. Where it is considered necessary to amend constitutional statutes such as the Scotland Acts this should be done in a way which is subject to thorough and meaningful scrutiny in this Parliament

Scottish Government response

The Bill concedes that some statutes are of such significance or constitutional importance that it would be inappropriate to amend them. The Scotland Act 1998, and the current devolution settlement, is the product of a referendum held in Scotland in 1997.

The Scottish Government therefore welcomes the Committee's support for its proposed amendments and is working with the UK Government to secure appropriate amendments to the Bill in the House of Lords.

F&C Committee conclusions on inter-governmental relations

152. The Committee recognises that the current structure of IGR has been widely recognised as not fit for purpose for a considerable period of time. The process of Brexit requires that this situation is finally addressed as a matter of urgency.

153. The Committee notes the proposals set out by the Welsh Government. The Committee considers that a new structure of IGR requires to be placed on a statutory basis including establishing a process for joint decision making. This new structure requires to be supported by an independent secretariat and provide a mechanism for independent dispute resolution.

154. The Committee also recommends that inter-parliamentary co-operation is a key component of scrutiny of the Brexit process and considers that the Inter-Parliamentary Forum on Brexit will form a central part of this process.

Scottish Government response

The Scottish Government agrees that the UK's inter-governmental machinery needs to be reviewed, particularly with the constitutional changes taking place. The process of EU withdrawal requires that this situation is finally addressed as a matter of urgency"

The existing JMC Joint Secretariat includes officials from all four member administrations. It is unclear what additional benefits an additional independent secretariat might bring.

The Government remains open-minded about the need for statutory underpinning of inter-governmental principles and dispute resolution. While this might help to encourage administrations act in line with the sound principles set out in the MOU, it could prove cumbersome and the mechanism by which it would be enforced is not clear. Detailed consideration of the legal and constitutional implications of setting intergovernmental relations onto a statutory footing need to be considered now. The Government will work further with the other administrations on this issue and report progress to Parliament.

F&C Committee conclusions on the scope of legislative consent

158. The Committee notes the view of the Scottish Government with regard to the areas of the Bill that require legislative consent. The Committee recommends, given the need for clarity and certainty in this process, that the Scottish and UK governments reach agreement on the areas of the Bill that require legislative consent as a matter of urgency.

Scottish Government response

The Scottish Government is confident of its position on the parts of the Bill which require the Scottish Parliament's consent. The Government will however discuss this matter with the UK Government. The aim of both governments is to achieve a legislative consent motion for the Bill as a whole, and this difference of opinion ought not to stand in the way of that.

F&C Committee conclusions on the Charter of Fundamental Rights

164. The Committee notes the Motion agreed by the Scottish Parliament on 10 January 2017 in relations to the Charter of Fundamental Rights and recommends that the Scottish Government set out in detail its objections to the Bill's provisions on the Charter

Scottish Government response

The Scottish Government does not believe that the full spectrum of rights protected by the Charter will be adequately and equally protected following the UK's withdrawal from the EU. While the Bill has the effect of ensuring that many existing safeguards derived from EU law will continue to apply in Scotland, that effect is not universal or comprehensive. For example, the Charter addresses areas not covered by the European Convention on Human Rights, and in other instances develops those rights in ways that go beyond the effect of the Convention. The Scottish Government is further concerned that the significance of the Charter in ensuring that rights derived from EU law continue to be properly understood and interpreted has not been satisfactorily addressed. In the absence of the Charter, and of enforceable guarantees, the long-term retention of existing fundamental rights will be left at the discretion of the UK Parliament. The Scottish Government also shares many of the criticisms voiced by commentators such as the Equality and Human Rights Commission in relation to the UK Government's proposals, including the adequacy of its "Right by Right" analysis of the Charter published on 5 December 2017. The Scottish Government therefore believes that the Charter should be retained as an integral part of the law of Scotland and the Bill should be amended accordingly.

The Scottish Government supports the position on the Charter set out in the recent motion of the Scottish Parliament:

[Motion S5M-03297: Angela Constance, Almond Valley, Scottish National Party, Date Lodged: 09/01/2017 - protecting fundamental rights and freedoms](#)

That the Parliament restates its commitment to human dignity and to acting at all times to respect, protect and promote human rights; reiterates the importance also of freedom, democracy, equality and the rule of law as common values shared by all progressive nations; acknowledges that the EU is founded on these same fundamental values, which are of universal importance and transcend national borders; calls on the UK Government to give an undertaking not to take, or propose, any action that weakens or undermines participation in other international human rights mechanisms, including in particular the Council of Europe and the European Convention on Human Rights, and records its opposition to any loss in Scotland of the human rights, equality, social protection and other safeguards and standards enshrined in EU law and set out in the EU Charter of Fundamental Rights; emphasises that civil, political, economic, social and cultural human rights are universal, inalienable and inviolable, and are simultaneously indivisible, interrelated and interdependent; further calls on the UK Government to ensure that Scotland is fully involved in all decision-making with regard to negotiations with the EU, including in relation to all matters affecting fundamental rights; condemns the refusal of the UK Government to provide non-UK EU citizens resident in Scotland with an immediate and unequivocal guarantee of future security and fair treatment, and resolves to defend not only the common values on which the EU and the Council of Europe are founded, but to act to the full extent of its powers to ensure that the rights and interests of all of the people of Scotland are safeguarded and protected.