OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 14 March 2018

Session 5

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FINANCE AND CONSTITUTION COMMITTEE
10th Meeting 2018, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Adam Tomkins (Glasgow) (Con)

COMMITTEE MEMBERS

*Neil Bibby (West Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)
*Ash Denham (Edinburgh Eastern) (SNP)
*Murdo Fraser (Mid Scotland and Fife) (Con)
*Emma Harper (South Scotland) (SNP)
*Patrick Harvie (Glasgow) (Green)
*James Kelly (Glasgow) (Lab)
*Ivan McKee (Glasgow Provan) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Donald Cameron (Highlands and Islands) (Con)
Jackson Carlaw (Eastwood) (Con)
Maurice Golden (West Scotland) (Con)
Jamie Greene (West Scotland) (Con)
Ross Greer (West Scotland) (Green)
Liam Kerr (North East Scotland) (Con)
Gordon Lindhurst (Lothian) (Con)
Dean Lockhart (Mid Scotland and Fife) (Con)
Michael Russell (Minister for UK Negotiations on Scotland's Place in Europe)
Tavish Scott (Shetland Islands) (LD)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

The Chamber

Scottish Parliament

Finance and Constitution Committee

Wednesday 14 March 2018

[The Convener opened the meeting at 08:00]

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

The Convener (Bruce Crawford): Good morning, and welcome to the 10th meeting in 2018 of the Finance and Constitution Committee. I see that we all look bright-eyed and bushy-tailed. It is good to see you all.

Section 11—Dealing with deficiencies arising from UK withdrawal

The Convener: We continue our consideration of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. Amendment 115, in the name of Dean Lockhart, is grouped with other amendments as shown in the groupings paper. Members will note from that there are a number of pre-emptions in group 10. I will remind members of any pre-emption as I call the relevant amendment.

Dean Lockhart (Mid Scotland and Fife) (Con): Amendment 115 is my only amendment in group 10. I will be supporting amendments 9, 14 and 22, and I will speak to amendments 11 to 13, 15, 119, 138, 206 and 212.

Amendment 115 seeks to clarify the scope and application of section 11. As other members highlighted yesterday, section 11 confers wide-ranging powers on Scottish ministers to pass regulations in a number of areas without the approval of Parliament. Specifically, section 11(1) empowers Scottish ministers to make such regulations as they consider appropriate in the following circumstances:

"Where the Scottish Ministers consider—

(a) that there is, or would be—

(i) a failure of retained (devolved) EU law to operate effectively, or

(ii) any other deficiency in retained (devolved) EU law,

arising from the withdrawal of the United Kingdom from the EU, and

(b) that it is necessary to make provision for the purpose of preventing, remedying or mitigating the failure or other deficiency".

Section 11(5) provides that regulations to be made by ministers

"may make any provision that could be made by an Act of the Scottish Parliament."

Amendment 115 follows the concerns raised by the Law Society of Scotland about the scope and the application of those powers. First of all, according to the Law Society,

"what constitutes a failure in the retained EU law to operate effectively"—

as mentioned in section 11(1)(a)(i)—

"is not clear and could be open to argument or subjective opinion (despite the examples of deficiencies in section 11) because the deficiencies in section 11 are neither exhaustive nor limited to deficiencies of the same kind",

which makes the provision very difficult to interpret.

The Law Society explained that section 11 adds further uncertainty. It said:

"section 11(11) broadens the category of deficiency"

that ministers may address

"by providing 'a failure or other deficiency arising from the withdrawal of the United Kingdom from the EU includes a reference to any failure or other deficiency arising from that withdrawal taken together with the operation of any provision, or the interaction between any provisions, made by or under this Act.'"

The operation and scope of section 11 is unclear.

To address those concerns, amendment 115 proposes to insert a new subsection into the bill that says:

"The Scottish Ministers must by regulations subject to the affirmative procedure define what, for the purposes of this Act, constitutes a failure of retained (devolved) EU law to operate effectively."

The purpose of my amendment is threefold: to introduce further legal certainty on the scope and the operation of the powers conferred on ministers; to introduce further legal certainty about what would constitute

"a failure of retained (devolved) EU to operate effectively";

and to introduce parliamentary scrutiny to the exercise of those powers by ministers.

I invite the minister in his remarks on group 10 to address the Law Society's concerns about the powers being conferred on ministers by section 11, which could be used and implemented without the scrutiny of Parliament. I also ask that the minister provide examples of what he might consider

"constitutes a failure of retained (devolved) EU law to operate effectively."

I move on to the three amendments in the names of another member that I am formally supporting: amendments 9, 14 and 22. Those

amendments propose to change the test applied for the use of the powers by ministers to pass the regulations that I have mentioned. As the bill is currently drafted, ministers would be able to "make such provision" using those regulations "as they consider appropriate" to deal with deficiencies arising from the UK withdrawal from the EU. The key words are "as they consider appropriate". Amendments 9, 14 and 22 would change that test so that ministers are only able to make such provision by regulation as "is necessary" to deal with deficiencies arising from the UK withdrawal from the EU.

Those amendments address concerns raised by the Law Society that the legislation as currently drafted would allow ministers to make provisions in whatever manner they consider appropriate, which is a subjective test and one that would be wide ranging. To address the issue, the Law Society has suggested an amendment that Scottish ministers should make only such regulations as are "necessary", which is an objective test, rather than "appropriate", which is a subjective test.

Amendments 11 to 13, 15, 119, 206 and 212, in the names of other members, are based on a similar rationale. They all change the existing tests in the relevant parts of section 11 from the subjective test of "appropriate" to the more objective test of "necessary". In my winding-up remarks, I would like to address those amendments in more detail.

I move amendment 115.

Neil Bibby (West Scotland) (Lab): As Dean Lockhart has said, there are multiple instances throughout part 3 where Scottish ministers could be permitted to exercise significant regulation-making powers. Those powers are far reaching and can be exercised as Scottish ministers consider appropriate. My concern, and the concern of many others, is that the bill as it is presently drafted places too much power in the hands of the Scottish Government and not enough power in the hands of the Parliament.

Amendments 116 to 119, 124 and 135 to 138, in my name, are an attempt to address those concerns. Instead of mandating the Scottish Government to use regulation-making powers where ministers consider it appropriate, the Scottish Government would be mandated to use regulation-making powers where necessary. That is the focus of not just my amendments in this group, but the amendments by Tavish Scott, which are supported by Neil Findlay, and those by Dean Lockhart.

The powers in the bill must be tested. The requirement for ministers to use the powers granted to them by the bill has to be tested. That is what my amendments, and a number of amendments from colleagues across the chamber, seek to do. The bill should not permit the use of those regulation-making powers where it is not necessary. Two of my amendments—amendments 119 and 138—closely resemble amendments 9 and 22, in the name of Neil Findlay. Those amendments were lodged separately but would have a similar effect. James Kelly will speak to those amendments.

It is necessary to adapt retained EU law so that it functions in Scotland on and after exit day, and it is necessary to confer new powers on Scottish ministers to manage that transition. However, the bill must not marginalise or be a vehicle for bypassing the Scottish Parliament. The powers available to ministers must therefore be limited to converting EU law into Scots law, and must not extend any further unchecked and without proper scrutiny.

I hope that members will consider supporting my amendments in this group.

James Kelly (Glasgow) (Lab): I will speak to amendments 9, 14 and 22, in the name of Neil Findlay, which I will later move on behalf of my colleague.

In essence, the amendments make the wording in two sections tighter and clearer by replacing the phrase "as they consider appropriate" with "as they consider necessary". That tighter wording provides greater legal clarity and is more concise with respect to the regulation-making powers, which ties in with points that Neil Bibby made.

With regard to the other amendments in the group, I support the amendments in the name of Neil Bibby and Tavish Scott.

Tavish Scott (Shetland Islands) (LD): Amendment 10 is one of a series of amendments that seek to restrict the use of ministerial room for manoeuvre in establishing new regulations. I will move the amendment in the spirit of remarks by Dean Lockhart, James Kelly and Neil Bibby.

The addition of the words "have reasonable grounds to" by amendment 10 and amendment 16 will toughen the tests, make them justiciable and narrow ministerial discretion.

Amendments 11 to 13 and 15 seek to toughen the test for ministerial action. Given the areas that we are discussing, that seems an appropriate course of action. I accept that the minister earlier explained that a test of "necessary", which has to be met before "appropriate" provisions can be proposed by ministers, has been placed in section 11(1)(b). That debate has just been spoken to by Mr Kelly.

My amendments seek to place a test of "necessary" on to all the deficiencies referred to in

paragraphs (c), (d), (e), (f) and (g) of section 11(2). I want to constrain the room for ministerial manoeuvre without recourse to Parliament. Ministers will have to make the case, before they can use those extensive new powers, that their remedy is "necessary". That seems a fair test.

My only other observation is that it seems to me that amendment 9 suggests that some members do not accept that there is a test of "necessary" in section 11(1)(b) that ministers must meet before they can consider any "appropriate" action. I have said that I accept that the "necessary" has been put there. I have an amendment in a later group to ensure that ministers must report how that test is met, which, again, will be an important check in the system, and I will move that amendment on that basis.

Jamie Greene (West Scotland) (Con): I will speak to my amendment first, as the other amendments are similarly themed. Mine perhaps stands out as being slightly different.

My amendment 134 and Neil Bibby's amendment 135 differ in what they are seeking to achieve, in that although Neil Bibby's amendment is heading in the right direction in terms of wording, I would like to go further with mine.

In my view, section 12(1), as currently drafted, is worrying. The proposal seems to imply that the responsibility for identifying a breach, or even what might be a breach, of the United Kingdom's international obligations that arises from withdrawal from the EU would lie subjectively with the Scottish Government. From my understanding, that subsection could be used by Scottish ministers to introduce or change regulations as they see fit to ensure that international obligations are met.

I cannot be the only MSP who is concerned about conferring that power on the Scottish Government. Doing so would undermine, in effect, the independence of not just our but any judicial system by adding an overtly political element. I do not believe that it is for the Scottish Government to make decisions about another Government's international obligations, nor do I believe that it is the Scottish Government's position to decide which treaties the UK Government is or is not adhering to. International treaties are enforced by the relevant courts, domestic or otherwise. For example, the European Commission is legally defined as the guardian of treaties, but, as the executive branch of the EU, it still must refer cases to the European Court of Justice or a court of first instance and it is bound by the judgments thereof.

My amendment places the responsibility for identifying breaches of treaties on relevant courts rather than ministers. It allows Scottish ministers, however, to make provisions that they see as appropriate for dealing with such breaches as have been identified by courts.

The new phrasing mirrors the current practice in the tripartite relationship that exists between the UK Supreme Court, the UK Parliament and the Human Rights Act 1998. For example, the Supreme Court can issue a declaration of incompatibility when it finds that an act of Parliament is incompatible with adherence to the 1998 act, and the UK Parliament would then make necessary changes to ensure that its act was compatible.

My amendment would enshrine into law that any dispute must be brought before the relevant court responsible for enforcing international obligations. All that I am proposing this morning is that we do not deviate from international practice in adding additional powers to the Scottish Government.

08:15

To turn to some of the other amendments in the group, I fully support amendment 115, in the name of Dean Lockhart, for the two reasons that he outlined. One is that it provides additional legal certainty; the other is that it will increase the ability of Parliament to scrutinise via the affirmative procedure. Many of the other amendments in this group, including those lodged by Labour, are welcome, in my view. Again, they add more objectivity.

The phrase "the Scottish Ministers consider" is used throughout the bill and I think that it is not just the view of MSPs that it should be replaced; we have had evidence from the Law Society that should be taken into account. Those are my only comments on the group.

The Convener: Liam Kerr will speak to amendment 206 and other amendments in the group.

Liam Kerr (North East Scotland) (Con): Section 30(1)(b) sets out a sweeping provision that any power to make regulations that are

"incidental, supplementary, consequential, transitional, transitory or saving"

will be allowed,

"as ... Ministers consider appropriate."

Section 32 repeats that form of words in a mopping-up section that will give broad powers of regulation, and again, it is expressed that the provision will be allowed where ministers consider it "appropriate". That is too broad. It will give the Scottish ministers powers to make legislation as "appropriate", which is subjective. I listened to Dean Lockhart praying in aid the Law Society of Scotland and seeking to interpose the objective

test of "necessary". I associate myself with his remarks, which apply equally to my amendments.

I also acknowledge Neil Bibby's comments about placing too much power in the hands of Scottish ministers through use of the word "appropriate". The bill should not permit the use of such powers where that use is not necessary.

Regulations, in this case, should be brought in only when they are required. My amendments 206 and 212 would tighten the definition and place the necessary checks on executive power. In anticipation of the ministerial response, I point out that this is, of course, going further than the European Union (Withdrawal) Bill, as is entirely appropriate because the Scottish Parliament has a single chamber, and the House of Lords brings an extra level of scrutiny to regulations in Westminster. Our particular set-up means that we have to be especially cautious about extensions of executive power. That caution is what amendments 206 and 212 seek, so I hope that the committee will look favourably on them.

Adam Tomkins (Glasgow) (Con): I will speak briefly on amendments in the group that are in the name of Opposition members who are not Scottish Conservatives. Obviously, the Scottish Conservatives will support the Scottish Conservative amendments, but we will also, for two reasons, support all the other Opposition amendments in the group, which are in the names of Neil Bibby, Tavish Scott and Neil Findlay.

First, amendments 116 to 118, 124 and 135 to 137, all in the name of Neil Bibby, and amendments 10 and 16, in the name of Tavish Scott, would all have the same effect, which would be to reduce excessive ministerial discretion.

The minister is fond of reminding members that we must be careful with language, but he constantly uses the unnecessary and hyperbolic rhetoric of the phrase "power grab" when he describes the withdrawal bill. There is a power grab in the continuity bill, but it is not a power grab from Westminster to Holyrood or the other way round; it is a power grab from the Scottish Parliament to the Government. We must be equally alive to both the appropriate balance of power between the executive branch and the legislature, and the devolution settlement. If we are to respect the constitution, we need to be alive to the issue of the separation of powers as well as to devolution and its appropriate settlement.

That is an element of the rule of law, which Gordon Lindhurst spoke about eloquently yesterday evening. For that reason, the Scottish Conservatives will support the amendments that I have mentioned, because they would reduce excessive ministerial discretion.

The second sub-group of amendments in the group contains amendments that would delete the word "appropriate" and replace it with the word "necessary" in a number of different provisions, principally sections 11, 12, 30 and 32, about which Liam Kerr has just spoken. Again, the minister has made great play of the fact that, in his view, one of the significant differences between the withdrawal bill at Westminster and the continuity bill in the Scottish Parliament is that ministerial powers can be used in the Scottish Parliament only when necessary, whereas ministerial powers at Westminster can be exercised when appropriate. Through our support of these Opposition amendments, we are encouraging the minister to be consistent rather than inconsistent, as he currently is, about the matter.

We also support the amendments for the constitutionally important reason that was outlined by Liam Kerr: we need to recognise that the Scottish Parliament is a unicameral Parliament, and not a bicameral Parliament like Westminster. The constitutional function of the House of Lords is to act as a check on what happens in the House of Commons. We have no equivalent of the House of Lords in Scotland. Therefore, we need to be even more alert than our friends and colleagues in Westminster have to be about ensuring that ministerial discretion is appropriately tailored. For that reason, we will support all the amendments that seek to remove from the bill the word "appropriate" and replace it with the word "necessary".

Patrick Harvie (Glasgow) (Green): I am slightly uncomfortable suggesting that I might have reached the same conclusion as Adam Tomkins; however, I have reached it for very different reasons. It strikes me as odd that he spent a good part of yesterday evening telling us that the most important thing is to have consistency with the UK legislation, but now he tells us that the minister should have consistency with his own arguments, rather than with those that are being made down south. For very different reasons, I do not think that we should follow the UK legislation in lockstep. I am judging the matter on its own terms. It seems to me that there is a good case for replacing the word "appropriate" with the word "necessary". When he responds to the group of amendments, I would like the minister to be very clear in separating the different arguments.

I have more concerns about the amendments that seek to remove the role of ministers in reaching a view about what they consider should be done, and which would instead apply an objective test. It is not clear to me who would assess and determine that objective test. During the debate on the continuity bill, there has been, on a great deal of matters, what has been described to us as room for difference of opinions

and room for disagreement on questions such as the competence of the continuity bill.

I want to ensure that we avoid a situation in which ministers reach a view that regulations are "necessary" and must be brought to Parliament, but are unable to do so, or the issue becomes mired in whether an objective test, which has not been well defined in the legislation, has been met, and whether ministers have the legal right to lay the regulations before Parliament.

We will have really important discussions later about the level of scrutiny of regulations. I hope that there will be cross-party support for beefing up the system and ensuring that Parliament will control the level of scrutiny that it wishes to provide, so that Parliament can hold ministers to account for the significant powers that they will acquire under the bill, if it is passed.

I would be very concerned if we were to leave ourselves in a position in which we are simply unable to debate, or begin scrutiny of, something because legal doubt has been raised over whether ministers have the right to lay a resolution for discussion, because of an ill-defined objective test.

I ask the minister to respond separately to these points: the question of replacing "appropriate" with "necessary", and the question of whether the trigger for laying an instrument can be based on what ministers consider.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Amendments 11 to 15 from Tavish Scott and Neil Findlay could make it almost impossible to exercise the powers in question. It seems reasonable to retain the word "appropriate" rather than replace it with a specific requirement to establish necessity. I can imagine a number of situations in which a policy direction might not actually be clear, so I think that it is better to enable flexibility to be applied.

In my view, therefore, amendments 11 to 15 could at best weaken the bill and at worst make it inoperable, at least in some circumstances. Rather than it being an example of excessive discretion being applied, it seems to me—I am mindful of Patrick Harvie's comments—an example of excessive inconsistency for this bill, in comparison with the equivalent bill in the UK Parliament.

The Minister for UK Negotiations on Scotland's Place in Europe (Michael Russell): It is appropriate that we come to section 11 first thing this morning. The issues of proper scrutiny and the way in which ministerial power can be exercised or restrained are crucial in consideration of a range of issues that we will discuss this morning.

At the outset, I want to indicate clearly that I am absolutely aware of the importance of ensuring that anything that is done under the continuity bill involves maximum scrutiny, and that ministers are aware of the special powers that the bill will give.

We have to ask why the bill will give special powers. It is because of the circumstances that have been created by the United Kingdom's Brexit process. That is why the powers exist in the withdrawal bill: there is a major job of work to be done, and it cannot be done using the tools that are currently to hand. If we are devising new tools to undertake this job of work, they must be appropriate and necessary, they must be able to be scrutinised, and they must be able to be trusted.

We have looked carefully at the UK bill and we have strengthened the powers of this Parliament, compared with the way in which the equivalent powers will be overseen, scrutinised and controlled by the Westminster Parliament. I am pleased by that inconsistency—to use Patrick Harvie's term—because it exists because we have been listening and continue to listen.

I will make a general point that applies to this and subsequent debates this morning. I will accept a range of amendments that strengthen this Parliament's powers, but I will not accept all the amendments, for reasons that I will give about those particular amendments. I am not resisting the principle of ensuring stronger scrutiny and more restraints on ministerial power, but that does not equate to my accepting all the proposals, some of which are inoperable or would be difficult to operate.

I do not think that we should be in lockstep with Westminster. I have always believed that we should do better than Westminster if we possibly can. That is what we will try to do.

I also point out to Patrick Harvie that the central problem in legislation is the way in which objective tests are enforced or scrutinised. There is no way around it: if legislation has an objective test and the objective test is not met, redress exists through the courts. That is the legal situation that we have. We should outline the objective test and ensure that it is applied and can be scrutinised closely by the Parliament. That is exactly what we should be doing and what we are trying to do.

I believe that the tests should be toughened, and I will try to find ways to toughen them in section 11 and subsequent sections, but I stress that it is not possible to accept all the amendments. Therefore, when I accept some amendments, I am doing so on the basis not of favouritism but of practicality and striking the balance between scrutiny and control and getting the job done.

Let me start with Dean Lockhart's amendment 115. By requiring regulations to define

"a failure of retained ... EU law to operate effectively"

arising from EU withdrawal, the amendment would require an intervening set of further regulations to be made, which would complicate the already difficult process of adjusting domestic law to Brexit.

08:30

The members who now support Brexit and intend to make it even more difficult for the Scottish Parliament to adjust to Brexit really need to consider their position. The amendment would delegate more power to ministers, which they have criticised elsewhere. Although

"failure of ... EU law to operate effectively"

might be a relatively wide concept, the power here is limited by the context of EU withdrawal, and by the test of whether it is a necessity to make provision

"preventing, remedying or mitigating the failure",

which we have added to the bill as another safeguard.

Neil Bibby's amendments 116 to 119, 124 and 135 to 138 would adjust the main legal tests for what deficiencies can be remedied, and how international obligations can be implemented. They would remove references to ministerial judgment of whether the law fails to operate properly or whether there is another deficiency or breach of international obligations, so that only provision that is objectively necessary would be permitted. I am sympathetic to that, but sections 11(1)(b) and 12(1)(b) already make careful provision to require that it is "necessary"—I stress that word, which is in the bill—to make provision

"preventing, remedying or mitigating the failure or ... deficiency".

However, that allows sensible, practical and appropriate solutions to be made without the need to ensure that they are absolutely necessary. In that context, the test would be unclear because we would apply it twice in different circumstances, which would leave a lot to be worked out by the courts. The word "necessary" is in sections 11(1)(b) and 12(1)(b) and there is an objective test.

That issue runs through many of the amendments in the group. We are drawing the boundary carefully, because we are drawing on the House of Lords Delegated Powers and Regulatory Reform Committee's report, which we accepted and have implemented. Members have talked about consistency: I note that the House of Commons has not accepted or implemented that report. We are also acting on the specific recommendations of committees here in Holyrood in going further than the UK bill.

The same issue applies to amendment 9, in the name of Neil Findlay. I am sympathetic, but for the same reason of enabling sensible and practical provision to be made in the midst of the crisis that Brexit has caused. If we go further than we already have, the ability to deal with that crisis will become diminished. There is a judgment to be made and, if it is made by ministers, it is subject to the bill, the chamber and the legal process, which are all in there.

There is a related point on amendments 11 to 13 and 15, in the name of Tavish Scott, and amendment 14, in the name of Neil Findlay. The amendments seek to replace "necessary" with "appropriate" in the detailed heads of what is a deficiency in describing EU arrangements or structures that are no longer relevant as a consequence of leaving the EU. That sounds apt in the context of the UK leaving the EU because—this is a key point—it might be "necessary" to retain some of those structures or arrangements, but not "appropriate" to retain the existing EU structures or arrangements. The intention is to have the power available to vary and adapt structures to new circumstances. If we use the word "necessary", we might find ourselves unable to do so.

By contrast, I am happy to support amendments 10 and 16, in the name of Tavish Scott, which provide that ministers must "have reasonable grounds" to consider that various matters apply in what is listed as a deficiency. That will help to clarify where we might be and where we are going.

I cannot accept amendment 134, in the name of Jamie Greene, which would require a court to identify a breach of a UK international obligation before section 12 regulations can be made, rather than leaving that identification to ministers. I believe that Jamie Greene's interpretation of the bill is wrong. The power will be exercised in the same way as it will in the rest of the UK, so the massive criticism that he made of exercising the power would have to apply to the UK, too. In fact, we have included additional safeguards. Primary legislation would have to be made in those circumstances in order to avoid a breach, which would greatly reduce the utility of the power in the special circumstances of Brexit.

I cannot support amendments 206 and 212, in the name of Liam Kerr, which would adjust the powers to make

"incidental, supplementary, consequential, transitional"

provision in regulations, such that ministers would have to consider provision "necessary". The normal formulation in which such provisions would

be included in a normal bill would be to allow such provision where appropriate or expedient, as well. That change would limit the provision that could be made in regulations and in the ancillary power in the bill to less than the standard latitude for even a normal ancillary power. For a bill of this nature, in which it is, given the range of material that the bill might have to cover, important to have wide ancillary powers available, it would greatly harm the practical flexibility of those powers to cover unforeseen eventualities if such a power was unavailable. In its report on the European Union (Withdrawal) Bill, the Delegated Powers and Law Reform Committee raised no issues about the equivalent power in that bill, which uses an appropriateness test, but instead suggested that the Scottish ministers should be given a similar power in the continuity bill.

My position is this: I am happy to accept amendments 10 and 16, and I have indicated that it is my intention to accept further amendments on scrutiny and other similar powers.

However, I cannot accept every amendment in the group, because many of them would either restrict the bill unduly or create circumstances in which the requirements of the bill would be undermined in a way that would make it impossible to fulfil the bill’s obligations to make the changes that are being forced upon us.

We have tried hard to improve those elements of the bill, compared to the UK bill, and we will continue to do so. I hope that members will accept that we are moving in the right direction and navigating a careful course through a range of competing demands.

Dean Lockhart: I will make three general points before turning to the minister’s response to the amendments. My first point relates to scrutiny—an issue that has been raised by a number of members. The debate surrounding section 11 powers is an important example of the fundamental concerns that members have expressed about the level of scrutiny of the bill that the Parliament has been afforded. Many of the amendments in this grouping were suggested by the Law Society of Scotland in its submission on the bill.

If the minister is unable to accept the Law Society’s suggestions on legal certainty and on tests being applicable to the use of these wide-ranging ministerial powers, providing a full explanation of why those recommendations and amendments cannot be accepted, we have concerns about how the bill will work in practice. The minister has acknowledged that the bill gives ministers—in his words—“special powers”. If that is the case, there is all the more need for proper, full scrutiny of the legislation. I accept that the minister is listening to members, but the process is short and there is not long for a listening exercise.

My second general point is that the proposed amendments are designed to address what Adam Tomkins referred to as a power grab by ministers under section 11. During the debate on the amendments, we have heard cross-party consensus—from Neil Bibby, James Kelly and Tavish Scott as well as from colleagues in my party—on the concerns about a power grab, and it is worth reflecting on some of those comments. Neil Bibby said rightly that the bill should not be a vehicle for bypassing the Scottish Parliament. Tavish Scott highlighted that the amendments will act as an appropriate check on the wide-ranging powers that would otherwise be conferred on ministers. Liam Kerr highlighted his concerns about the extent and wide-ranging nature of the powers.

My third point relates to the overreach in section 12(1). Like Jamie Greene, I am worried about the current wording of the section and how it may impact international treaties that the UK is party to. Jamie Greene’s amendment 134 highlights, inter alia, the critical role that is played by the judicial system in the interpretation of international treaties, and it is somewhat disappointing that the minister was unable to accept that amendment.

I turn to the minister’s response to the amendments. The minister has acknowledged that the bill confers “special powers”, and some of the amendments are designed to specify how those special powers will work. It is disappointing that the minister is unable to accept my amendment 115, as it is designed to address concerns that have been raised by the Law Society precisely on the issue of how the special powers will be exercised by the Scottish ministers. If special powers are being conferred by the legislation, there is a case to be made for special provisions being made that will define and regulate how those powers are used by ministers, especially if that is outside the scrutiny of the Parliament.

Likewise, it is disappointing that the minister proposes to retain the use of the subjective test of appropriateness in a number of areas rather than the objective test that has been proposed by the Law Society in its submission.

The minister has agreed to two amendments and has suggested that others may be accepted under further consideration. My question, which relates not only to this group of amendments but to others, is whether we really have time to discuss, review and vote on a further iteration of amendments based on submissions that have been made not only by members but by stakeholders and a number of experts. That is perhaps a question that we can come back to when we discuss later groups.

The Convener: The question is, that amendment 115 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 115 disagreed to.

Amendment 116 moved—[Neil Bibby].

The Convener: The question is, that amendment 116 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 116 disagreed to.

Amendment 117 moved—[Neil Bibby].

The Convener: The question is, that amendment 117 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 117 disagreed to.

Amendment 118 moved—[Neil Bibby].

The Convener: The question is, that amendment 118 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 118 disagreed to.

The Convener: If amendment 119, in the name of Neil Bibby, is agreed to, I cannot call amendment 9, because there is a pre-emption.

Amendment 119 moved—[Neil Bibby].

The Convener: The question is, that amendment 119 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)

Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 119 disagreed to.

Amendment 9 moved—[James Kelly].

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 9 disagreed to.

The Convener: Amendment 120, in the name of Adam Tomkins, is grouped with amendments 121, 122, 123, 148, and 150 to 154.

Adam Tomkins: The amendments in my name in this group are probing amendments. I do not intend to press them at stage 2, but I do intend to revisit the substance of the matter at stage 3.

The amendments seek to square the circle in respect of the demands and requirements of the devolution settlement. Ever since the publication of the withdrawal bill, the Scottish Conservatives have been consistently of the view that the bill does not respect the devolution settlement and needs to be amended. We signed up unanimously to the Finance and Constitution Committee's recommendation that clause 11 of the withdrawal bill be removed or replaced. Those are strong words and we meant them—I am sure that every member of the committee did, too.

08:45

We have also been four-square behind the United Kingdom Government in insisting that Brexit does not inadvertently—or, indeed, deliberately—lead to the break-up of the United Kingdom or to the disintegration of the UK's domestic market. There are competing legitimate demands from the UK and Welsh Governments on the one hand and from the Scottish Government on the other hand, and it has always seemed to us that both sides need to be satisfied in legislating for the United Kingdom's smooth withdrawal from the European Union.

We know that there have been several months of negotiations between the UK Government and the Scottish and Welsh Governments and the Northern Irish Executive on the issue. We also know that another round of those negotiations is taking place this afternoon, when the First Minister meets the Prime Minister in London. Those negotiations have made significant and substantial progress, and the UK Government has tabled an amendment to clause 11 of the withdrawal bill that goes a considerable distance towards satisfying the requirements of the Scottish and Welsh Governments and the Finance and Constitution Committee's recommendations in its interim report.

The UK Government amendment does not go all the way and the deal is not yet done, but progress is significant in what others have termed—I do not particularly like this phrase—the "deep dive"; that is, the examination of the issues for which there is a need for a legislative or non-legislative common framework across Great Britain or the whole of the United Kingdom to ensure that the powers that are exercised by Governments at all levels, including by ministers of the Crown, are not exercised in a manner that is inconsistent either with the constitutional arrangements of the devolved UK or with the imperative that the integrity of the UK's domestic market is not unduly disrupted by the Brexit process.

In all of that, there has been significant agreement across the political parties, including between the Scottish Conservatives and the Scottish Government. Mr Russell's letter to all MSPs of 12 March raises a number of issues that we continue to agree with and, indeed, welcome. For example, Mr Russell says:

> "the Scottish Government has consistently made clear that we are not opposed to common frameworks where these are in the best interests of Scotland and are ready to work with the UK Government to agree where these may be required."

I unambiguously welcome and thank Mr Russell for saying that—indeed, he has said that many times. It is welcome that the Scottish Government has recognised throughout this entire process that there is a need for UK common frameworks. At the same time, Mr Russell says in his letter that a challenge with the UK Government's amendment to clause 11 of the withdrawal bill, which has been tabled in the House of Lords, is that it does not specify—or seek to specify—the areas in which there will be a need to ensure that repatriated

powers are not exercised in a manner that could threaten the integrity of the UK's domestic market.

To be candid, it has always been my view that it would be in the interests of both Governments, and in the interests of the United Kingdom, for the withdrawal bill to specify the areas in which there is likely to be a need for a common framework. I have always been of the view, and I continue to be of the view, that it would be in the public interest and in all our interests for that to be not just on the record—which it now is, thanks to the disclosures by the Cabinet Office last week—but in primary legislation. That is what my amendments in this group seek to do. In a sense, they seek to cut through and, I hope, solve the current impasse between the UK and Scottish Governments on the consult/consent issue. I will be very interested to hear what the minister has to say about that in due course.

My amendments say that there should be a number of "protected fields"—that is my language, not the UK Government's language. The minister might have a number of objections to that language, but, for want of a better form of words, there should be a number of protected fields, by which I mean fields in which it would be irresponsible to exercise repatriated powers in a manner that would risk undermining, threatening or jeopardising the integrity of the UK's domestic market. When power is to be exercised in one of those protected fields, the amendments require the Scottish ministers to act in a way that is consistent with a common framework.

In the debate that we had in the chamber yesterday afternoon, the minister made great play of the fact that I said that common frameworks need to be "agreed, not imposed". Those are not my words but the words of the Secretary of State for Scotland, and that is the view of the United Kingdom Government. The secretary of state said that in evidence to the Scottish Affairs Committee in the House of Commons last year, and he repeated it to the Finance and Constitution Committee here a few weeks after that. It is the position of the secretary of state that common frameworks need to be agreed, not imposed, and that is reflected in the force of my amendments.

I recognise that my amendments are deficient, which is why I am not going to press them to a vote. I will revisit them and hope to bring them back at stage 3. The reason why they are deficient is that they were drafted before the Cabinet Office published the list of powers that—again, I am using jargon that has been used in the intergovernmental negotiations—sit in the various buckets.

In the Cabinet Office's view, there is one bucket of powers for which immediate devolution presents no problem, there is another bucket of powers for which there is a requirement for some sort of non-legislative framework, and there is a third bucket for which there is a requirement for a legislative framework. We do not yet know how much disagreement there is between the UK Government and the devolved Administrations about which powers sit in which buckets, because we have had publication and transparency from only one side of that argument so far. Perhaps the minister will want to reflect on that in a few moments.

Clearly, if we embark on this direction of travel, the list of protected fields that we put into legislation will need to reflect the agreement—if there is an agreement—between the UK Government and the devolved Administrations about which powers sit in which buckets; in other words, which are the protected fields—the fields in which it is important that repatriated powers are not used in a manner that seeks inadvertently or, indeed, deliberately, to undermine, jeopardise or threaten the integrity of the UK's domestic market.

In my view, the best place for these provisions to appear—the minister and I may be in agreement here—would be the withdrawal bill. I am not sure that they fit perfectly in either section 11 or section 13 of the continuity bill, but, as I said, the amendments are designed to be probing amendments. I realise that the situation is fluid, so they are designed to test the extent to which the Scottish Government and the Finance and Constitution Committee—which might have something to say, given that we wrote about the issue extensively in our interim report on the withdrawal bill a few weeks ago—think that such a solution might work in either bill to square the circle of the need to recognise the demands of the devolution settlement and the need to recognise that repatriated powers must not be used in a manner that inadvertently or deliberately seeks to undermine or threaten the integrity of the UK's domestic market.

I move amendment 120.

Jamie Greene: My comments follow on very nicely from the salient points that Adam Tomkins made about section 13 and his amendments in the group. I will set out the narrative of our amendments in the group. The principal rationale behind them is that nothing in the bill should undermine the structures of the United Kingdom or its internal market. That is what our amendments seek to achieve. Amendments 148 and 154, in my name, contain similar wording, so I will cover them together.

Section 13 is interesting. My interpretation of section 13(1) is that it gives Scottish ministers the power to subjectively cherry pick, after the UK leaves the European Union, which EU decisions, regulations, legislation or directives they would like

to make provision for by regulation. The minister is welcome to comment on whether he thinks differently.

Section 13(2) says that

"the Scottish Ministers may ... omit"

any EU directive or regulation

"which has no practical application in ... Scotland".

Unfortunately, subsection (2) fails to define who will decide whether such EU legislation has any "practical application in ... Scotland". It is worth members bearing in mind that the wording in section 13 as it stands is that all of this will take place after the UK leaves the EU.

At the Equalities and Human Rights Committee last week, I questioned Tobias Lock on the issue, and my understanding is that he thought that no non-EU country proactively incorporates EU legislation, regulations or directives into domestic law in the way that is proposed in section 13. There may be sensible reasons why the Scottish Government wants to do so, but the practice is certainly unprecedented.

As we know, the UK Government is engaged with the European Union in many quite complex negotiations that will have an impact on all the nations in the UK for many years to come. It is imperative that, as a Parliament, we do not agree to provisions in the bill that could be used to undermine the UK Government in its negotiations with the EU.

If the bill is passed, it will apply not just after exit day—it will be live during any potential transitional period. I accept that the Scottish Government may wish to hold back on regulating in specific devolved retained areas until after the deal with the EU is finalised; it should be allowed to do that, where necessary. However, it is entirely possible that section 13, as drafted, will allow the Scottish Government to make regulations that could inhibit the UK Government's ability to do the trade deals and create the common frameworks that will be required.

Perhaps when the minister comments on this group, he could clarify the intention behind section 13 in relation to the adoption of EU legislation after the UK has left the EU. What does he seek to achieve? What benefit is he looking for?

James Kelly: I note that Adam Tomkins has indicated that he will not press amendment 120 or move his other amendments in the group, and that they are probing amendments. In a sense, he is using this exercise to test the arguments and seek the views of other committee members.

Amendment 120 would allow UK ministers to withhold consent, which I think would undermine the devolution settlement. I agree with the principle of having UK-wide frameworks. However, those frameworks must be set up on a consensual basis, and I do not think that there should be enshrined in the bill a principle that would allow UK ministers to withhold their consent. I hope that Mr Tomkins will bear that in mind when he considers whether to bring back at stage 3 amendments that are similar to those in this group.

Patrick Harvie: Like James Kelly, I acknowledge that Adam Tomkins does not intend to press his amendments in the group to a vote. Implicit in Adam Tomkins's remarks was the assumption that the way to achieve common frameworks is about where power is placed—where authority and the ability to make law or regulations is placed between the two Governments—and, in effect, that it is to bind the hands of this Parliament and Government. That is not the way to achieve common frameworks, but the way to achieve imposed frameworks. We do not simply need warm words in a statement from the currently incumbent Secretary of State for Scotland; we need the law to be clear and for common frameworks to be the emergent result of action in multiple jurisdictions.

09:00

When I was elected to the Parliament, one of the first pieces of legislation that I was involved in as a committee member was on charity law. Both Parliaments were legislating on charity law at about the same time, because it was recognised that that required to operate across the UK, or at least across Great Britain, where many charities operate in multiple legal jurisdictions and have the same identity and employment structures. We did not want to create barriers that would make that impossible. That did not require one Parliament to legislate for everybody—it required co-operation and co-ordination. The language that was used for the result was not "common framework", but in effect that is what it was. That is the way in which we should be looking to achieve common frameworks, where they are necessary.

I commend Jamie Greene on his creativity with amendments 148 and 154. The suggestion that we should agree to amendments that say, in effect, that the Scottish Parliament and Scottish Government can have any policy that they like as long as it is Tory policy, and any Brexit that they like as long as it is the hardest of Tory Brexits, is extraordinary. The UK Government had to produce an entire bill to achieve something that we all agreed was fundamentally incompatible with devolution. Jamie Greene has managed that in just three lines. It is clearly unsupportable, but as a work of perverse art it is impeccable. Well done!

Michael Russell: I found it difficult to follow the summary of amendments 148 and 154, but let me

deal with them first. I agree entirely with James Kelly's overall view that some of the amendments imply the undermining of the devolved settlement, but I will come to Professor Tomkins's subtle amendments shortly, because I want to treat them very seriously.

Patrick Harvie's example of the charity law legislation was very good, and I tell him frankly that I will use it again, because it illustrates very clearly how, when there are different dispensations, that can work. However, let me deal with Jamie Greene's amendment 148, which would require the Scottish Government to sit on its hands, essentially, until it was told things by the UK Government. Then the Scottish Government would act, but it would discover that the UK Government had changed its mind, because the amendment would bind this process not even to something that we know or understand, but to UK Government policy, which even a sympathetic observer would agree changes from time to time without us or anybody else being told.

Amendment 148 would also bind us to

"the negotiating lines of the UK Government in their negotiations".

The UK Government has said repeatedly that it does not intend to publicise its negotiating lines, so that would bind us to a secret protocol that we do not know and could not find out, but which we would have to observe at all times. That is, frankly, and with the greatest of respect, nonsense. Both of Jamie Greene's amendments are nonsensical and should not detain us.

Let me turn to Professor Tomkins's very subtle amendments. They are, I think, a clever attempt to probe what the positions of the Scottish and Welsh Governments are in some matters. I use the word "sophistry" as a compliment to Professor Tomkins, because the amendments are well thought through. However, Professor Tomkins's description of where the present situation lies in terms of buckets of powers is defective in a key regard, which is that there is no lid on those buckets. There is nothing to say what we have put in those buckets so that we can agree to that and move on.

The key issue here is that the UK Government could put other things in those buckets at any time, and without any consultation, and we would simply have to accept it. It could fill—to the brim—the bucket of all the powers that the Scottish Parliament has, and we could do nothing about it. It is not the issue of what is in the buckets that is a matter for discussion and negotiation—indeed, Professor Tomkins's amendment 121 already includes things that have been moved to other buckets without consultation—but, as Mr Kelly indicated, the issue of the powers of the Parliament, the devolved settlement and respecting that settlement as it operates.

"Agreed, not imposed" was what Professor Tomkins said yesterday. He now says that those were not his words, but those of the Secretary of State for Scotland. I accept that: they are both his words and those of the secretary of state. However, they are not yet the words of the UK Government—and that is the problem. First, it is a problem that the secretary of state, who is a minister of the UK Government, is using them while the UK Government is not. It is also a problem because the amendment, as presented to the House of Lords this week, is based not on agreement but on imposition. Until that changes, there cannot be an agreement.

However, to give Professor Tomkins some credit, I think that there are elements in his amendments that would help in the negotiating process. They would certainly include the fact that ministers of the Crown would not act where the Scottish Government and the Scottish Parliament had the clear competence and were acting in that competence, and that any actions would have to be taken by agreement. I find those elements useful. If Professor Tomkins is not moving his amendments, I would be very happy to have a discussion about them later. It would be better to have them in a withdrawal bill than in other legislation, but I would be happy to discuss that.

I return to Jamie Greene's points. As the negotiating lines of the UK Government are in a sealed box, I am not prepared to set policy on the basis of something that somebody else has put in a sealed box, or in a bucket.

Adam Tomkins: I thank all members who have contributed to the debate on the group, and particularly the minister for his reflections on my amendments—although I am not sure that I will take "sophistry" as the compliment that he perhaps intended. "Subtle" I will take as a compliment, and "well thought through" I certainly will; I will think about the buckets and lids.

First, I will respond to what James Kelly said. I am sure that this is my fault; perhaps what I said in introducing the amendments was unclear. There is no sense in which the amendments in my name in this group would "undermine the devolution settlement", to use James Kelly's words. In amendment 120, the consent of a minister of the Crown would be required in order to safeguard the integrity of the UK. I would have thought that, as a member of the Labour Party, James Kelly would have not just understood that but supported it, rather than criticised it. It is the responsibility of ministers of the Crown and of the UK Government—of whatever political colour—to safeguard and protect the integrity of the UK. That does not mean that there is, in any sense, any

imposition here by UK ministers on devolved Administrations.

If there is a way of making amendment 122 clearer, I ask members to advise me. To my mind, it says perfectly clearly that

"a United Kingdom common framework has been agreed between the devolved administrations and the United Kingdom Government",

so ministers of the Crown may not exercise their powers where there has been an agreed common framework. I do not know what is so baffling, confusing or bewildering to Mr Harvie—or, even more concerningly, to Mr Kelly—about the use of the word "agreed". I do not know how it could be made clearer, but if either Mr Kelly or Mr Harvie could advise me about that, I will be happy to take that advice.

I hear what the minister says about the moveable feasts that we see in the buckets. That is a well-made point, on which I will reflect between now and stage 3—perhaps in consultation with the minister and/or his officials. I think that, within the scheme that is sketched out in these amendments, there is a possible solution to the current impasse between the devolved Administrations on the one hand and the UK Government on the other about the way in which Brexit can be legislated for in a manner that is completely coherent and which respects the integrity of the UK and also, in all its particulars, the devolution settlement. I am very happy to continue conversations—publicly or privately—with UK ministers, Scottish ministers or anybody else to see whether we can broker that deal, which would be completely consistent with everything that the committee said in its interim report a few weeks ago.

I seek leave to withdraw amendment 120.

Amendment 120, by agreement, withdrawn.

Amendments 121 to 123 not moved.

The Convener: If amendment 124 is agreed to, I cannot call amendment 10, because of pre-emption.

Amendment 124 moved—[Neil Bibby].

The Convener: The question is, that amendment 124 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 124 disagreed to.

Amendment 10 moved—[Tavish Scott]—and agreed to.

Amendment 11 moved—[Tavish Scott].

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 11 agreed to.

Amendment 12 moved—[Tavish Scott].

The Convener: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 12 agreed to.

Amendment 13 moved—[Tavish Scott].

The Convener: The question is, that amendment 13 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 13 agreed to.

Amendment 14 moved—[James Kelly].

The Convener: The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 14 agreed to.

Amendment 15 moved—[Tavish Scott].

The Convener: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 15 agreed to.

Amendment 16 moved—[Tavish Scott]—and agreed to.

09:15

The Convener: Amendment 125, in the name of Dean Lockhart, is grouped with other amendments as shown in the groupings paper. Members should note that there are a number of pre-emptions in the group; I will remind you of the pre-emption when I call the relevant amendment.

Dean Lockhart: I lodged four amendments in this group: amendments 125, 131, 139 and 160. I will deal with amendments 125, 139 and 160 together, because they operate in a similar fashion. They relate to the wide-ranging powers that are being conferred on the Scottish ministers to make regulations without the approval of the Scottish Parliament under sections 11(1), 12(1) and 13(1). The bill provides that those regulatory powers may be used to make

"any provision that could be made by an Act of the Scottish Parliament."

The relevant provisions are in sections 11(5), 12(2) and 13(3).

Experts' evidence on the bill highlighted a number of concerns about the wide-ranging powers that are to be conferred on ministers. In evidence to the Culture, Tourism, Europe and External Relations Committee last week, Professor Nicola McEwen said, in relation to section 13:

"I would be concerned at the extent to which this section affords ministerial powers, rather than legislative powers or appropriate scrutiny by Parliament ... it is appropriate for those to be explored with proper scrutiny and consultation."—[*Official Report*, *Culture, Tourism, Europe and External Relations Committee*, 8 March 2018; c 31.]

In addition, the Law Society has called for clarity on the scope and application of the wide-ranging powers that are conferred on the Scottish ministers to make regulations under sections 11(1), 12(1) and 13(1), and constitutional expert Professor Alan Page said in his submission:

"the Scottish Ministers will be taking powers to implement EU instruments over which the Scottish Parliament will have had no say, a potentially major surrender by the Parliament of its legislative competence, and one which under the Bill as introduced may be extended indefinitely."

Although many of the detailed provisions of sections 11, 12 and 13 seek to limit the scope and operation of ministerial powers—for instance, sections 11(8), 12(3) and 13(5) give examples of what the regulations cannot cover—there is concern that the proverbial coach and horses are then driven through those limitations by the overriding provisions of sections 11(5), 12(2) and 13(3), which contradict those limiting provisions by declaring that the ministerial powers may be used to make

"any provision that could be made by an Act of the Scottish Parliament."

These are indeed "special" powers, as the minister described them.

To address the concerns of the Law Society and other experts, and to resolve legal uncertainty around potentially conflicting provisions of sections 11, 12 and 13, amendments 125, 139 and 160 would provide clarity on the operation of sections 11(1), 12(1) and 13(1) by deleting the overriding provision that the powers may be used to make

"any provision that could be made by an Act of the Scottish Parliament."

The deletion of the provision would not just provide legal certainty but would uphold the proper role of this Parliament. I make clear that my proposed approach would not prevent the Scottish Government from setting out in more detail in the bill what the ministerial powers can and cannot cover, as some of the provisions in sections 11, 12 and 13 attempt to do.

Amendment 131 would provide additional protections when ministers exercise their powers under sections 11(1) and 11(9). Section 11(9), as it is drafted, provides that ministers may issue regulations that remove or modify illegal protection in certain circumstances, including under section 11(8)(d), removing any protection relating to the independence of judicial decision making or decision making of a judicial nature by a person occupying a judicial office, or otherwise make provision inconsistent with the duty in section 1 of the Judiciary and Courts (Scotland) Act 2008 to guarantee the continued independence of the judiciary, and, in section 11(8)(i), modify the Equality Act 2006 or the Equality Act 2010. The Scottish ministers may remove those protections or make the specified modifications only if, under section 11(9), alternative provision is made in ministerial regulations that is broadly equivalent to the protection that is being removed or the provision that is being modified.

The impact of my amendment 131 would be to add safeguards in the event that ministerial power is exercised to remove or modify protections. The amendment provides that any protection can be removed or any provision modified by ministers only if permission is given to an additional level of protection in law that is no less than the protection that is being removed or the provision that is being modified. I hope that the amendment is not considered controversial, as the wording is aimed at ensuring that ministerial regulations do not have the unintended consequence of removing protections that are already in place under law.

I will speak to the other amendments in the group in my winding up.

I move amendment 125.

Tavish Scott: My comments on my amendments will follow the remarks that I made in the pre-stage 2 debate yesterday in relation to the scope of the powers in the bill. I do not want to see new quangos or criminal offences created by regulation. If the Scottish ministers have need of those things, they should produce normal primary legislation, which will allow the Parliament to offer scrutiny, amendment and detailed consideration.

Amendments 17 and 24 would prevent the creation of a new public body through ministerial regulations, and amendment 26 would add the creation of new quangos to the list of things that cannot be done under section 11. Amendment 26 would transfer the creation of new quangos under those regulations from the permitted list to the forbidden list. If ministers needed to establish a new quango to keep pace with European Union law for the next 15 years, they would have to produce primary legislation, so that the Parliament could decide whether the proposed new body was required or whether its functions could be carried out by existing bodies. The normal parliamentary procedures would allow such detailed consideration, and I am concerned that, were we not to follow those procedures, such detailed consideration may not take place.

Amendments 18 and 23 would prevent the creation of new criminal offences through ministerial regulations. At the moment—as I read it—the bill prevents the creation of a "relevant" criminal offence, which is defined later as an offence for which those who are guilty can be sentenced for up to two years in prison. That seems a significant power to create through regulation with no chance of amendment by the Parliament. Deletion of the word "relevant" would mean that all new criminal offences would have to be established by primary legislation, which is surely the purpose of this place.

Amendment 19 would include an additional test of the permissibility of regulation. It proposes that regulations must not increase legislative burdens on businesses or individuals. If ministers need or wish to increase the burdens, they should do that through primary legislation—they should publish a bill, hear evidence from those who will be affected

and allow members of the Parliament to lodge amendments to mitigate those burdens as they see fit. That cannot be done through regulations, so the additional test should be added to the bill.

Jamie Greene: I will speak to amendment 126 first, and then to amendment 142 separately.

The existing wording of section 11(6) allows for the establishment of a Scottish public authority to carry out functions under any new regulation that is introduced. Amendment 126 is designed to be helpful to Scottish ministers in that respect. In addition to the creation of a Scottish public authority, which I believe is the premise of section 11(6)(b), my additional wording will allow the minister to amend the object and purpose of a public authority to enable it to carry out its functions as any additional functions are placed upon it under subsection (1).

I hope that the minister welcomes that ability, but it is worth pointing out that there are some drawbacks and potential consequences to expanding or introducing new agencies in Scotland to deal with any new regulations that are brought in. That point was eloquently made by Tavish Scott in the context of the setting up of new quangos. My concern is not only that we may be overloading our public authorities by having them carry out functions that are currently exercised in Brussels but that it is likely that, without significant adaptations in workforce infrastructure and financial backing, current agencies in their existing forms may struggle to deal with those functions, especially with those EU laws that are transposed into our system. Dr Kirsty Hughes, the director of the Scottish Centre on European Relations, made that pertinent point in evidence to the committee last week.

Anyone who has ever been to Brussels will comprehend my anxiety around the sort of support infrastructure that is required to deal with the level and quantities of EU law that we may have to bring over. For example, the directorate general for agriculture and rural development, which is pertinent to the Rural Economy and Connectivity Committee, of which I am a member, is comprised of 10 subdirectorates, each of which has 48 units below it, and each of those units has a head of unit, two deputies, three deputy director generals, two assistants to the director general and a director general—and that is just at the management level.

I am not saying that all of that structure will be necessary in Scotland, given that those DGs manage 28 member states, but many of the functions of those agencies will need to be carried out in the Scottish civil service. My amendment 126 does not just allow the creation of additional new public authorities; it allows us to amend existing public authorities to enable them to carry out functions relating to devolved retained EU law. We will discuss the financial consequences of that later, in considering other amendments.

I will speak briefly to amendment 142. Something that jumped out at me when I read the bill is that regulations made under section 12, which is entitled "Complying with international obligations", may not, under subsection (3)(f),

"be made to implement the UK withdrawal agreement".

It is entirely unclear what the consequence of that may be. I implore the minister to explain to us what the intention of that wording is. If there is no need to implement the UK withdrawal agreement, what is the rationale behind that wording, and what is the potential consequence? It seems to fly in the face of a provision that appears earlier in the section, under which ministers may by regulation introduce provisions as they see fit to deal with breaches of international obligations resulting from the UK's withdrawal from the EU. I have previously commented on my reservations about that. It is entirely unclear why that specific wording is in the bill, and I propose to remove it. I will await feedback from the minister before deciding whether to move amendment 142.

The Convener: I call Liam Kerr to speak to amendment 130 and the other amendments in the group.

Liam Kerr: Thank you, convener. Do you wish me to speak to amendment 129, in the name of Graham Simpson?

The Convener: Yes, given that you are speaking to the other amendments in the group and that Graham Simpson is not here, please feel free to do so.

09:30

Liam Kerr: I will speak to amendment 129, in the name of Graham Simpson, first, and I will move it on his behalf. I am grateful to the convener for allowing me that opportunity. This crucial amendment would reduce the ministers' rights to change legislation in relation to the independence of the judiciary as well as the Equality Act 2006 and the Equality Act 2010.

Section 11(1) allows that,

"Where the Scottish Ministers consider ... that there is ... a ... deficiency ... they may by regulations make such provision as they consider appropriate".

Section 11(8) provides limits on those powers. However, section 11(9), as drafted, states that the section 11(8) limits on making regulations that affect the independence of the judiciary or that affect the Equality Act 2006 or the Equality Act 2010 can be waived provided that "broadly equivalent" provisions are put in their place. I shall

revisit the phrase “broadly equivalent” in relation to my amendment 130 shortly.

Section 1 of the Judiciary and Courts (Scotland) Act 2008, which is referenced in section 11(8)(d), guarantees the independence of the Supreme Court and Scottish and international courts from interference by MSPs or the Lord Advocate. The Equality Act 2010 and its precursor act, the Equality Act 2006, which are referenced in section 11(8)(i), bring together earlier provisions to counter discrimination.

Dealing with the second point first, section 11(9), in relation to section 11(8)(i), states that “alternative provision” can be made for modifications of the 2006 and 2010 acts. However, I am concerned that it is not within the Scottish Parliament’s power to modify UK legislation and that, by implication, the provision in section 11(9) risks representing a serious overstatement of the Scottish Parliament’s powers. For that reason, it must be removed. Furthermore, it is highly inappropriate that any mechanism should exist for ministers to legislate without the consent of the Scottish Parliament in any area that would affect section 1 of the Judiciary and Courts (Scotland) Act 2008. That seems to be the practical impact of subsection (9).

I cannot understand why the areas that are set out in section 11(8) should all be completely protected save in regard to those two areas. That makes me suspicious. We have heard members’ concerns about a power grab by the Executive through ministers seeking to do things when they feel that it is “appropriate” and seeking to create and harness for themselves new derogations and abilities. Amendment 129 is, therefore, crucial in ensuring that ministers cannot change legislation relating to the independence of the judiciary or relating to the 2006 and 2010 acts.

Amendment 130 also relates to section 11. I have suggested leaving out the word “broadly”. The use of that word raises similar concerns to those that have been raised by Dean Lockhart in relation to his amendment 131. Section 11(9) is very important. In effect, it gives ministers the right to make changes to things that relate to the independence of the judiciary and to modify the 2006 and 2010 acts. That right has to be specific—those areas of law are far too important to tamper with.

As drafted, section 11(9) means that ministers can make changes relating to the independence of the judiciary or to the equality acts if the regulations that they are introducing are “broadly equivalent” to those that are being removed or changed, but what does that mean? We just do not know.

Clearly, “broadly equivalent” is vague enough that the new protection for the independence of the judiciary or, for example, the new definition of equality could be less than the existing protection, and that is not acceptable on any analysis and must not be countenanced. It should either be equivalent or it should not be allowed. By removing the word “broadly”, we make it clear that, if ministers want to change those very important areas, that has to be done at the level of the existing protection or provision, not below it.

To anticipate the minister again, which I am keen to do, I believe that the term “broadly equivalent” is most often used in the context of compatible trade and standards regimes—for example, in relation to packaging. The application is surely different in a legislative context, particularly one of this magnitude.

The wording of section 11 is clearly not sufficiently tight. Therefore, for safety, the word “broadly” should be removed and amendment 130 should be agreed to.

Murdo Fraser (Mid Scotland and Fife) (Con): I will speak to amendment 144 and comment briefly on some of the other amendments in the group. Amendment 144 seeks to delete section 12(4). In effect, it is a probing amendment, because I am not entirely clear what is in the minister’s mind in relation to section 12(4), and I would like to understand the minister’s intention more fully. Once I have heard from him, I will decide whether to press the amendment to a vote.

The background is that section 12 sets out the right to make regulations to meet international obligations. Section 12(3) sets out exceptions to that, and says that regulations may not impose taxes, make retrospective provision or create criminal offences and so on. Section 12(3)(d) says that the right to make regulations cannot remove any protection of independence of the judiciary, and section 12(3)(i) says that the right to make regulations cannot modify the Equality Act 2006 or the Equality Act 2010. Section 12(4) than adds a qualification to those exceptions. The purpose of amendment 144 is to check whether that qualification is necessary.

Section 12(4) says that regulations can be made that would remove protection from the judiciary or modify the equality acts if

> “alternative provision is made in the regulations that is broadly equivalent to the protection being removed or the provision being modified.”

That raises a number of questions. I might be echoing Liam Kerr here, but I wonder what the term “broadly equivalent” means and what “alternative provision” is. Why would the Government seek to have those powers? What does it intend to do with them? The issues that are

at stake in relation to section 12(4)—the independence of the judiciary and equality legislation that governs so many rules—are important and substantial matters of public law. The area requires further discussion.

Amendment 144 would remove section 12(4) altogether. The effect would be that, under section 12, ministers would still have the right to make regulations and, as per section 12(3), there would be qualifications to that, but there would be no further qualification to the qualifications, with vague definitions of further changes. An alternative approach would be to clarify by setting out what "broadly equivalent" or "alternative provision" means, but that requires an answer to the basic question of why the Government feels that it needs the ability to make changes to the law in this very important and sensitive area. I look forward to hearing from the minister what the rationale is behind section 12(4), and at that point I will decide whether to put the amendment to a vote.

I support all the amendments in the group. The amendments in the name of Tavish Scott are particularly important. He made important points about the significant matters on which ministers are seeking to take power to make law by regulation rather than by primary legislation. We have had a lot of rhetoric about a power grab but, actually, the most egregious example of a power grab that we have seen so far is what is contained in section 11, through which ministers seek to take power from Parliament in a range of areas. That is why I support Tavish Scott's amendments.

Gordon Lindhurst (Lothian) (Con): My amendment 145 makes a simple but significant amendment to section 12. Section 12 empowers the Scottish ministers to

"make such provision as they consider appropriate"

by regulations where they consider that there is or would be a breach of international obligations arising from withdrawal and that it is necessary to make provision to prevent or remedy the breach. The section is therefore premised on something that is almost entirely subjective, in the consideration of the Scottish ministers and in their minds. In passing, without going into what has been said, I refer to the Law Society's comments on section 12 and on legal certainty.

Bearing all that in mind, I turn to my amendment to section 12(4), which restricts the protections that section 12(3) provides against the exercise of the powers given to the Scottish ministers in section 12. The restriction of section 12(4) is, of course, limited to the provisions of section 12(3)(d) and 12(3)(i), but it allows removal of the protection

"if alternative provision is made in the regulations that is broadly equivalent to the protection being removed"

and so on. That is not good enough. The word "broadly" should be left out, for very good reason, as it adds to the uncertainty of the provision. Why not have, as my amendment proposes, equivalent provision for the protection of rights?

The committee has heard with interest my colleague Liam Kerr's "Oxford English Dictionary" definitions and I hope that members will not be disappointed with my more broad-brush approach to the word "broadly". A simple definition of it is "in general and without considering minor details" or "widely and openly". In other words, use of the word "broadly" in the context that we are speaking about provides no definition at all. When that context relates to removal of protection and interference with rights, it is imperative that the section be clarified to provide actual equivalence. That word is clear.

Amendment 145 is in accordance with amendments 130 and 131, which I commend to the committee.

Yesterday, the minister said that the bill has to work within its own terms, and who could disagree with such a proposition? It might indeed be called a legal tautologism. He also commented on littering the statute book with unnecessary provisions. Now is not the time or place to comment on the Scottish Government's legislative programme. However, if the minister were serious about statutory litter, he would simply withdraw the bill. That would be the ultimate tidying-up exercise.

As a lighter alternative, we could delete section 12(4), as Murdo Fraser has posited. Failing that, the least that the minister could do is agree to leave the humble word "broadly" out of it.

Neil Bibby: As with other groupings, we understand that the Scottish Government must have new powers to manage a period of transition and to absorb EU law into Scots law. However, as we said previously, those powers must be proportionate and balanced. Although I do not support a number of the amendments in this group from Conservative members, some could help to achieve that balance and I will support amendment 130, for example, in the name of Liam Kerr. It seek to removes the word "broadly" from section 11(9) on the equivalence of regulations. This is an instance in which the bill will benefit from more precise language.

I will also support Tavish Scott's amendments in the group. I share his reservations about the creation of a new public body or a new criminal offence through regulation-making powers arising from the bill. Amendment 26 would specifically forbid the creation of a new quango under these regulation-making powers. In our judgment, Tavish Scott's amendments are fair and proportionate and we will support them.

Patrick Harvie: I will just make a few comments about the amendments to which I am drawn and ignore the others for the moment. I hope that the minister will have a chance to respond.

First, amendments 145 and 130 seek to remove the word "broadly" and amendment 131 seeks to add an additional caveat to the removal of the first instance of the word "broadly". I see some merit in that. I know that Gordon Lindhurst sees that as legislative decluttering. I tell him that I have a number of anarchist friends who think that the world is far too cluttered with legislation in general, but I promise that they do not have any whiff about them at all. Perhaps, unlike last night, he might want to explore the issue further.

09:45

It would be good to hear the minister explain why he feels—if he does—that removing the word "broadly" would be inappropriate. It seems to me that the amendments give some clarity, particularly amendment 131, which would add words to ensure that there is protection

"no less than the protection being removed".

There is some merit to that.

Two amendments—amendments 23 and 25—address the word "relevant" in relation to criminal offences. It might be my fault, but I cannot see where the term "relevant" is defined in the context of this part of the bill, so it would be helpful if the minister could tell me what is meant by "a relevant criminal offence" and why it is necessary to restrict the term "criminal offence" in this area.

I have heard a strong argument for restricting the power to create new public bodies, particularly in light of Jamie Greene's amendment—he is quite capable of putting his legislative creative powers to constructive, rather than destructive, use. The additional power to amend by regulation the object and purpose of a public authority might allow ministers to take a new function that needs to be newly exercised in the devolved landscape and give it to an existing body, without undermining its current functions. That would potentially remove the need to create new bodies. If the minister has clear examples of why there might be a need for the Scottish Government to propose the creation of a new body without primary legislation but by regulation, I would like to hear them. It seems to me that there is a good argument for requiring ministers to bring primary legislation if they want to make the case for a new body. I would be interested in the minister telling us why, and in what circumstances, it would be necessary to create a new body by regulation.

Michael Russell: Once again, we are dealing with key sections of the bill. The section of the bill that we are dealing with at the moment, and the next two sections, deal with the scrutiny of, and restraint on, ministerial power. I will indicate my acceptance of certain amendments during my comments. I do not accept all of them, because not all of them can be accepted, for a variety of reasons that I will give.

No one is in any doubt that the Scottish Government and I are opposed to Brexit. In normal circumstances, the Scottish Government would not have sought such a breadth of powers, but we are not in normal circumstances. Those powers are necessary in many cases because of the circumstances in which we find ourselves. Indeed, they are the only way in which we can properly prepare our devolved laws, in the time that we have, for the shock and disruption of a Brexit that is being forced upon us. We have always recognised that. We have no desire to take any broader powers than are needed. That is why we are flexible in this process—listening to people's concerns and trying to go further. I will indicate how we are doing that in a moment.

Let me set out very briefly the changes that we have already made to the continuity bill, compared with the withdrawal bill. We have introduced a test of necessity, set out additional limitations on the powers and produced an enhanced procedure for scrutiny of the most significant uses of those powers. I am also mindful of the votes that the committee has just had on sections 11 to 15, which indicated that the committee wants to go further. I understand that and I will do everything in my power to help the committee to do that but, again, only where it can be done.

We have already taken, and are taking, steps to address the legitimate concerns that are held by members across the chamber, but I remind members that broad powers are needed because of the scale of the task that faces us. EU law and the EU institutions are woven through our law. They have been there for almost half a century, and they will not be easy to untangle.

Broad powers are also needed because of the sheer uncertainty that is involved in the UK's negotiations with the EU. Some 20 months on from the referendum in June 2016, we are little closer to knowing the details of the scenario in which the UK will leave the EU. In many cases, therefore, our understanding of the sorts of changes that will need to be made to our laws and by when is still very cloudy. That uncertainty is not of our making, but again I want to balance the need to deal with it with the legitimate desire to ensure the strongest possible appropriate and necessary scrutiny and ministerial restraint.

Let me speak to each amendment in the group. Dean Lockhart's amendments 125, 139 and 160 appear to be aimed at limiting the scope of what

can be done using sections 11, 12 and 13. I cannot support those amendments, largely because of their wording. There is no clear category of “things that require to be done in an act of the Scottish Parliament”—in effect, the words of his amendments. Sections 11, 12 and 13 are drawn to set out exactly what the power is and the limits that apply. The amendments might raise interesting questions for the courts, but we do not feel that such questions are necessary, and the amendments would limit what it is possible to do.

Tavish Scott’s amendment 17 would prevent the fixing powers from being used to establish new public authorities. His amendments 24 and 26 would prevent the keeping pace power from being used to establish a new public authority. The Scottish Government is content to accept that, when keeping pace with EU law requires the establishment of a public authority, that should be capable of being done only by way of primary legislation. I therefore suggest that the committee should agree to amendments 24 and 26.

Amendment 126, from Jamie Greene, goes in a rather odd direction. It appears to expand the powers of the Scottish ministers, allowing the powers to be used to adjust the general purposes of a public authority. We do not think that this would be an appropriate use of the fixing power, and we would therefore reject amendment 126.

Amendments 18, 23 and 25 from Tavish Scott would see the powers restricted so that no criminal offence could be created using them. They are already restricted to the creation of “relevant” offences, which are offences punishable by two years or less by way of imprisonment. That is defined by section 27, and it is the same test as for the current powers to implement EU law—there is no change in the test.

In many situations, establishing a suitable set of enforcement mechanisms in an area of EU law will require the creation of regulatory offences. The Scottish Government would therefore invite the committee to reject amendments 18, 23 and 25. If it did not, in many cases enforcement mechanisms could be set up only through a lengthy process of primary legislation, which would interfere with the purpose of the bill. Also, as I said, the power is constrained in the same way as existing powers in relation to EU law.

Amendment 19 would supplement the list of things that the powers cannot be used to do. It is similar to amendments that we have debated already, and it would prevent the powers from being used to increase burdens on individuals and businesses. That is an entirely laudable aim, but the amendment misunderstands and undermines the nature of the powers conferred on the Scottish ministers in sections 11 and 12.

The bill limits the powers to being used when necessary to a particular aim. Under section 11, for example, the powers can be used only when it is necessary to prevent, remedy or mitigate a failure or deficiency. Section 11(2) sets out an inclusive and exhaustive list of the types of deficiencies covered. Those are the only circumstances in which the power can be used. If there is no deficiency caused by the exit from the EU, it is not necessary to remedy anything and no power is therefore available.

The powers are not an opportunity to go through the body of EU law and make policy changes. They are solely about discharging our responsibility to make the changes required to keep the body of law operating sensibly. It is important to have that point in the forefront of our minds. As I said, the powers are not an opportunity to go through the body of law and make changes; that might be desirable, but it is not what we are trying to do, nor could we do it. The powers enable us to discharge our responsibility to make the changes required to keep the body of law operating sensibly as it is, or modified if there are failures or deficiencies—but only if there are failures or deficiencies and to the extent that those failures or deficiencies are rectified.

The Scottish ministers could never use the powers to make substantial policy changes. The test that amendment 19 would put into the bill would make the powers opaque and difficult to operate. Leaving the EU is going to be very complex. It is complex already. It may well be necessary to make some changes that, taken on their own, could involve increasing a burden on an individual or business. That is, regrettably, the nature of the task, and the restriction that these amendments would place on the powers would be complex, imprecise and very difficult to apply. Therefore, although I understand its motivation, I urge members to reject amendment 19.

Amendments 129 and 144, from Graham Simpson and Murdo Fraser, would remove the rule that allows a modification of a protection to take place in certain circumstances, as long as alternative provision that is “broadly equivalent” to that protection is made at the same time. Those provisions were drawn from protections in the Public Services Reform (Scotland) Act 2010 and they are a sensible, flexible rule. We would not want to prejudge the exact form that any amendment might have to take or exactly how it could be drafted.

However, we recognise and support the point that is made by Liam Kerr and Gordon Lindhurst in amendments 130 and 145, which would remove the word “broadly” from that rule, which would require any replacement protection to be exactly

equivalent. I therefore recommend that members vote against amendments 129 and 144 but for amendments 130 and 145.

If members vote for the two amendments to remove the word “broadly”, voting for Dean Lockhart’s amendment 131 becomes unnecessary. That amendment would require any replacement protection to be “no less” than the protection modified. That would be better achieved by amendments 130 and 145.

Finally, Jamie Greene’s amendment 142 would remove a limit that is currently on the section 12 power. At present in the bill, the withdrawal agreement is excepted from that power. As I have explained to members, we did not take a corresponding power to clause 9 of the withdrawal bill, which would have specifically empowered us to implement the terms of the withdrawal agreement by subordinate legislation—I explained that yesterday.

I understand the point of Jamie Greene’s amendment. On reflection—no doubt he will be surprised by these words too—I can see that it could be a valuable adjustment to the way in which the bill works. If the interaction between an existing international agreement and the withdrawal agreement was complex, we would not want to be prohibited from taking it into account in our use of the section 12 power. I am therefore content to support Mr Greene’s amendment 142.

Dean Lockhart: The minister again started his response on a positive note, indicating that he would accept many of the amendments in the group, but he went on to decline most of them.

Let me first address my amendments before turning to the amendments that have been lodged by other members. It is disappointing that my amendments 125, 131 and 160 are not accepted by the minister. They are based on comments and concerns that were raised by the Law Society and other experts who are concerned about the open-ended powers—the so-called “special powers”—that are being conferred on ministers to make provisions of any kind

“that could be made by an act of the Scottish Parliament”.

In his statement, the minister said that there is uncertainty over what would be covered by

“any provision that could be made by an Act of the Scottish Parliament”.

That uncertainty is another good reason why that overriding provision should not be included in the bill. If the minister wants clarity and to set out exactly the scope and the operation of the ministerial powers, the better approach, as we have suggested, would be to detail in the bill what those ministerial powers can and cannot cover, rather than having overriding catch-all provisions—as set out in sections 11(5), 12(2) and 13(3)—that provide the all-encompassing power that ministers can make

“any provision that could be made by an act of ... Parliament”.

We feel that the provisions support the view that has been expressed by experts that the bill shows scant respect for the legislative process.

On the other amendments, I support the concerns that were expressed by Murdo Fraser, Liam Kerr and others about the far-reaching operation of section 11(9), for the reasons that have been outlined. The power of ministers under the section could be far reaching. Potentially, we could see ministers, without the approval of or scrutiny by Parliament, removing protections relating to the independence of judicial decision making, or decision making of a judicial nature, and modifying the Equality Act 2006 or the Equality Act 2010.

10:00

There is provision for the replacement with an alternative provision of any provision that is amended or modified, but again, there is uncertainty about what that might mean in practice.

I certainly consider that the powers that will be conferred on ministers under sections 11, 12 and 13 are excessive. They also create uncertainty about how they will operate in practice.

The minister raised other issues about how the powers will operate under section 13 in particular, but those matters will be dealt with in later groups of amendments, so I will reserve my comments for those discussions.

The Convener: The question is, that amendment 125 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 125 disagreed to.

Amendment 17 moved—[Tavish Scott].

The Convener: The question is, that amendment 17 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 17 agreed to.

The Convener: I call Jamie Greene to move or not move amendment 126.

Jamie Greene: At the risk of being accused of further perversion, I will move the amendment.

Amendment 126 moved—[Jamie Greene].

The Convener: The question is, that amendment 126 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 126 agreed to.

Amendment 18 moved—[Tavish Scott].

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 18 disagreed to.

Amendment 19 moved—[Tavish Scott].

The Convener: The question is, that amendment 19 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 19 disagreed to.

Amendments 127 and 128 not moved.

The Convener: If amendment 129 is agreed to, I cannot call amendments 130 and 131, because they will have been pre-empted.

Amendment 129 moved—[Liam Kerr].

The Convener: The question is, that amendment 129 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)

Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 129 disagreed to.

Amendment 130 moved—[Liam Kerr]—and agreed to.

Amendment 131 moved—[Dean Lockhart].

The Convener: The question is, that amendment 131 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 131 disagreed to.

Amendment 132 moved—[Adam Tomkins].

The Convener: The question is, that amendment 132 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 132 disagreed to.

Amendment 133 moved—[Adam Tomkins].

The Convener: The question is, that amendment 133 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 133 disagreed to.

The Convener: The question is, that section 11 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 11, as amended, agreed to.

After section 11

The Convener: I ask Patrick Harvie to move or not move amendment 20.

Patrick Harvie: I am happy to look forward to working further on the issue in the run up to stage 3.

Amendments 20 and 21 not moved.

Section 12—Complying with international obligations

The Convener: If amendment 134 is agreed to, I cannot call amendments 135 to 138 and 22, because they will have been pre-empted.

Amendment 134 moved—[Jamie Greene].

The Convener: The question is, that amendment 134 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)

Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 134 disagreed to.

Amendment 135 moved—[Neil Bibby].

The Convener: The question is, that amendment 135 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 135 disagreed to.

Amendment 136 moved—[Neil Bibby].

The Convener: The question is, that amendment 136 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 136 disagreed to.

Amendment 137 moved—[Neil Bibby].

The Convener: The question is, that amendment 137 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 137 disagreed to.

The Convener: If amendment 138 is agreed to, I cannot call amendment 22.

Amendment 138 moved—[Neil Bibby].

The Convener: The question is, that amendment 138 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 138 disagreed to.

Amendment 22 moved—[James Kelly].

The Convener: The question is, that amendment 22 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)

Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 22 disagreed to.

Amendment 139 moved—[Dean Lockhart].

The Convener: The question is, that amendment 139 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 139 disagreed to.

Amendment 23 moved—[Tavish Scott].

The Convener: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 23 disagreed to.

Amendments 140 and 141 not moved.

Amendment 142 moved—[Jamie Greene]—and agreed to.

Amendment 143 moved—[Donald Cameron].

The Convener: The question is, that amendment 143 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 143 disagreed to.

The Convener: If amendment 144 is agreed to, I cannot call amendment 145 because it will have been pre-empted.

Amendment 144 not moved.

Amendment 145 moved—[Gordon Lindhurst]—and agreed to.

Amendment 146 moved—[Adam Tomkins].

The Convener: The question is, that amendment 146 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 146 disagreed to.

Amendment 147 moved—[Adam Tomkins].

The Convener: The question is, that amendment 147 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 147 disagreed to.

The Convener: The question is, that section 12 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 12, as amended, agreed to.

Section 13—Power to make provision corresponding to EU law after exit day

Amendment 148 not moved.

The Convener: At this point, we shall suspend for 10 minutes. Thank you, colleagues.

10:15

Meeting suspended.

10:34

On resuming—

The Convener: Amendment 149, in the name of Donald Cameron, is grouped with the amendments shown in the groupings paper. Members will note that there are a number of pre-emptions in the group. I will remind members of the pre-emption when I call the relevant amendment.

Donald Cameron (Highlands and Islands) (Con): I have lodged only a single, specific amendment to section 13, which, it is fair to say, is one of the most difficult and controversial sections in the bill, because it relates to the keeping-pace power, as it is being termed—the power that would allow the Scottish Government to make provision corresponding to EU law after exit day. I will say more about the section as a whole when I sum up in the light of the debate on the amendments.

Amendment 149 seeks to add some important riders to the use of that potentially wide-ranging power as it is set out in section 13(1). The amendment is very much on the same theme as other amendments that have been debated this morning, as it relates to the checks and balances on executive power and the legislature's role in those. It seeks to place two conditions on the use of executive power. First, regulations that are made under section 13(1) would have to be subject to the restrictions and limitations of the Scotland Act 1998 so that any use of the power would be compatible with the devolution settlement as it is enshrined in that act. That part of amendment 149 would do no more than ensure that the use of the power was fully conversant with the Scotland Act 1998 and would provide for the overarching protection that is provided by devolution. I would not call that littering the bill with obsolete references; in my submission, that would be enshrining devolution.

Secondly—and no less important—amendment 149 seeks to apply the condition that the Parliament must give its consent to the use of the power in section 13(1). In short, that part of my amendment is a simple, even basic, provision that seeks only to require that the Scottish Parliament, of which we are all members, must agree to the use of the power that ministers may seek to exercise under section 13(1). It is not a party political point; it is about the need for a separation of powers between the Executive and the legislature, which is a fundamental point to make. The condition would apply to ministers of whatever political stripe, not least because of the potential 15-year timeframe that could apply to the use of the power. The issue goes to the very nature of what we do here. Ultimately, it is about respecting each other as MSPs and respecting the role of the Parliament in scrutinising the power of the Executive.

I move amendment 149.

Liam Kerr: I will speak to amendments 155 to 159, in the name of Graham Simpson. I am grateful to you, convener, for permitting me to speak on his behalf.

Amendments 155 to 157 and 159 would clarify the section as meaning that ministers can make regulations not where EU law is no longer appropriate but where it is no longer operable, which is a much tighter and—dare I say it?—more appropriate definition. It is about how much power is grasped by the Scottish ministers.

Section 13 sets out the power to allow ministers to make regulations that correspond to EU regulations, provisions or some such after exit day. Donald Cameron has spoken persuasively about the importance of section 13, and I strongly associate myself with his remarks.

Subsection (2) sets out the details of what ministers may and may not do. It sets out that they may omit provisions that link to arrangements that

no longer make sense, such as agreements between the UK and EU member states, or that are dependent on UK membership of the EU. The purpose behind that is sensible, and the merit of the section, therefore, is clear. However, I would draw attention to one particular phrase that is used throughout; all of those things are omitted if they

"no longer exist or are no longer appropriate".

The phrase "no longer appropriate" is vague and implies a level of judgment on what might constitute appropriateness. If we import an ability to make a subjective judgment, it must be a matter of concern and worry that there is no equivalent check on the use of a minister's judgment. Surely we should not be countenancing a situation in which Scottish ministers omit something from regulations on the basis that they simply feel it to be "appropriate". By switching the term "appropriate" for "operable", amendments 155 to 157 and 159 tighten up the meaning. If something is not "operable", it should not be ported in. That is objective, correct and sensible, and it is why the amendments should be agreed to.

Amendment 158 is slightly different but makes a similar point. Section 13(2)(f) clarifies that if Scottish ministers use the powers under section 13(1) to make provision—say, to implement an EU directive—they may confer extra

"functions or restrictions which"

they feel

"it is appropriate to retain".

Once again, that is a judgment call. There is a risk, because when we make law, we make it for years and for Scottish ministers who are yet to come. It must be right to ensure that functions or restrictions are ported only where it is necessary—that is, imperative or required—to do so. It is not right to leave the matter open to judgment, subjectivity or discretion, as the word "appropriate" does. I therefore commend amendment 158, which seeks to replace "appropriate" with "necessary".

Tavish Scott: I will speak to amendments 27 and 34 in particular. I share the views expressed by Donald Cameron in his opening remarks on this section, which is about keeping pace post March next year. The two areas that he highlighted are, arguably, the ones that I feel most strongly should be improved in the bill.

At stage 1—it seems weeks and weeks ago now, but it is important to remember that it happened only a week ago—I reflected on the need for the Administrations across the United Kingdom to co-operate. Moreover, I reflected yesterday on the fact that those involved in the rural economy know all too well the importance of a complete UK picture to the success of their businesses. In that respect, amendment 27 complements other proposals that I am making by seeking to compel Scottish ministers to consult the other three Administrations prior to taking action under section 13 to keep pace with EU law after exit day.

Every political party has constantly cited the need for framework agreements, co-ordination and co-operation across the United Kingdom as powers are allocated after exit day; indeed, the point was made by Adam Tomkins this morning and by the minister in his letter on Monday night. There is no political dissent in that respect. This amendment stipulates that if one of the other three Administrations asked the Scottish Government not to make a particular regulation to keep up with EU law, that regulation could not proceed. If Scottish ministers insisted on doing it in the face of that opposition across the UK, the proposal would have to be introduced in primary legislation; as a result, Parliament would be able to look at it in detail, consider why the other three Administrations were opposed to it, hear from stakeholder interests, Scottish business and others, then decide whether the Government had made the case. The amendment does not say that the Government of the time cannot bring forward a policy proposal or deal with a particular issue that it feels must be addressed; it is just saying that scrutiny and proper parliamentary accountability should be in place to allow that to happen.

With the amendment, we would be able to protect the workings of the UK single market by what would be, in effect, unilateral action by a single Administration. It represents a federal idea of co-operation—I make no apologies for believing strongly in that—and it contrasts with some Conservative amendments that give control of these issues entirely to UK ministers.

Amendment 29, together with amendments 31 to 33, would replace the current 15-year extent of the powers to keep pace with EU law with a maximum period of five years, to be renewed every year thereafter. The minister has made it clear that he proposes to assess how the powers have been used before they are renewed. I agree—and I take that point—but I want to cut down the length of time for which ministers from any party in the next 15 years can rely on the section 13 powers. After all, here we are looking at legislation that will affect whoever the Administration will be in future sessions of the Parliament.

10:45

Amendment 34 proposes to do away with section 13 completely. It shares much with Neil Findlay's amendment 35. However, my amendment goes further and allows ministers the

opportunity to explain their need for further powers. I recognise the point that the minister has made in respect of any minister of any Government seeking powers in circumstances that we cannot fully envisage. My proposal in amendment 34 is to ensure that ministers who are keen to make a provision will be given three months in which to prepare a report on how primary legislation might be used to achieve the same end. In other words, it is a way forward in addressing the concerns that I recognise the Government and ministers have, but it creates a parliamentary route for proper scrutiny of what is needed with regard to ministerial powers post March 2019.

Why does that matter? It matters because we have become obsessed with the language around power grabs. Nobody looking at section 13 is under any illusion; that could only be described as ministerial seizure of the most extensive powers. As some colleagues have already mentioned this morning, the power grab argument works both ways. Some could say that if we leave this bill as it is for 15 years, ministers of any persuasion could create new laws and abolish old ones, create new quangos or imprison people for up to two years under offences brought to the statute book by regulation and not primary legislation. We have had a bit of a cut at that already—and rightly so—but it is very important that the issue is carefully thought through, even with the time constraints that we have today.

The minister has said before that he had expected a similar section to section 13 to be in the UK bill. He has also said—let me be right about this—that the Lib Dems would probably like the UK to keep pace with EU legislation. Now, I understand and agree with both those points, but it cannot be done through this truncated emergency procedure. If similar plans had been in the UK bill, they would have been subject to the scrutiny of two Houses of Parliament over months and months, not the much shorter period in which we are having to deal with this bill here in Parliament. This provision does not have to dovetail with what is in the UK bill; it can be brought forward at any point—perhaps even after exit day.

I argue that section 13 is not an emergency. The minister may well have arguments to say that other sections demonstrably are, but this absolutely is not. Amendment 34 gives the minister and, more important, Parliament the opportunity to look at the issue of parliamentary scrutiny in the round and over a period, not in a considerable rush. It is a constructive way forward for ministers, who can publish a report and justify their plans through the full scrutiny of this Parliament. This section is not an emergency.

At last week's meeting of the Culture, Tourism, Europe and External Relations Committee, Professor Nicola McEwen, one of our pre-eminent political scientists, was, in my view, warm about a route such as that which is laid out in amendment 34 being a sensible way forward in a difficult area of accountability and scrutiny. I hope that the Government might see it in that light.

If I may, I will make a final point. Neil Findlay's amendment 42, which I support, is one of three that make sure that the UK Government and the other devolved Administrations are consulted before regulations or an act are made under section 13—the keeping-pace power—which is also an important step.

With those remarks, I will be happy to move my amendments.

Murdo Fraser: I will speak to my amendments 164, 165 and 168 to 173. I will also speak to amendments 28 and 30, in the name of James Kelly, and amendments 29, 31 and 32, in the name of Tavish Scott, all of which cover the same territory.

The amendments that I have lodged in this group are complementary and overlapping. I have tried to present colleagues with a menu of different options to choose from in addressing their concern about the current drafting of subsections (7) and (8) of section 13. The amendments in the names of James Kelly and Tavish Scott, to which I have referred, would have a similar impact.

Section 13 contains wide powers for Scottish ministers to make provisions by regulation after exit day. We have just heard from Tavish Scott, and we heard in the stage 1 debate and in yesterday's pre-stage 2 debate from a wide range of colleagues across different parties, concerns about the extent of those powers and the periods for which they will last. The powers to make regulations will come under a degree of parliamentary scrutiny. With regard to the amendments that I have lodged, my primary concern is that the periods allowed to Scottish ministers to exercise those regulation-making powers are too extensive.

Those regulation-making powers will exist for a total period of 15 years after exit day. Section 13(7) refers to the initial period of five years. Scottish ministers will be able to extend that for up to a further five years under section 13(8)(a), and for a further five years under section 13(8)(b), which gives us that total of 15 years from exit day. That seems to me to be far too long for Scottish ministers to have those considerable powers.

My amendment 164 seeks to reduce the initial period from five years to four years, and amendment 165, which is also in my name, seeks to reduce the period from five years to three years.

James Kelly's amendment 28 seeks to reduce the period from five years to two years, and Tavish Scott's amendment 29 seeks to reduce it from five years to one year. My preference would be to see the period reduced to as short a time as possible, so my preferred outcome is for Tavish Scott's amendment 29 to be agreed to. Failing that, I would support James Kelly's amendment 28, which would reduce the initial period from five years to two years; then I would support amendment 165, in my name, which would reduce the period to three years. If all else fails, I would support amendment 164, in my name, which would reduce the period to four years. I would then support amendment 30, in the name of James Kelly, which would leave out section 13(8) altogether—in other words, Scottish ministers would not be entitled to have any additional powers beyond the initial period.

However, if that approach is not agreed to, I would move on to my second set of amendments—amendments 168, 169 and 170—and amendment 31, in the name of Tavish Scott. In effect, I would repeat the exercise in relation to the first extension period, which is currently stated in section 13(8)(a) as being "up to five years". My preference would be to support Tavish Scott's amendment 31, which would reduce the extension period from five years to one year. If the committee did not agree to that, I would then support my amendment 170, which would reduce the period from five years to two years, failing which I would support my amendment 169, which would reduce the period from five years to three years. Failing all that, I would support my amendment 168, which would reduce the period from five years to four years.

I would then go through the same exercise again in relation to the further extension period, which is contained in section 13(8)(b). Again, my preference would be to support Tavish Scott's amendment—amendment 32—which would reduce the further extension period from five years to one year. In the event that that was not accepted, I would then support amendment 173, which would reduce the period from five years to two years, failing which I would support amendment 172, which would reduce the period from five years to three years. Failing all of that, I would support amendment 171, which would reduce the period from five years to four years.

I also support amendment 33, in the name of Tavish Scott, which would put a total time limit of five years on all extensions, and amendment 34, also in the name of Tavish Scott, which would require ministers to produce within three months of the bill's being passed and obtaining royal assent a report setting out the Scottish Government's intentions in this area.

James Kelly: I will speak to my amendments 28, 30 and 37 and, with the convener's permission, amendments 35, 36, 38, 40, 42, 48, 52 and 54, in the name of Neil Findlay.

As others have said, the amendments in this group relate to the extension of regulation-making powers post-exit day. I think that this is one of the more problematic areas in the bill because of the extent of the powers that will be granted to Scottish ministers.

Speaking to an earlier group, Mr Russell said that he was keen to use the bill to enhance the powers of the Scottish Parliament. However, in section 13, he is using the bill to enhance the powers of Scottish ministers. I agree with many of the points that Tavish Scott and Murdo Fraser made.

Amendment 28 seeks to reduce the time for which the regulation-making powers last from five years to two years. Subsequent to that, amendment 30 would take away ministers' power to seek cumulative five-year extensions. Amendment 37 would improve and make more focused the scrutiny of the affirmative procedure.

I turn to Neil Findlay's amendments. Amendment 35 would take out section 13 altogether, given the fundamental problems that have been expressed about the section and the powers that it grants to ministers. Amendments 36, 38, 40, 42 and 48 are similar to amendment 37, in that they would improve scrutiny. They would also introduce proper consultation.

I ask members to support the amendments in my name—28, 30 and 37—and 35, 36, 38, 40, 42, 48, 52 and 54, in the name of Neil Findlay.

Michael Russell: I thank members for the amendments that they have lodged in this group.

I acknowledge that section 13 is probably the most controversial section of the bill. The obligation is on the Government to indicate why the section should remain in the bill, as there are moves to remove it, and how it should operate. I will accept some changes to its operation and am willing to accept more, as there is one set of amendments that I want to talk about that could be useful but which requires additional work.

The section is necessary. The same discussion is taking place in Wales because there is an equivalent section in the Law Derived from the European Union (Wales) Bill and it is clear that there will be a concern about continuing regulation and legislation. In my response to some of the environmental questions that were raised yesterday, I illustrated some of the areas in relation to which the provisions in section 13 would have a vital role. Regulatory alignment has been much discussed in the past few months,

particularly in the context of the Northern Irish border, but there are other reasons why regulatory alignment is extremely important. To achieve it, the Parliament would require a power of the nature of that in section 13. Otherwise, it would be incredibly onerous to achieve.

The power must be properly used. It must be limited. It can be limited in scope—I will come on to that in a moment—and in time. However, without it, serious damage will be done to certain Scottish industries. I have used agriculture as an example, and serious environmental damage could certainly result without the power. Therefore, as we have seen in other parts of the bill, we must balance the requirement for scrutiny, ministerial restraint and ministerial supervision with the requirement to do something in the exceptional circumstances that we face. It is important to remember that there is nothing normal about the way in which the UK Government has approached the matter. There is nothing normal about the Brexit process, so we have to have some tools that we presently do not have.

I accept the principles of scrutiny and restraint. The question is how we achieve what members want. I will make some constructive suggestions—I hope that members will take them constructively.

Donald Cameron spoke to his amendment 149. He will not be surprised to hear that I regard the first part of it to be unnecessary because restrictions on reserved matters apply anyway under the Scotland Act 1998, as section 13(3) of the bill confirms.

I thank Graham Simpson for his amendments 155 to 159. The comments that were made usefully explored and introduced some of the issues that are raised by the keeping-pace power. I understand that the intention behind those amendments is to ensure that the Scottish ministers may put a keeping-pace proposal to Parliament only when a higher test is met and in more limited circumstances. I agree with that principle, but the amendments as drafted would not meet that test.

11:00

Section 13(2) confers a limited ability to modify post-withdrawal EU law so that it can properly operate in the circumstances of the UK no longer being a member of the EU. In many uses of the keeping-pace power, no such modification would be necessary. For example, if we were adding, after withdrawal, new additives to a list of prohibited foodstuffs when an EU regulation was similarly updated, it is likely that nothing would need to be adapted.

The test for adapting EU law under the keeping-pace power is the same as the test that applies to the fixing powers in sections 11 and 12. Mr Simpson's amendments would allow those adaptations to be made—they would allow EU law provisions to be omitted—only when part of EU law is not operable. We do not consider that that is the correct test because, often, there is something in EU law that would be theoretically possible to maintain, and which could be argued to be operable, but which it would be inappropriate to keep as a result of EU exit. We would not want to have to put to Parliament regulations that contained inappropriate provisions.

Mr Simpson's amendment 158 would bind the regulations to only conferring functions or imposing restrictions that it is "necessary"—his word—to retain. As recommended by the Delegated Powers and Law Reform Committee, of which Mr Simpson is the convener, the Scottish Government has introduced a test of necessity for the fixing powers in the bill. However, amendment 158 would not work in the same way. Deciding whether to put to Parliament a proposal to make changes to keep pace with EU law involves a question of judgment: on the part of ministers about whether to propose regulations, and on the part of Parliament about whether to accept them. That would involve deciding between different possible approaches, and would require a judgment around appropriateness.

The Government is listening on section 13 and we agree with the intention behind Mr Simpson's amendments. We want to make changes—we want to address those concerns. However, I hope that I have pointed out that, technically, the amendments would have the effect of preventing the Scottish Government from adapting the keeping-pace proposals that it puts to Parliament to make them work properly.

Although I cannot support his amendments, I make an offer to Mr Simpson: if he would like to discuss these matters with the Scottish Government, we will see whether we can adapt his amendments to make them work.

Similar concerns are raised in the second part of Mr Cameron's amendment 149, and I acknowledge the variety of other amendments in the group that other members have lodged, including Tavish Scott. I understand the points that Tavish Scott makes. There could be implications for other parts of the UK if Scotland were to keep up with EU law in a way that they do not mirror. I will make three points to Mr Scott in response. First, if there are any international agreements with the EU that affect devolved matters, either in relation to withdrawal or in the longer term, the Scottish Government will be bound by obligations under those agreements in the normal way. Secondly, if there are UK-wide frameworks that affect devolved matters, the Scottish Government

will, obviously, follow its commitments under those frameworks—that is what we are trying to negotiate. Thirdly, beyond international obligations and commitments under frameworks, it is the responsibility of this Parliament to ensure that devolved law is effective, and the Government believes that the provision is essential if the Parliament is to do that.

The future is uncertain—that is never truer than in relation to matters concerning Brexit. We do not suggest that there should be a power to keep us in step with EU law for all time, and the provision is, therefore, sunsetted. However, to reflect the uncertainty, there needs to be scope for using the provision, and the limitations of the scope in relation to Mr Scott's concerns are met.

At stage 1, there was confusion about the nature of the sunsetting provision. I therefore lodged Government amendment 166 to clarify our policy. However, we recognise the strength of feeling on section 13, which is reflected in the amendments. Therefore, we propose to discuss further with interested parties changes to the provisions with a view to finalising a position on the sunsetting provision and the extension of the powers.

I want to discuss changes to the sunsetting provision and changes to scrutiny, and we want to look to impose a strong reporting requirement. In the middle of my comments about scrutiny and operation, I indicated that I am willing to consider changes; I am willing to do so with Mr Simpson, and I will do so with other members. On the reporting requirement, we can look to see whether an amendment at stage 3 from any side of the chamber can be found. However, with regard to sunsetting, I think that I need to go further in order to show my good faith.

Mr Fraser has presented the Parliament with a menu, which was very good of him. I will pick two things from the menu, and I hope that he will accept that I am in earnest and acting in good faith. I will support two of his amendments—amendments 169 and 173—and I will not move my amendment 166. That means that we have found a sort of middle point, which involves an initial extension for three years and subsequent extensions for only two years. In that way, I will be meeting the objections that we have heard to date, as we will have found a way to limit the use of the power and put in place a higher test than exists at the moment, which was Mr Simpson's point; we will have taken two items from Mr Fraser's menu; and we will be continuing to discuss the ministerial reporting of powers.

I accept that the power is broad. The correct level of scrutiny needs to be considered. I note the proposals from Tavish Scott in a later group of amendments that would, in effect, make any use of the power subject to the enhanced affirmative procedure that is set out in the bill. I am happy to continue to discuss members' concerns.

We will, I hope, proceed on the basis that we are trying to make the power better and make it work, but I cannot accept that we should simply give up on it, because I can envisage circumstances in which it will be a necessary part of the armoury, even in the emergency sense that Tavish Scott discounts. There will be circumstances in which the power will be absolutely essential.

I hope that I have made a reasonable set of suggestions. I suggest that the committee accepts amendments 169 and 173, that I do not move amendment 166 and that I ensure that Mr Simpson's proposals are discussed with him and others as appropriate, so that we can find a way to make the power work, but in a much more constrained, supervised and scrutinised way.

Dean Lockhart: My amendment 167 also relates to the so-called keeping-pace powers in section 13. I associate myself with the comments of Donald Cameron, Liam Kerr, Murdo Fraser and Tavish Scott on the overreach of the powers. As drafted, section 13(8) envisages that the wide-ranging ministerial powers, including the power of ministers to make any provision that could be made by an act of Parliament, will be in place for a period of up to 15 years. I will come on to the minister's updated proposal on that in a second.

Amendment 167 occupies common ground with the amendments of Murdo Fraser and Tavish Scott. I will still move amendment 167, as an alternative option among the other provisions that are being considered by the committee. I thank the minister for his proposals to revise the sunset provisions that are set out in section 13, and I am sure that the committee will consider those.

Under amendment 167, the Scottish ministers could extend the regulation-making powers at the end of the initial five-year period by a further period of only one year, and only then if the Scottish Parliament had been consulted in accordance with section 15, which provides a degree of parliamentary scrutiny. My amendment 191, which will be discussed in a later group, would bolster the scrutiny powers of Parliament in that context.

There are various proposals in front of the committee with respect to the sunset provisions. However, I intend to move amendment 167.

Neil Bibby: As Donald Cameron and others have said, section 13 is easily the most controversial section in the bill. As I said in my remarks in the chamber yesterday, this group of amendments is one of the most important, if not the most important, that we will debate. Section 13

grants sweeping regulation-making powers to the Scottish ministers. It would allow the Scottish Government to implement laws in Scotland that correspond to EU law, even if that EU law takes effect after exit day and after we leave the EU.

Members will recall that Professor Aileen McHarg expressed uncertainty to the committee about whether the powers granted by section 13 are keeping-pace powers or something altogether more difficult to justify. As I said in the stage 1 debate in the Parliament, Professor Alan Page of the University of Dundee warned the committee that section 13 amounts to

“a potentially major surrender by the Parliament of its legislative competence”.

He also referred to it as “a thoroughly bad idea.” Concerns were also raised about a democratic deficit.

I therefore have grave reservations about section 13, which I do not believe should be agreed to. However, if it is agreed to, we should ensure that the amending stages enhance parliamentary scrutiny, promote transparency and build checks and balances into the bill, and that is what the amendments in the name of my colleagues James Kelly and Neil Findlay seek to do. As we have heard, there are also a number of amendments from Conservative and Liberal Democrat members, which we are prepared to support.

We want to ensure that not only proper scrutiny but proper consultation is built into the bill, and that a bill that the Scottish Government introduced to protect this Parliament’s place in our democracy is not used to sideline or marginalise it. We want to ensure that there is no power grab from this Parliament by ministers; as the bill stands, there is. I ask all members to consider supporting the Labour amendments and, specifically, amendment 35, in the name of Neil Findlay, which would remove section 13 altogether.

Patrick Harvie: There is no simple way through this. We are being asked to make a hideously complicated set of decisions from a complicated menu of items, as Murdo Fraser described them. He was right to bring that range of options, but it makes the process extremely complicated, unless we have provision to vote by single transferable vote, which I do not think that Murdo Fraser would like as much as I might.

The minister is right to say that these are not normal times. We are living through an extended constitutional crisis. On numerous occasions, I have heard Brexiteers almost describe the Brexit process as something as simple as resigning from the local golf club, when in fact we are talking about the biggest job of legislative heavy lifting that I can think of anywhere, ever. If anyone can come up with an example of a more complex process that is being undertaken anywhere, I would be interested and dismayed to hear about it.

Let us recognise the complexity of the job that we have ahead of us. A balance has to be struck between making the process viable and manageable and maintaining parliamentary control of it, and there is no perfect solution. In the chamber last week, Mike Rumbles appeared to concede that he does not think the whole process can be done with primary legislation alone. I apologise if I misheard or misunderstood him, but if I understood him correctly I have to agree; I think that section 13 is, regrettably, necessary.

The balance that is being struck needs to be changed. Given the way that we will have to vote now, it may be that the stage 2 process merely shakes out the range of attitudes and opinions that there are. It may leave us in a stronger position at stage 3 to vote on something that can gain majority support or which the majority can at least live with. Let me just run through the amendments that, at the moment, I intend to support, because they seem to me to strike the right balance.

Amendment 165 would reduce the initial period from five years to three years in the provision in line 15 on page 12 of the bill that

“No regulations may be made ... after the end of the ... 5 years beginning with exit day.”

Reducing that period to three years is a reasonable compromise. Following that, amendments 31 and 32 would reduce the extensions from their current limit to one year and, if I am reading this right, amendment 33 would limit the total period to five years—after the maximum allowed number of extensions, the total period would be five years. That seems to me to be a reasonable compromise between what the Government is asking for and the need to restrain powers that I think we all acknowledge are exceptional.

Moreover, if there was a maximum period of five years, the Government, whether it be the current one or its successor—who knows what situation we will be in at the time?—would, if it believed that a further extension was absolutely unavoidable, have ample time to return to Parliament with new primary legislation that would set out additional powers to extend what by that time would be the continuity act, if the bill is passed.

That seems like the right balance to strike. Whether or not we are able to reach agreement on this or something like it today, I hope that, whatever the result of the votes, members across the parties are willing to work towards something at stage 3 that a majority can at least live with.

11:15

Donald Cameron: Section 13 is without doubt one of the most troubling provisions in what is a troubling bill. To be fair to the minister, he has acknowledged that; I think that he described it as the most controversial section in the bill, and he also referred to the broad power that it makes provision for.

In summing up, I want to make a few general points before turning to some detailed specifics. First, the keeping-pace power in section 13 has no equivalent in the UK bill. The Government often tells us that the bill has been drafted in the same vein as the UK bill and that some of the provisions are identical, which gives them some justification; however, that is not the case here. This is a striking political choice that the Government has made and which goes well beyond the UK bill.

The minister is quite open about his antipathy towards Brexit, but Brexit is, without doubt, happening. [*Interruption*.]

The Convener: I am sorry, Mr Cameron, but if you sit back from your microphone, you will not get that popping sound.

Donald Cameron: I am sorry, convener. My enthusiasm is getting the better of me.

The Convener: We are all enthusiastic.

Donald Cameron: There is, in fact, no actual need to keep pace with EU law if we are leaving the EU. There might well be alignment not just in Scotland but across the UK immediately after exit, but there is no actual need for these powers.

That position should be contrasted with that in the earlier parts of the bill that deal with carrying over EU law into domestic law. We all accept, in principle, the need and requirement for that to happen in that case, but as far as this section is concerned, that need simply does not exist. We might differ in how continuity of law might happen—different ways are set out in the continuity bill and the UK bill—and it must happen. That said, it is not mandatory here.

Indeed, I think that the Government accepts that. Its policy memorandum, which provides a very lengthy justification for this particular section—always a warning sign, in my view—describes it as

"a useful method ... in advance of primary legislation".

The very fact that this is a temporary power that, as the Government has said, might be required only "in the short term" underlines that. With great respect, the minister has, in my view, not given an adequate response to that criticism.

In making primary legislation or supervising secondary legislation, this Parliament has the ability to fill the so-called "legislative lacunae" that the policy memorandum refers to without the need for a keeping-pace power. We can do what we want within the terms of devolution; indeed, we can make that primary legislation. I simply disagree with Patrick Harvie on this point. If we can pass a bill like this one in three or four days, we can certainly legislate quickly on more specific issues such as food additives, which are referred to in the policy memorandum, as well as update ambulatory references in the law. In short, I repeat the view that has been expressed by many that this is an unnecessary provision and represents an extensive overreach of executive power.

My specific points relate to proper parliamentary scrutiny. I welcome the minister's constructive approach to those specifics, but I want to draw attention to the Delegated Powers and Law Reform Committee's report, which says:

"This is a very significant power and would potentially allow delegated powers to be used for a wide range of circumstances that may otherwise be considered appropriate to be done by primary legislation.

The Committee queried whether this power was appropriate to the purpose of this particular Bill. The Committee also queried whether there was the same urgent need for such a power and, therefore, whether it was appropriate to include such a power within a bill being treated as an emergency bill."

With that in mind, I turn briefly to the comments of various members as well as members of the committee. Liam Kerr mentioned his desire to see the word "operable" being used instead of "no longer appropriate", and he made potent criticisms with regard to that being better than a subjective judgment on what is appropriate. The language is much tighter, and it requires an objective judgment to be made.

Tavish Scott spoke most strongly, I think, about the primacy of primary legislation. Although I might disagree with some of his comments, particularly about federalism, he said that scrutiny should be in place and referred to the proper parliamentary route to what is required. I also associate myself with his comment that this could be a ministerial seizure of the most extensive kind. Finally, he was absolutely right to point out, with regard to this being emergency legislation, that this is not an emergency, and that the matter deserves time. When we talk about "accountability" and "scrutiny", as Mr Scott did, we do not mean them as catchphrases or clichés; they really matter.

In the same vein, Murdo Fraser commented on the wide powers and gave a suite of different solutions, James Kelly talked about the problematic nature of section 13 and Neil Bibby quoted a witness who called it a "major surrender". The minister should be aware—as, to be fair to him, I think he is—of the various serious concerns that have been expressed by members across the

chamber on the keeping-pace power, and I welcome his offer with regard to specific amendments. Of course, it is up to members which amendments they move.

The Convener: Just as the process of discussing the amendments has been quite complicated, so, too, is the process of voting. Forgive me, then, if I take a wee bit of time to go through it.

The question is, that amendment 149 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 149 disagreed to.

Amendments 150 to 154 not moved.

The Convener: I ask Liam Kerr to move or not move amendment 155, in the name of Graham Simpson.

Liam Kerr: I am grateful for the minister's comments, so I will not move the amendment.

Amendments 155 to 159 not moved.

The Convener: I ask Dean Lockhart to move or not move amendment 160.

Dean Lockhart: I will not move the amendment, because I believe that my colleagues have lodged better ones.

Amendment 160 not moved.

Amendment 161 moved—[Donald Cameron].

The Convener: The question is, that amendment 161 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 161 disagreed to.

Amendment 24 moved—[Tavish Scott]—and agreed to.

Amendment 25 moved—[Tavish Scott].

The Convener: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 25 disagreed to.

Amendment 26 moved—[Tavish Scott]—and agreed to.

Amendment 162 moved—[Donald Cameron].

The Convener: The question is, that amendment 162 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 162 disagreed to.

Amendment 163 moved—[Donald Cameron].

The Convener: The question is, that amendment 163 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 163 disagreed to.

Amendment 27 moved—[Tavish Scott].

The Convener: The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

Abstentions

Bibby, Neil (West Scotland) (Lab)
Kelly, James (Glasgow) (Lab)

The Convener: The result of the division is: For 3, Against 6, Abstentions 2.

Amendment 27 disagreed to.

The Convener: I remind members that amendments 164, 165, 28 and 29 are direct alternatives, which can all be moved and decided on. The text of whichever amendment is the last one to be agreed to is what will appear in the bill.

Amendment 164 moved—[Murdo Fraser].

The Convener: The question is, that amendment 164 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 164 disagreed to.

Amendment 165 moved—[Murdo Fraser].

The Convener: The question is, that amendment 165 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 165 agreed to.

Amendment 28 moved—[James Kelly].

11:30

The Convener: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 28 disagreed to.

Amendment 29 moved—[Tavish Scott].

The Convener: The question is, that amendment 29 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 29 disagreed to.

The Convener: If amendment 30 is agreed to, I will not be able to call amendments 166 to 170, 31, 171 to 173 and 32.

Amendment 30 moved—[James Kelly].

The Convener: The question is, that amendment 30 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 30 disagreed to.

The Convener: If amendment 166 is agreed to, I will not be able to call amendments 167 to 170, 31, 171 to 173 and 32.

Amendment 166 not moved.

The Convener: If amendment 167 is agreed to, I will not be able to call amendments 168 to 170, 31, 171 to 173 and 32.

Amendment 167 moved—[Dean Lockhart].

The Convener: The question is, that amendment 167 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 167 disagreed to.

The Convener: I remind members that amendments 168, 169, 170 and 31 are direct alternatives.

Murdo Fraser: In view of what the minister said, and in the expectation of satisfaction further down the list, I will not move amendment 168.

Amendment 168 not moved.

Amendment 169 moved—[Murdo Fraser]—and agreed to.

Amendment 170 moved—[Murdo Fraser].

The Convener: The question is, that amendment 170 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)

Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 170 disagreed to.

Amendment 31 moved—[Tavish Scott].

The Convener: The question is, that amendment 31 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 31 agreed to.

The Convener: I remind members that amendments 171 to 173 and 32 are direct alternatives.

Amendments 171 and 172 not moved.

Amendment 173 moved—[Murdo Fraser]—and agreed to.

Amendment 32 moved—[Tavish Scott].

The Convener: The question is, that amendment 32 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 32 agreed to.

Amendment 33 moved—[Tavish Scott].

The Convener: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 33 agreed to.

Amendment 34 moved—[Tavish Scott].

The Convener: The question is, that amendment 34 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 34 disagreed to.

Amendment 35 moved—[James Kelly].

The Convener: The question is, that amendment 35 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 35 disagreed to.

Section 13, as amended, agreed to.

Adam Tomkins: On a point of clarification, convener, does the committee need to agree to the section?

The Convener: No. The vote on amendment 35, which sought to delete section 13, was held immediately before. By disagreeing to the amendment, we agreed to the section, so we did not need to do so a second time. Thank you for raising that point of clarification.

Section 14—Scrutiny of regulations under sections 11, 12 and 13

The Convener: Amendment 174, in the name of Ross Greer, is grouped with amendment 187.

Ross Greer (West Scotland) (Green): I am glad to speak to amendments 174 and 187. The vast majority of the changes that we anticipate will need to be made as a result of this process are addressed in sections 11, 12 and 13, which contain the powers to correct deficiencies in EU law, to comply with international obligations and to keep pace with legal developments in the EU after Britain's exit day.

Section 14 sets out a list of changes that are to be made through the affirmative procedure and through the affirmative procedure with additional consultation—the super-affirmative procedure. All other changes are left to the negative procedure. Amendments 174 and 187, in my name, would instead grant the Scottish Parliament the power to decide the appropriate scrutiny procedures.

At their core, the amendments are about asserting the role of the Parliament alongside that of the Government. Although it obviously contains some differences, the approach is modelled on the sifting committee amendment that was introduced to the UK Government's withdrawal bill by the Conservative chair of the Commons Procedure Committee—an amendment that was agreed to. Amendment 187 will provide our committees with the power to decide on the appropriate procedure—negative, affirmative or super-affirmative—to be used for statutory instruments during the process.

Some speakers in yesterday's debate seemed to indicate that they understood that amendment 187 would create a new sifting committee, which Neil Findlay kindly volunteered me for. To be clear, I believe that we should empower the relevant subject committees of the Parliament as a practical way of managing the workload. However, ultimately, the specific arrangements would be a matter for the Parliament through the Standards, Procedures and Public Appointments Committee, as the issue is to do with the Parliament's standing orders.

Amendment 187 would oblige ministers to lay all statutory instruments as drafts for the relevant committee to consider. The committee would then take 15 days to make a recommendation, which would be binding on ministers. It is the empowerment of Parliament, rather than the inappropriate overempowerment of ministers, that the amendment sets out to achieve. It is essential to assert, through the bill itself, the need for the Parliament rather than the Government to be in the driving seat and to prevent ourselves from being tied down by prescriptive lists during an unpredictable process. We can then avoid, for example, potentially significant issues being dealt with through the negative procedure because we did not adequately predict a necessary change in the list of those that required the affirmative procedure and thus ended up with an unsatisfactory level of parliamentary scrutiny.

Amendments 174 and 187 are in keeping with the sentiments that the minister and all other parties throughout this process have outlined so far, and I hope that they are agreed by the committee.

I move amendment 174.

Neil Bibby: I welcome amendments 174 and 187 from Ross Greer on the basis that any additional scrutiny of the extensive new powers that the bill grants to the Scottish ministers must be given the committee's fullest consideration.

The amendments in this group are not the only amendments that seek to enhance scrutiny, but my understanding is that they would not pre-empt any other amendments that the committee will consider later. This group therefore presents the committee with an opportunity to agree to a further process for scrutiny of the regulation-making powers that sections 11, 12 and 13 grant to Scottish ministers. That includes requiring the Scottish Government to lay a statement before the Parliament, setting out its own views on an appropriate method of scrutiny, and making it a condition that a committee of the Parliament can recommend an appropriate method of scrutiny.

To be clear, we do not believe that Ross Greer's amendments alone provide enough additional scrutiny, given the scale of the new powers that ministers will acquire. We do, however, believe

that these amendments would be a useful addition to the bill and we are minded to support them.

Patrick Harvie: I, too, welcome Ross Greer's amendments and commend him for his patience in sitting through not just today's session but much of last night's session as well, waiting for us to reach this group.

Outside the formal committee process, when members across the parties have been talking about these issues, there has been some good, constructive discussion around ways of enhancing and scaling up the scrutiny powers of the Parliament. What these amendments propose is an important way of achieving that and—critically—of placing the responsibility to decide how that should happen with the Parliament itself.

It is worth reinforcing the point that proposed new subsection (4) in amendment 187 includes the phrase

"such of its committees as the Parliament may determine has made a recommendation",

so it would be for the Parliament to decide what recommendations to offer. I know that some members have proposed a new sifting committee, as Ross Greer mentioned, while others have suggested using our existing subject committees, which I think would also be appropriate. Yet others have suggested using either the existing Delegated Powers and Law Reform Committee or an enhanced DPLR Committee. Of course, it is within the scope of the choices that we could make, as a Parliament, to expand the remit of the DPLR Committee or to increase its size if we thought that that was an important step in ensuring that it had the capacity to undertake the work. All of those options are compatible with amendment 187, and it would be for the Parliament to decide the appropriate course of action.

11:45

We will listen to what the minister has to say, and we will take his comments seriously. I suspect that, if he believes that a different approach is necessary, everybody will be willing to debate that at stage 3. However, my instinct at this point is that we should agree to amendment 187. I hope that, if the Government wishes to tweak or adjust the amended bill, everybody will be able to discuss the matter in a constructive spirit, and we will be in a stronger position to do that if the amendment is agreed to.

Adam Tomkins: I do not say this very often, but I agree with what Patrick Harvie has just said. Perhaps it is because he is sitting on what is customarily the Tory front bench. I hope that that does not spoil things.

Patrick Harvie: I could impersonate Ruth Davidson's laugh at this point, but I will try not to.

Adam Tomkins: I agree that you should not try to do that.

We have not yet heard what the minister has to say on the group. However, even if he wants to argue that there is some kind of technical deficiency in the amendments, I respectfully urge Mr Greer to press them to a vote so that we can revisit them at stage 3 as opposed to not pressing them at this point in the hope that the Government might find time at stage 3 to revisit the issues. It is incredibly important that we do everything that we can at this stage to ensure that effective parliamentary scrutiny is maximised with regard to the powers that are legislated for in the bill.

For those reasons, the Scottish Conservatives support the amendments in the group.

Michael Russell: I want to agree to the amendments, and I will not oppose them here and now. Nevertheless—Ross Greer knows that this is not an excuse, as I have had a conversation with him about it—I think that there are aspects of the amendments that require to be changed and that the amendments pre-empt work that is being done with the parliamentary authorities that we were very happy to instigate. That detailed work is being undertaken to ensure that things are done in the best possible way.

Among the technical issues is the fact that the timeframe of 15 days is problematic for the Parliament's flexibility and ability to plan its procedures. I also think that the Delegated Powers and Law Reform Committee is the right place for what is proposed to happen, but it probably needs to be enhanced to allow that. There are issues with its powers, which would need to be adjusted, but we can address those issues.

With such legislation, we have to balance what we think is absolutely perfect with what we think will work, as that is what members want to work. To use a Platonic remark, the best is often the enemy of the good. Therefore, I am happy to endorse what Ross Greer is trying to do, and I ask him to work with us over the next few days to produce amendments that will make the approach work properly. We will then be in a position to have a process that is better than the one in the bill.

I am still very keen to have a criteria-driven process. It is really important that we have criteria by which we can judge our decisions. We may wish to breach those criteria on occasion—there could be special circumstances in which we do so—but, if we understand the criteria that we are applying when we are choosing whether to use an affirmative, super-affirmative or negative procedure, we will be on much firmer ground when

we come to the difficult decisions and to decisions that could go either way. Therefore, I would want to see in the process a continuation of the criteria-driven system that we are trying to put into the bill.

I am relaxed about the amendments being agreed to and do not think that they need to be forced to a division, although that is up to individual members. We can then do our best to make changes. If Ross Greer will commit to that, I will make that commitment, and we can then move on.

Ross Greer: I am happy to give the minister that commitment. I welcome the appetite that the committee has shown. I will press the amendment, and any necessary technical amendments can be made at stage 3.

The Convener: The question is, that amendment 174 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Harvie, Patrick (Glasgow) (Green)
Tomkins, Adam (Glasgow) (Con)

Abstentions

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 0, Abstentions 5.

Amendment 174 agreed to.

The Convener: If amendment 36 is agreed to, I cannot call amendment 37.

Amendment 36 moved—[James Kelly].

The Convener: The question is, that amendment 36 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 36 disagreed to.

Amendment 37 moved—[James Kelly].

The Convener: The question is, that amendment 37 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 37 disagreed to.

The Convener: Having reached this stage, and given the time, my intention is to suspend the meeting. We will reconvene in the chamber at 6.30 to complete our stage 2 consideration of the bill, subject to further discussion with the parliamentary authorities. The clerk will confirm the exact arrangements by email later in the day.

11:51

Meeting suspended.

18:31

On resuming—

The Convener: Good evening, colleagues. We now resume our stage 2 consideration of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. We are into the last lap. I wish Emma Harper a happy birthday. It has been a heck of a way to spend your birthday, but thank you for staying with us and I hope that there is some cake left by the time we are finished.

Amendment 175, in the name of Adam Tomkins, is grouped with other amendments as shown in the groupings. Members will note from the groupings that there are a number of pre-emptions in the group. I will remind members of a pre-emption when I call the relevant amendment.

Adam Tomkins: The effect of amendment 175 is simply to improve the quantity and quality of parliamentary oversight of regulations to be made

under some of the key provisions of the bill, namely sections 11 to 13, which have already been debated. As drafted, section 14(1) requires some, but not all, regulations that are made under sections 11(1), 12 and 13(1) to be subject to the affirmative procedure. Amendment 175 simply deletes the condition so that all regulations that are made under sections 11(1), 12 and 13(1) would be subject to the affirmative procedure. It is a simple amendment.

I move amendment 175.

Jamie Greene: I have seven amendments in the group so, in the interests of time, I will speak only to my own amendments. Amendments 176 and 180 are very similar in wording to amendment 126, so there is little point in reliving the arguments in favour of the wording, as the amendments mirror amendment 126, which was agreed to earlier. Amendments 176 and 180 are largely technical amendments, and I hope that members will support them. They relate to our new direction of travel in how public bodies may be amended to carry out their functions, as was agreed earlier.

Amendment 181 relates to section 14. All that it seeks to do is increase the period of scrutiny that is available to Parliament from 60 to 90 days before an instrument comes into force, as detailed in section 14(5). The rationale is fairly obvious: having three months instead of two months to scrutinise an instrument before it comes into force allows an optimal period of time for scrutiny through the parliamentary process. I hope that the minister will agree to that extension, as I think that it fits better with the current norms in scrutiny timelines.

Amendment 182 ensures that any regulations introduced by ministers as a result of section 14 are also accompanied by a review of their financial implications. That is important because, as the Scottish Parliament works its way through retained devolved EU law, there need to be provisions in the bill whereby Scottish ministers update Parliament on the financial implications.

Paragraph 18 of the financial memorandum states—and this is an important point—that

"Some possible uses of the powers would have more significant cost implications. The powers in the Bill could be used, for example, to transfer significant regulatory functions to existing public bodies in Scotland or to create new public bodies for the purpose of exercising functions currently discharged at the EU level."

The financial memorandum also states that the costs "are difficult to quantify" at this point. I accept that, but it is right that, when the costs are known to the Government, Parliament should be informed. Amendment 182 places an obligation on ministers to keep Parliament informed of the cost implications arising from regulations as a result of section 14.

Amendments 189, 190 and 192 relate to section 15, "Consultation on draft proposals". At the moment, the wording in the bill reads that the Scottish ministers must consult

"such persons as they consider appropriate".

My three amendments do the following. Amendment 189 introduces committees to the scrutiny process via whatever procedure is suitable and available to them. That is an important addition because committees are best placed to scrutinise proposals for regulations that are introduced under section 14.

Amendment 190 seeks to give committees adequate time to consult and, where appropriate, take evidence from people as they deem fit to give a plurality of opinion on the subject matter of the minister's proposal to make regulations. This seems to be a better way of consulting on new regulations than simply leaving it to such persons as Scottish ministers consider "appropriate", which is the current drafting.

Amendment 192 simply defines what a "relevant committee" is, as this is a new term that I have introduced to the bill. Clearly, that should be whichever committee has been defined as the lead committee based on the subject matter of the regulation. I hope that members will take on board these amendments, which I think are quite positive ones.

James Kelly: Amendment 39 seeks to introduce the affirmative power in relation to sections 11, 12 and 13, thereby introducing greater scrutiny and transparency to the bill and enhancing it as a result. I indicate support for all the other amendments in the group, with the exception of two.

I do not support amendment 181, in the name of Jamie Greene, on the basis that it extends the time for laying instruments from 60 days to 90 days. I prefer the original timetable. I also do not support amendment 191, in Dean Lockhart's name. Although it is a reasonable amendment and makes some good points about additional documentation, it takes out the requirement for the Government to have regard to representations that are made, which I think is a reasonable proposal from the Government that I would prefer to keep.

Michael Russell: I will start with the other amendments and come to mine in a second.

There are three amendments—amendment 175 and James Kelly's amendment 39, read with amendment 37 in an earlier group—which would make all regulations under the main powers in the bill subject to the affirmative procedure no matter their content. We do not regard that as an

appropriate or even a possible way forward. I want to be very clear about that because, although I am going to accept a number of amendments, when amendments would make the bill inoperable, I have to make that clear. It is going to be a significant challenge in any case to take forward the legislative burden, and those amendments make it much, much harder.

Amendments 178 and 179, in the name of Jackson Carlaw, go even further. They make everything subject not to the affirmative procedure but to the enhanced affirmative procedure. The amendments would make the bill impossible to operate. Rather than a prudent, workable fallback that can be deployed in the event of no agreement—we are, of course, still working for an agreement—the Scottish Parliament would instead be left with an unworkable and impractical bill that could not be deployed effectively, because no Government or Parliament could do so within a reasonable time. That is part of the balance to which members have referred, and the amendments push the balance way beyond what is operable or workable.

I strongly urge the committee to reject amendments 178 and 179, and to focus instead on what the Government has proposed, on the reassurance that we will work very closely with the parliamentary authorities, as we currently do, to manage the legislative programme, on the bona fides that we have shown in accepting amendments to earlier sections—I am about to accept some more now—and on the fact that we have taken on board all the recommendations of the Delegated Powers and Law Reform Committee. We have shown a strong willingness to move on those issues, but when something becomes inoperable, it is important that we say so clearly. I do not think that I have said that so strongly in relation to any other amendments, but amendments 178 and 179 simply do not make it possible for the bill to work in the way it is supposed to work.

Amendments 176, 180 and 182, in the name of Jamie Greene, relate to something different. They are connected to the proposal that the Scottish ministers should have the ability to redefine the general objects of a public authority in consequence of EU withdrawal. We did not ask for that power; indeed, the last time there was an amendment on that, which was earlier today, I seem to remember—things are merging together in a legislative blur—we indicated that we did not want the power. However, the committee saw fit to pass the power, so I see no point in resisting the amendments and I suggest that they are simply accepted. That is another indication that we are willing to look at the bill and change it as we go forward.

Amendment 177, in my name, is intended to clarify the instruments that are subject to the affirmative procedure. We think that regulations should be subject to the affirmative procedure when they confer on a domestic public authority a function that is currently held by a European institution. Section 14(2)(d) of the bill as introduced sets out a narrower test. This short amendment corrects the point, and I would like committee members to vote for it, if they can.

Amendment 181, in the name of Jamie Greene, would make the period of scrutiny given to Parliament under the enhanced affirmative procedure last for 90 rather than 60 days. Given that this is a bill about the substantial time pressures under which the Scottish Government and the Scottish Parliament will have to undertake the delivery of a programme for change that is required for Brexit, through no timetable of our own, that would be unwise. The enhanced procedure has already been enhanced by proposals from the Scottish Government for a period of statutory consultation and for additional reports to be laid before Parliament on that consultation. The Scottish Government has moved a substantial direction in order to make the enhanced affirmative procedure much more responsive and the amendment would take it in a direction that would make it ever harder to operate the bill. I am sure that that is not the intention; I am sure that no member would come here and endeavour to wreck the bill. We should consider carefully whether amendments that are well meant will have consequences that have not been considered.

Amendments 189, 190 and 192, in the name of Jamie Greene, also add to the complexity of scrutiny. They would require scrutiny of proposals to legislate under the enhanced procedure by all relevant parliamentary committees. As drafted, the bill requires proposals to be laid before Parliament at the start of the process and an explanation of the consultation to be laid before Parliament at the end. Where appropriate, parliamentary committees could respond to such proposals with their own investigation, but I do not want to see such a requirement set out in the statute. As has been aptly demonstrated by the past week's activity, the Parliament and its officials are more than capable of responding flexibly, where necessary, to developing demands for evidence, investigation and scrutiny.

Amendment 183, in the name of Donald Cameron, misunderstands the role of the Presiding Officer. At present, failures to comply fully with procedural requirements relating to secondary legislation must be explained in letters to the Presiding Officer. The bill continues that well-established practice in relation to the enhanced affirmative procedure. Mr Cameron's

amendment would change that so that ministers had to write to the Scottish Parliament instead. The Presiding Officer's role in that regard is to uphold the standards that are expected of ministers by the law and the standing orders; it is a scrutiny role. For consistency's sake, the Presiding Officer should continue to have that role, rather than for his role—and the Parliament—to be weakened, which would be the case if the amendment were accepted. All letters to the Presiding Officer from ministers in relation to subordinate legislation are published, and the failures are scrutinised as an obligation by the Delegated Powers and Law Reform Committee.

18:45

I thank Donald Cameron for amendments 184 and 185. They raise an important issue that was also pursued by Patrick Harvie when I gave evidence to the Finance and Constitution Committee. Given the sheer scale and complexity of the programme of legislation expected in relation to Brexit, we need to recognise that it is almost inevitable that we will need to lay some of our instruments in recess. As the committee will be aware, laying instruments in recess is not uncommon. It is important to note that laying instruments in recess does not ordinarily reduce the time that is available for parliamentary scrutiny, because standing orders preserve the amount of scrutiny time by excluding any recess period longer than four days.

We all recognise that regulations under the continuity bill will be made against a hard deadline that is out of our control and a backdrop of uncertainty. In those circumstances, it would be appropriate for the bill to set out more about what should happen when instruments need to be laid during recess. Therefore, although we agree with the sentiment behind Donald Cameron's amendments, the problem is their form. Amendment 184 might, in some circumstances, delay when an explanatory statement must be provided, given that not every day is a sitting day.

Amendment 185 points in the direction of the right approach. I agree that the Government should have to explain any decisions to lay instruments under the continuity bill during recess—I do not resist that in the slightest. Therefore, I undertake to lodge stage 3 amendments to give effect to the proposals. On that basis, I hope that either amendments 184 and 185 will not be moved or, if they are moved, the committee will reject them.

Tavish Scott's amendments 41 and 43 would make any exercise of the power under section 13 subject to enhanced affirmative procedure. I have explained elsewhere that we are reflecting on section 13. I am sympathetic to those amendments. I will come back to the Parliament on the procedure at stage 3, but I indicated this morning that it will form part of a package of measures that we are looking at for section 13.

Amendment 44 would exclude regulations under section 13 from the consequences of failing to meet the 60-day laying requirement under the enhanced affirmative procedure. Like Donald Cameron's amendment 183, adding the requirement to write to the Scottish Parliament where the Scottish ministers fail to comply with procedural requirements, it is unnecessary and unhelpful and breaks the established system. Procedural requirements such as the 60-day rule are tried and tested sanctions that are taken seriously by the Government and scrutinised intensely by the Delegated Powers and Law Reform Committee. We would be called to account and required to report to the Parliament for any failures under that rule. We would expect to be so called, and the procedure exists to allow that to happen.

Tavish Scott's amendment 45 would require Scottish ministers to consult the UK and devolved Administrations on all enhanced affirmative regulations. I am very resistant to that proposal on the grounds that I gave earlier when I discussed the issues of consultation. That provision could be in areas where there are no relevant reserved areas or UK frameworks, so we could have an unnecessary level of bureaucracy and delay. We consult on legislative proposals that affect the other Administrations under the memorandums of understanding in any event, where there is a relevant interest. I still anticipate that frameworks will be established, and that approach would be built into the structure of those frameworks.

Neil Bibby's amendment 188 would change the words used to describe the consultation requirement. The language that is used in the bill is well known and understood. It imposes a strong consultation requirement on Scottish ministers, and it is not clear who would be appropriate in the abstract and administrative law will require the discretion on who to consult to be exercised fairly. I would not want to see the wording of that section change, and I invite the committee to reject the amendment.

Dean Lockhart's amendment 191 would have a detrimental effect on the statutory consultation provision. It would remove, for example, the requirement to send copies of consultations to those being consulted; it would remove the requirement

"to have regard to any representations"

that they make. However, it would replace that with the requirement that ministers disclose their "relevant legal advice" to an uncertain end. The

amendment should be rejected for that reason alone, because it would wreck entirely the proportionate processes set out in the bill for consulting on the instruments with the most significant policy implications and it would result in less scrutiny and consultation.

I find myself in the position of accepting two other amendments from Tavish Scott, amendments 46 and 47, to add the reasons for considering that the necessity test applies to a proposed exercise of the section 11 power to matters on which statutory consultation is required as part of the enhanced procedure.

However, I am not clear about the purpose of Tavish Scott's amendment 53 on the fees and charges scrutiny procedures, and I am very doubtful about its effect. It would add a reference to sections 11 to 13 to section 19, but the regulations under section 19 would not be made under those sections, which would lead to a circle of confusion. I invite members not to support the amendment.

I think that I have made it clear that there are amendments that can be accepted, and there are areas in which we want to do more work with members to lodge amendments, but there are areas, regrettably, in which the effect of the amendments would be massively detrimental to the bill. We have indicated strongly how we are trying to move to match the requirements that members of this committee and others are bringing, but there are some areas in which, if we were to move in that direction, the bill could not operate at all.

Jackson Carlaw (Eastwood) (Con): I realise that there is a desire to move matters forward, so I will speak slightly more briefly to my amendments than I might have anticipated doing. When I came to Parliament this morning, the first thing that I was confronted with was a message in my inbox from a group called praying for politicians, who told me, "Today we include prayers for Jackson Carlaw MSP." The group prays for five politicians each day. I do not know whether they followed last night's proceedings or they saw what today's proceedings were to be and thought that a little bit of spiritual oomph might help to persuade the more silently engaged members of the committee, whom I failed to persuade yesterday to exercise their endeavour in consideration of my amendments, to participate.

This is an unusual situation, because I think that it is the first time that the minister has demolished my amendments before I have had an opportunity to speak to them. I noticed, to paraphrase that well-worn phrase, that my amendments were, in his opinion, too wee, too small and too stupid to make the enhanced affirmative procedure work, but nonetheless I feel that it is appropriate to push forward with the amendments, at least in a restricted form.

The amendments would provide greater scrutiny for ministers' new powers, by making all regulations subject to the affirmative procedure. Amendments 178 and 179 should, of course, be read alongside one another. Sections 11(1), 12 and 13(1) give ministers power to make provision consistent with EU legislation. Section 14 sets out how that is to be scrutinised. As drafted, the bill breaks regulations into two categories. There are some specific instances, set out in section 14(2), where the affirmative procedure is required, and everything else in section 14(3) is negative only. Section 14(5) sets out some further conditions for some, and only some, of the regulations covered in section 14(2). By removing section 14(3), there is provision only to submit those regulations to the positive procedure, effectively ensuring that the Scottish Parliament must vote on any regulations created under sections 11(1), 12 and 13(1).

The Law Society of Scotland agrees with the need for ministers to consult before using those powers. The society's comment on section 15 in its response to the Scottish Parliament's Finance and Constitution Committee states:

> "We agree with the general proposition that Scottish Ministers should consult with interested parties before making regulations under section 14(5). However Scottish Ministers must ensure that there is adequate time to consider such draft regulations."

If there is general agreement that consultation and scrutiny are good things, why not expand their application? It is difficult to see why the three basic provisions in paragraphs (a), (b) and (c) of section 14(2) are covered by the need to bring changes before Parliament under section 14(5), but not the subsequent provisions in paragraphs (d), (e), (f) and (g).

My amendments would increase the role of Parliament in scrutinising regulations and would increase the power that we have to hold ministers to account and to choose what regulations are appropriate after we leave the EU. That is clearly a different accountability regime from that which is in the European Union (Withdrawal) Bill. I think that that is appropriate, as we are a unicameral Parliament, and the procedures for scrutinising secondary legislation are accordingly less robust. The amendments would ensure that the Parliament was properly accoutred to undertake the task in hand.

The only final comment that I would make is that, having spoken on health in the Parliament for many years, I am familiar with repetitive strain injury, so I would very much encourage members of the committee, when considering my amendments, to consider using their alternative arm for the rest of the business in hand this

afternoon and this evening, just in order to save the damaged limbs that have had so much work to do in putting down so many of the well-considered amendments that I have been happy to speak to.

Tavish Scott: I am slightly puzzled by that last reference, but I am not going to go there, convener.

I take the minister's point that he is alive to the purpose of amendments 41 and 43. I appreciate that. My principle, as the minister will well understand—and I appreciate that colleagues are heartily sick of hearing this argument now—is that none of the keeping-pace powers should be exercised by a negative instrument, but they should all undergo the enhanced affirmative procedure, and this committee could add requirements to the bill to ensure that those orders cannot be made that would cause difficulty elsewhere. That is the purpose behind amendments 41 and 43, and I welcome further consideration of them.

If amendment 44 is agreed to, it will not be possible for ministers to avoid the super-affirmative procedure for the exercise of powers in section 13, which is the section of the bill that most concerns many of us. Subsections (7) to (9) of section 14 offer ministers various ways to avoid super-affirmative scrutiny; amendment 44 would prevent such short cuts from being available to ministers for any of the keeping-pace powers that they seek in section 13. I hope that members will consider amendment 44 in that light. It has been strongly argued that section 13 is an unsatisfactory vehicle for keeping-pace powers, but at least amendment 44 would preserve the super-affirmative procedure for changes to law.

I listened to the minister's comments about amendment 45. I think that he protesteth too much. He talked about bureaucracy, and I take the point that most of us do not want to be here—from first principles—but I think that it is possible for the different Administrations and Governments of these nations to agree what is and is not subject to consultation. I do not quite see in amendment 45 cause for the minister's dire protestations of gloom.

I am grateful to the minister for his consideration of amendments 46 and 47.

As I read it, amendment 53 would ensure that section 13 orders, which are my principal concern, as I hope that the minister accepts, would always be subject to the affirmative procedure. That is the purpose behind amendment 53, but if I have drafted the amendment in a way that has consequences that are unbeknown to me, I accept the minister's criticism.

Donald Cameron: I intend to move amendment 183. It is important that the explanation to which section 14(8) refers should be given to the Scottish Parliament rather than the Presiding Officer. The primacy of this Parliament is important, and for that reason the approach in amendment 183 is useful.

I note the minister's assurances in relation to the sentiment, if not the form, of amendments 184 and 185, and for that reason I will not move those amendments when the time comes.

Neil Bibby: We have established that the bill grants significant Scottish statutory instrument making powers to the Scottish ministers. The bill provides that

"regulations under section 11(1), 12 or 13(1) containing provision falling within subsection (2)(a), (b) or (c)"

of section 14 cannot be laid before the Scottish Parliament unless there has been consultation, in accordance with section 15.

Amendment 188, in my name, would require the Scottish ministers to consult "appropriate persons", rather than

"such persons as they consider appropriate",

as is provided for in section 15. There is a difference. It should not be for the Scottish Government alone to decide who it is appropriate to consult on a draft SSI under the bill. I hope that members will support amendment 188.

I support a number of other amendments in the group. I associate myself with James Kelly's comments in that regard, particularly on the amendments that will enhance parliamentary scrutiny and accountability.

Dean Lockhart: Amendment 191 would improve parliamentary scrutiny. I note the overlap with other amendments that members have lodged, including the minister's proposal. Amendment 191 would amend section 15, requiring ministers to provide the Parliament with additional information and documentation, setting out

"material relevant to the Parliament's consideration of the regulations",

which would include "relevant legal advice" and

"an explanation of how the proposed regulations amend existing law".

As I said, amendment 191 should be read with other amendments. The purpose of lodging it was to increase parliamentary scrutiny.

19:00

Patrick Harvie: I welcome the fact that the minister supports amendments 46 and 47. That is very positive. I am grateful that a proposal has been made on the question of instruments being laid during recess, but my initial reaction on

reading the amendments in question was, "Something needs to be done, but is this it?" I am pleased that the minister appears to have made a fairly clear commitment that he will put forward an alternative approach to address that issue at stage 3.

In relation to the group as a whole, my instinct is often to seek to increase the level of scrutiny to which statutory instruments are subject, but we need to balance the natural instinct of Parliament to want to hold ministers to greater account against the volume of work that Parliament will be asked to do over the coming period. Although I might have been open to supporting some of the other amendments that specify levels of scrutiny of regulations, in the light of the fact that we have already agreed to a sifting process that will allow Parliament to decide for itself what level of scrutiny will be applied and to increase that level of scrutiny, I would like to see the detail of what the Government is willing to agree to in relation to the amendment that has been agreed to. Once we know what changes it wants to make to that, we can perhaps revisit at stage 3 any outstanding concerns to do with the stipulation of specific scrutiny requirements.

I say that on the record in the hope that our Presiding Officer might be minded to select for debate at stage 3 amendments that members think are necessary if, in the light of the discussions on the sifting process, people still want to specify a particular level of scrutiny for particular types of instruments. I think that we should wait to see what form the sifting process ends up taking and what further changes the Government wants to persuade us to make before we reach a final view on specific scrutiny procedures.

I hope that that is clear—it might not be.

Willie Coffey: Despite the entertaining way in which Jackson Carlaw presented amendments 178 and 179, which was designed to lure us into supporting them, I think that, in effect, they would mean that all the regulations would be subject to the super-affirmative procedure, which in my view would make the bill unworkable. A consultation would need to be held on the draft instrument, for which 60 days would have to elapse, as well as the time that it would take to consider all the representations that were made thereafter. Rather than helping the bill, amendments 178 and 179 are intended to make the bill unworkable, so I think that we should not support them.

Adam Tomkins: Contrary to what Mr Coffey said, I do not think that any of the amendments in this group are designed to make the bill inoperable. On the contrary, they are designed to enable, in a unicameral Parliament, effective and robust parliamentary scrutiny.

Subject to that observation, I welcome the generality of the minister's constructive approach to a number of the amendments in this group, and I have nothing further to add.

The Convener: The question is, that amendment 175 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 175 disagreed to.

Amendment 38 moved—[James Kelly].

The Convener: The question is, that amendment 38 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 38 disagreed to.

Amendment 176 moved—[Jamie Greene]—and agreed to.

The Convener: If amendment 39 is agreed to, I cannot call amendments 177, 178, 40 and 41 because of pre-emption.

Amendment 39 moved—[James Kelly].

The Convener: The question is, that amendment 39 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 39 disagreed to.

Amendment 177 moved—[Michael Russell]—and agreed to.

The Convener: If amendment 178 is agreed to, I cannot call amendment 40 because of pre-emption.

Amendment 178 moved—[Jackson Carlaw].

The Convener: The question is, that amendment 178 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 178 disagreed to.

Amendment 40 moved—[James Kelly].

The Convener: The question is, that amendment 40 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 40 disagreed to.

Amendment 41 moved—[Tavish Scott].

The Convener: The question is, that amendment 41 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 41 disagreed to.

Amendment 42 moved—[James Kelly].

The Convener: The question is, that amendment 42 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 42 disagreed to.

The Convener: If amendment 179 is agreed to, I cannot call amendment 180, because of pre-emption.

Amendment 179 moved—[Jackson Carlaw].

The Convener: The question is, that amendment 179 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 179 disagreed to.

Amendment 180 moved—[Jamie Greene]—and agreed to.

Amendment 43 moved—[Tavish Scott].

The Convener: The question is, that amendment 43 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 43 disagreed to.

Amendment 181 moved—[Jamie Greene].

The Convener: The question is, that amendment 181 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 181 disagreed to.

Amendment 182 moved—[Jamie Greene]—and agreed to.

Amendment 183 moved—[Donald Cameron].

The Convener: The question is, that amendment 183 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 183 disagreed to.

Amendment 184 not moved.

Amendment 44 moved—[Tavish Scott].

The Convener: The question is, that amendment 44 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 44 disagreed to.

Amendment 185 not moved.

The Convener: Amendment 186, in the name of Maurice Golden, is in a group on its own.

Maurice Golden (West Scotland) (Con): My amendment refers to quarterly reports on the use of power. Members will see the specifics, so there is no need to go through them in detail.

The amendment requires ministers to make regular reports on deficiencies that they have identified and, every quarter, to publish how many there are and how many the Scottish Parliament will be expected to see soon.

This is an instance where deviation from the withdrawal bill is justified by the fact that we are a unicameral chamber. The House of Lords plays a strong role in scrutinising delegated powers, but we have no equivalent, so it is important that good processes are in place so that there is transparency and clarity about the scale of deficiencies and that ministerial action is taken to address them.

Amendment 186 is in keeping with a previous amendment to section 7, on the challenges to validity of retained devolved EU law. I therefore urge the committee to look upon amendment 186 favourably.

I move amendment 186.

Neil Bibby: I support Maurice Golden's amendment. In the circumstances, requiring the Scottish Government to produce a quarterly report in relation to the use of section 11 powers seems neither onerous nor excessive; rather, it seems measured and appropriate. The reports would be useful in reassuring Parliament and the public that the powers that have been granted to ministers, in what I remind the committee is an exceptional piece of legislation, are being used appropriately. I support the amendment.

Patrick Harvie: I have a similar sentiment. I am still slightly amused by the inconsistency with which our Conservative colleagues apply the consistency principle. However, I do not think that the burden of complying with what the amendment proposes sounds particularly onerous, so I see merit in the principle that motivates it. I will be interested to hear the minister's response. The level of work that would be involved in complying does not seem to me to be intolerable.

19:15

Michael Russell: A later amendment has essentially the same effect. I tend to favour the later amendment, because it gives the opportunity for some flexibility on the matter.

Maurice Golden slightly misunderstands the role of the committees of the Parliament, particularly that of the Delegated Powers and Law Reform Committee, which will receive the information regularly. The parliamentary authorities will receive the information regularly, and there is already a commitment to an information flow with the parliamentary authorities. If he had worked with the Tory member who lodged the later amendment, it might have been possible to meld what they propose into a general reporting function. I am sorry that that has not happened, but I will not get overexcited about it. If the committee wants to see quarterly reports, so be it.

The resource available to the Government is not unlimited. The Government will be very much under pressure because of the pressures of Brexit. From the Chancellor of the Exchequer's statement yesterday, we now know that the allocation of funds on Brexit will not be done with any great generosity of spirit. However, in the circumstances, I have more important things to worry me at this stage, so if the committee feels inclined to support amendment 186, we will accept it.

Maurice Golden: Amendment 186 is part of essential scrutiny. Reporting to Parliament is critical. If we had a second or revising chamber, the consistency argument could be applied equally across the legal provisions in the continuity bill and the withdrawal bill. However, as should be apparent to members of the committee and of the Parliament, we have a separate system. Therefore, on occasion, when scrutiny and ministerial accountability have to be considered, we cannot apply exactly the same rationale and process.

I press amendment 186.

Amendment 186 agreed to.

The Convener: The question is, that section 14, as amended, be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 14, as amended, agreed to.

After section 14

Amendment 187 moved—[Ross Greer].

The Convener: The question is, that amendment 187 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Abstention

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 0, Abstentions 5.

Amendment 187 agreed to.

Section 15—Consultation on draft proposals

The Convener: If amendment 188 is agreed to, I cannot call amendments 45 and 189.

Amendment 188 moved—[Neil Bibby].

The Convener: The question is, that amendment 188 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 188 disagreed to.

The Convener: If amendment 45 is agreed to, I cannot call amendment 189.

Amendment 45 moved—[Tavish Scott].

The Convener: The question is, that amendment 45 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 45 disagreed to.

The Convener: Will Jamie Greene say whether he wishes to move amendment 189?

Jamie Greene: In the light of the minister's opposition to scrutiny of his new regulatory powers, I will move the amendment.

Amendment 189 moved—[Jamie Greene].

The Convener: The question is, that amendment 189 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 189 disagreed to.

Amendment 190 moved—[Jamie Greene].

The Convener: The question is, that amendment 190 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 190 disagreed to.

The Convener: If amendment 191 is agreed to, I cannot call amendments 46 and 47.

Amendment 191 not moved.

Amendments 46 and 47 moved—[Tavish Scott]—and agreed to.

Amendment 192 moved—[Jamie Greene].

The Convener: The question is, that amendment 192 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 192 disagreed to.

The Convener: The question is, that section 15, as amended, be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 15, as amended, agreed to.

Section 16—Explanatory statements: appropriateness, equalities etc

Amendment 48 moved—[James Kelly].

The Convener: The question is, that amendment 48 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 48 disagreed to.

The Convener: Amendment 193, in the name of Jamie Greene, is grouped with amendments 194, 195, 49 to 51 and 196.

Jamie Greene: At the risk of being accused of repetition, or perhaps even deviation or hesitation, my amendments in the group once again seek to remove ambiguity from the bill—in this case, from section 16. Specifically, amendment 193 would replace the words "in their opinion" from section 16(2)(a), because that phrase simply leaves too much room for interpretation. My wording change seeks to tighten subsection (2), so that it is not just "in their opinion"—meaning the Scottish ministers' opinion—and will ensure that the statement that ministers make when an instrument or draft is laid has been afforded due diligence, and that ministers have taken reasonable steps to confirm that the instrument will do no more than is appropriate.

The words

"having carried out due diligence and taken reasonable steps"

are well-established and commonly used legal terms that would remove doubt about the subjectivity of the term "in their opinion". I hope that members will welcome that.

Amendment 194 is another tightening change. In its current form, the wording includes "details". I seek to replace "details" with "notable findings", because the word "details" does not always include findings or important findings; in fact, superfluous or unimportant findings could still be construed as "details". "Details" is vague. By changing the word "details" to "key and notable findings", amendment 194 technically aligns with my previous amendment on the level of detail that must be presented in the statement that the minister lays, and it conforms to the language that I propose in amendment 193. I hope that members will agree that that will indeed remove the ambiguity in section 16.

I move amendment 193.

Dean Lockhart: Amendment 195 is a technical amendment that seeks to change a reference to "the consultation", in the singular, by replacing it with a reference to "any consultations", in order to clarify that multiple persons or organisations can be consulted under section 15.

Tavish Scott: Amendment 49 and the other amendments in the group are about the explanatory statements. As Dean Lockhart and Jamie Greene have already mentioned, this is about the importance of the Government of the day making clear its intention and its purpose in the measures that it will introduce.

New powers are being allocated to the UK Administrations by the process that the various Parliaments and legislatures are going through, and extensive order-making powers are being proposed for ministers in all the Administrations. Therefore, we want to ensure, through amendment 49, that the Scottish Parliament will have the opportunity to make sure that ministers in many ways lead by example in considering the impact of their proposals on the operation of the UK single market. Amendment 49 would require them to publish the responses to consultation of the other Administrations. We think that that is an important part of the explanatory statements that would help any Parliament to discharge its duties appropriately, properly and fully. Amendment 49 would be the way to get a reference to the importance of that UK single market on the face of the bill.

Amendment 50—together with amendment 51—would prevent ministers from short-cutting processes for proposals under section 13, which I believe is important. The bill currently provides, in subsection 16(7), that ministers can avoid all the requirements to make statements on necessity, equalities, and consultation that are contained in subsections 16(2) to 16(6). Amendment 50 would mean that the short cut and opt-out from the reporting requirement would not be available for powers under section 13. I suspect we agree across all the political parties that that is extremely important. Amendment 50 would remove the permission to short-cut from subsection 16(7). The amendment would specifically require section 13 proposals to have the written justifications that, again, I suspect many members would seek.

Neil Bibby: Amendment 196, in my name, and the other amendments in the group would introduce further checks and balances to the bill. Section 16 of the bill will apply when a Scottish statutory instrument or a draft SSI containing regulations under section 11(1), section 12 or section 13(1) is to be laid before Parliament. For clarity, the sections relate to deficiencies arising from UK withdrawal from the EU, complying with international obligations, and the power to make provision corresponding to EU law after exit day.

Amendment 196 would make it clear that an explanatory statement for a relevant SSI or draft SSI must be made in writing and published. It would remove from the bill the provision that Scottish ministers can decide an appropriate way to publish those statements. It is a small but significant amendment; I ask committee members to give it their full consideration.

There are a number of other amendments in the group that would, in my judgment, enhance scrutiny and improve transparency. As members are aware, there will be no pre-emptions in this group. I will therefore support all the amendments in the group.

Patrick Harvie: On Tavish Scott's amendment 49, I can entirely understand why he wants to place significant emphasis on any potential impact on the operation of what is generally referred to as

"the single market in goods and services within the United Kingdom"—

that is an important factor. However, I do not think that I am comfortable with the suggestion that it has a status that is so much higher than all the other factors that might be impacted on that it should be referred to in the legislation while the other factors are not.

It might well be the case that, in considering any instruments that contain regulations under section 16, the Government and the Parliament might face a conflict between maintaining the operation of that single market and maintaining the social and environmental protections that are also important to us, and which we have talked about including in the text of the bill.

The Government would be foolish to lodge a draft of an instrument that did not contain some detail on all the impacts that the regulations would have. It will be up to Parliament to decide to what extent we want to question ministers on all those impacts and whether we want to approve or reject an instrument that ministers lay before Parliament. In doing so, I think that we should consider the range of factors that might be impacted rather than elevating one of them to a higher status.

19:30

Michael Russell: At the outset, I say that I do not think that Dean Lockhart's amendment 195 makes things any clearer, but I will not go to the stake for the sake of a plural, so I will accept the amendment.

As far as Neil Bibby's amendment 196 is concerned, I am worried that it would take out the phrase,

"in such manner as the Scottish Ministers consider appropriate",

which is clearly understood and has meaning in other statutes. Its inclusion is entirely consistent with the UK bill. In those circumstances, the use of the phrase is understandable and consistent, and it should not be exchanged for a vaguer provision.

Jamie Greene's amendments 193 and 194 present us with a very interesting issue, which I want to address. The continuity bill contains a clear process for laying explanatory statements. Amendments 193 and 194 would make it unclear. For example, amendment 194 seeks to replace the requirement to set out the details of a consultation with a requirement to set out its "key and notable findings". That provision is badly defined, loose and weak, and it would be subject to endless interpretation. The Parliament would not get the information that it will get in the light of what is in the bill.

Amendment 193 raises a more interesting issue. Mr Greene wants to take out the phrase "in their opinion" where it relates to the Scottish ministers, but the same words are used in the UK bill. The UK bill is being approved by Mr Greene's colleagues on the ground that the opinion of UK ministers should be taken, but he is endeavouring to change the same wording in the continuity bill because he is not willing to take the opinion of the Scottish ministers. That is an interesting approach to the bill. What is good enough for Mr Greene's colleagues at Westminster in terms of how a minister would operate is not good enough for him when he comes into this chamber. I am sorry to hear that. I think that his amendments are wrong and weak, and that they display a mindset that we should worry about when we are talking about the approach of a Scottish member to a Scottish bill in a Scottish Parliament.

With regard to Tavish Scott's amendments 49 to 51, at the risk of repeating myself—I hate repeating myself, as Mr Scott knows—we have been here before on the issue. Patrick Harvie's remarks were helpful. I understand where Mr Scott is coming from. I am honestly not being patronising—I understand and agree with his intention—but there is a triple lock, which I want to explain to him again. It may make no difference to whether he moves his amendments, but if it made a difference, I would be pleased.

I agree that there could be implications for other parts of the UK if Scotland was to update EU law in a way that was not mirrored in the UK, but we would be bound by international obligations in the normal way. Secondly, if there are UK frameworks, those frameworks will contain a reference to how things will operate. Thirdly, I have stressed that, ultimately, it is up to this Parliament to decide how it operates and to decide whether it wishes to take such an approach. Therefore, there are three strong reasons—which I have now repeated three times—for not taking the approach that Mr Scott advocates. Mr Harvie has added to those reasons what changes might be necessary.

It would greatly please me if Mr Scott did not move his amendments, but if he does, I hope that members will not support them, as has previously been the case.

Jamie Greene: I thank members for their contributions on this short group of amendments. Very reasonable and considered suggestions have been made. I thank those committee members who agreed in advance to support some of my amendments. I welcome that pragmatic approach.

However, I am a little bit disappointed by the minister's comments. There were 231 amendments to the bill, and there will be substantive differences between how the bill will look at stage 3 and how it looked when it was introduced. The comparison of the continuity bill with the UK withdrawal bill is simply comparing apples and pears. It is not the same bill, and we must approach it that way. I approached the continuity bill entirely earnestly. I have looked at it line by line, as every other member should have done. The Scottish Conservatives have looked at the continuity bill in great detail, which is why we are sitting here for a second night, in the committee's third session at stage 2, scrutinising the bill. I am very disappointed by the minister's simplistic view of the bill and the wording of our amendments. We are treating the continuity bill in its own right, and we are right to do so.

I find it intriguing that the minister considers the term "key and notable" to be loose and weak while the word "detail" is not. In my view, "key and notable" is a profoundly specific term, so I look forward to members supporting amendment 193, which I press.

The Convener: The question is, that amendment 193 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 193 disagreed to.

Amendment 194 moved—[Jamie Greene].

The Convener: The question is, that amendment 194 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 194 disagreed to.

Amendment 195 moved—[Dean Lockhart]—and agreed to.

The Convener: Does Tavish Scott wish to move amendment 49?

Tavish Scott: Given the certainty of defeat, I will not move my amendment.

Amendments 49 to 51 not moved.

Amendment 196 moved—[Neil Bibby].

The Convener: The question is, that amendment 196 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 196 disagreed to.

The Convener: The question is, that section 16 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 16, as amended, agreed to.

Section 17—Requirement for Scottish Ministers' consent to certain subordinate legislation

The Convener: Amendment 197, in the name of Jamie Greene, is grouped with amendment 198. I point out that, if amendment 197 is agreed to, I cannot call amendment 198.

Jamie Greene: Amendment 197 might seem quite drastic. It seeks to take out section 17(2), which is about the requirement for Scottish ministers' consent to certain subordinate legislation. I have lodged the amendment because I want to probe the minister and I hope that he will clarify the aim of section 17(2). It seems to give a veto over subordinate legislation to Scottish ministers. Before I decide whether I will press or seek to withdraw my amendment, I would like the minister, if possible, to address some of my questions. What is its intent?

Section 17(2) says:

> "subordinate legislation, to the extent that it contains devolved provision, is of no effect unless the consent of the Scottish Ministers was obtained before it was made, confirmed or approved."

How is that likely to impact on, for example, any common frameworks in the UK? Does it allow Scottish ministers to prevent UK ministers acting via subordinate legislation after approval has been given, or only if approval has been given? Does it mean that all UK subordinate legislation will be effective only if consent has been given by Scottish ministers?

My concern with section 17(2) is that it means that Scottish ministers can block subordinate legislation that is applicable in Scotland because they choose to, for whatever reason, prior to it being introduced. That is quite a worrying scenario; it puts potential political conflicts of opinion before the application of the law. Therefore, my instinct is to have it removed, unless I can be persuaded otherwise.

I move amendment 197.

Ross Greer: I am happy to speak to amendment 198. As it stands, section 17 requires the consent only of Scottish ministers to be given when a UK minister changes an area of devolved law using a statutory instrument. Amendment 198 requires that the consent of the Scottish Parliament is granted, too. In some ways, that is

the opposite of what amendment 197, in the name of Jamie Greene, seeks to achieve, thus the pre-emption. However, it is very much in keeping with the arguments that have been made by Conservative colleagues, particularly Mr Tomkins, as well as by Liberal Democrat and Labour colleagues, with regard to the relative power of the legislature and executive.

As with my previous amendment on the sifting procedure for statutory instruments, the purpose of amendment 198 is to give the Scottish Parliament its rightful place, and to ensure that procedures are as democratically robust as possible. As it stands, the bill would allow ministers of a minority Government to give consent while a majority of Parliament was opposed. The amendment brings us closer to our recent constitutional tradition of seeking parliamentary consent through the Sewel convention.

Adam Tomkins: I have a simple question, which I would like the minister to reflect on when he responds to the amendments in this group. Section 17(2), which is the focus of the two amendments in this group, strikes me as difficult to justify in terms of legislative competence. What is the minister's take on that? Why does the Scottish Government think that it is within competence? Section 17(2) seeks to provide in an act of the Scottish Parliament for how ministers of the Crown make delegated legislation through the Westminster Parliament, which strikes me as straightforwardly and manifestly reserved, unless I have missed something in the Scotland Act 1998. My simple question is for the minister to explain the Scottish Government's view as to how section 17(2) is within legislative competence.

Patrick Harvie: With his amendment, Jamie Greene seems concerned that section 17(2) would give Scottish ministers the ability to block any subordinate legislation operating in Scotland that was passed by UK ministers. If only we had the ability to do so, but we do not. The section clearly states that it is about subordinate legislation

"to the extent that it contains devolved provisions".

It is purely about matters that are within the remit of this Parliament, and the purpose of this Parliament is to hold ministers to account on devolved functions.

That is why Ross Greer's amendment improves the bill; it is about ensuring that this Parliament is able to hold ministers accountable for the decisions that they make, including the consent that they would give under section 17(2). I hope that members will agree that, if consent is to be sought and if it is possible to be granted, it should be granted with the agreement of this Parliament and not of ministers alone.

James Kelly: As Adam Tomkins said, the substance of the two amendments focuses on section 17(2), with two contrasting approaches. I very much prefer the approach that was outlined by Ross Greer in his speech and in his amendment, which would give the Scottish Parliament powers in relation to consent, to the approach that would take away consent from Scottish ministers. It is appropriate that the focus should be on the Parliament and, as such, I support amendment 198 and oppose amendment 197.

19:45

Michael Russell: Let me address Adam Tomkins's point immediately. Section 17(2) does not prevent UK ministers from doing anything; it simply prevents what they do from having effect. [*Laughter*.] Well, Mr Tomkins is a constitutional lawyer. I thought that he would like the subtlety of that point but, clearly, he likes only his own subtlety and not other people's. Section 17(2) affects only devolved matters and is entirely within competence, as we will argue very vigorously. In addressing Jamie Greene's point, I make it clear that I welcome the opportunity to explore the section. I cannot accept either amendment. I know that that will upset people and may result in the defeat of one or other of them but, at this stage, I want to explain precisely why that is.

Let me deal with Jamie Greene's amendment, which, if I may use the term, is the less attractive of the two. As it stands, UK ministers can make orders in devolved areas. We support that and can see that there will be circumstances in which a UK-wide approach to fixing deficiencies will be the best one, as we have said constantly. We currently do so with transpositions under the European Communities Act 1972. However, the UK bill does not require formal consent from devolved ministers when powers are exercised in devolved areas. The Scottish and Welsh Governments have proposed amendments to that effect but, so far, they have been resisted by the UK Government.

Section 17 requires UK ministers to seek formal consent from Scottish ministers in such circumstances. It follows that I could not accept Mr Greene's amendment, which would defeat the purpose of that section. Mr Greene asked me whether I believe that Scottish ministers should have the power to prevent UK ministers from exercising their rights—yes, I believe that they should. This is the legislature and there are devolved powers for it, which we have the right to exercise. Of course, we can agree to other people exercising them on our behalf if we so consent, but we cannot have that imposed on us—to use a word that was much used earlier today and

yesterday. Therefore, this section makes it clear that we will not have that imposed. UK ministers may do what they wish, but it cannot have effect unless we say so.

I turn to Ross Greer's amendment 198. We have considered carefully whether parliamentary consent should also be required for such regulations, which is a debate that we should have. It is a much more closely argued debate than the one that I have just indicated to Jamie Greene. However, the Government has come down on the side of the conclusion of the Delegated Powers and Law Reform Committee and the Finance and Constitution Committee on the UK bill, which is that the statutory consent should be from ministers but that there should be a mechanism for Parliament to scrutinise ministers' plans before such consent is given. It will not be for ministers alone—to use Patrick Harvie's phrase. Parliament will scrutinise ministers' plans before such consent is given, which was the conclusion of two of the Parliament's committees including this one. That approach keeps clear the accountability of Scottish ministers to this Parliament for their decisions and the accountability of UK ministers to Westminster for the exercise of their powers. It does not cut across that.

Scottish Government and parliamentary officials have been working on a protocol for parliamentary scrutiny in circumstances in which orders would be made under powers in the UK bill but the consent of Scottish ministers is required. The draft protocol seeks to ensure that the approval of the Scottish Parliament for the Scottish ministers' consent to the exercise of the Scottish Parliament's power is obtained so that Parliament is involved again in that way. I believe that the draft protocol should be available to ministers and members shortly—in my view, as shortly as is possible would be desirable, given the debate on this. I believe that having joint working protocols in such matters is the best route, so I have to urge the committee to reject both of these amendments. It may reject one with more enthusiasm than it does the other, or it may reject one and not the other, but that is the opinion that I hold presently. I think it best to keep to the recommendations of the two committees.

Jamie Greene: I will quickly make two points on that interesting discussion. From the comments that Adam Tomkins made in his question, it is quite clear that there is some ambiguity over the competence of section 17(2). I do not think that that should be avoided or ignored. In fact, that odd provision seems like an unfortunate power grab by the minister. I say that because he is giving Scottish ministers the ability to cherry pick the bits of UK subordinate legislation to which they will give or not give consent and to decide whether they will have effect. The minister is saying to the UK ministers, "You can make legislation, but I will decide whether it comes into effect." That sounds like a dangerous scenario to be in, and it is outwith the entire objective of the continuity bill. It is nothing more than giving an additional power to the minister—and a rather unfortunate one at that.

I will press amendment 197.

The Convener: The question is, that amendment 197 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 197 disagreed to.

Amendment 198 moved—[Ross Greer].

The Convener: The question is, that amendment 198 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)

Against

Burnett, Alexander (Aberdeenshire West) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 198 disagreed to.

The Convener: The question is, that section 17 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 17 agreed to.

After section 17

Amendment 199 not moved.

The Convener: The question is, that section 18 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 18 agreed to.

After section 18

The Convener: Amendment 200, in the name of Murdo Fraser, is grouped with amendment 202.

Murdo Fraser: Section 18 deals with financial matters, and amendment 200 has the effect of ensuring that the provisions on finance do not compromise the fiscal framework. I could talk at great length about the operation of the fiscal framework, but I sense a certain weariness on the part of committee members at this stage in the proceedings. Despite the exhortations that I hear around me, encouraging me to talk at length, I will keep it fairly short.

We are all familiar with the fiscal framework, which regulates the financial arrangements between the UK Government and the Scottish Government pursuant to the Scotland Act 2016. Sections 18, 19 and 20 of the bill create substantial new powers for the Scottish ministers. For example, section 19 extends the right of public bodies to make charges when they use the powers in the bill to deal with deficiencies, to comply with obligations or to make provision in line with EU law after exit day.

There are financial powers in the bill, and we know that EU withdrawal will have major financial implications. Other aspects of spending policy that are currently determined at the European level are returning to the UK and will, in due course, return to Scotland, such as agricultural support. Therefore, there will be an impact on the way in which the fiscal framework operates.

Amendment 200 is designed to ensure that, with the extensive new financial powers in the bill, the complex situation of EU funding and the need to support the fiscal framework, the fiscal framework as it currently exists is protected. The principle is accepted that, as we say in the amendment, the fiscal framework must not be undermined.

I could go on at great length, if required, but I will leave it at that and will return to the amendment in winding up.

I move amendment 200.

Jamie Greene: I support amendment 200.

Amendment 202 arose because, despite much of the conversation being around the transposition of law in the bill, very little attention has been given to our potential financial liabilities through our withdrawal from the EU, although that is an important subject to consider. Members will, of course, be entirely unsurprised to hear that there is nothing political in the motivation behind this amendment, which I lodged for the simple reason that I felt that the issue may have been overlooked in the bill's drafting and thought that it was an important issue to raise, especially in the Finance and Constitution Committee's deliberations at stage 2.

The additional section to be included after section 22 relates to our liabilities resulting in loans paid from the European Investment Bank. I am not privy to all investments made by the EIB, but I know that they include, for example, £175 million for improvements to the M8, £192 million for investment in hospitals, and £50 million from the European strategic investment fund, as part of the Scottish Government's Scottish-European growth co-investment programme, which alone is around £417 million—I suspect that the final figure may be higher. In the interests of transparency, I hope that members will think it quite acceptable to ask Scottish ministers to outline to Parliament what those liabilities are and what the repayment terms are, as part of the due diligence on the financial implications of the bill, and indeed of EU withdrawal, to ensure that there are no unintended consequences in future Scottish budgets as a result of failing to identify or quantify those liabilities.

I have deliberately chosen to use the term

"Before the end of the transition period",

rather than "before exit day", as the time when the Scottish ministers should report to Parliament, because the carving up of the liabilities will naturally be part of the final exit negotiation, and I think that that should leave plentiful time for the minister to get full realisation of the numbers and timescales. I hope that members find that an acceptable request.

Patrick Harvie: I am slightly unclear about the issues raised in amendment 202, and I look forward to hearing the minister's response to it, particularly on whether those issues are already reported and whether we would be adding anything by agreeing to the amendment.

On amendment 200, in the name of Murdo Fraser, on the principle of protecting the fiscal framework, I have three specific issues to raise. I am worried that "undermine" might be a rather subjective test, and that it could leave the bill open to a great deal of political interpretation as to

whether something undermines the fiscal framework.

My second concern is that it seems to me inevitable that the fiscal framework will change during this process, either as a result of functions being devolved and the financial resources to carry out those functions being transferred, or—and this is my third point—as a result of a review of the fiscal framework, which is supposed to take place anyway. I seem to remember that the Smith commission, which debated the creation of the devolved financial powers that led to the fiscal framework, agreed that it should be reviewed. If I remember rightly, that was to be done on a five-year timescale, which would place it squarely within the transition period.

It may be that it is impractical to undertake a comprehensive review during the Brexit process, but I do not think that we should bind our hands and be unable to change the fiscal framework, if indeed it has to change, either as a result of additional functions being devolved to this Parliament or as a result of that pre-scheduled review, which might one day, with any luck, help to tidy up the mess for which Adam Tomkins and I both bear a share of responsibility.

James Kelly: I am not convinced about either of the amendments in this group. Murdo Fraser's main concern seems to be that there is the potential for the fiscal framework to be undermined. I would have thought that it is implicit in the fiscal framework being in place that it should have the support of ministers and that they should not be acting to undermine it.

On amendment 202, like Patrick Harvie, I will be interested to hear the minister's explanation. I would have thought that there must be a mechanism in place to ensure that the value of the loan arrangements with the European Investment Bank can be brought into the public arena without that having to be in the bill.

20:00

Michael Russell: I am conscious of the time, so I do not want to digress too much. However, I have noticed that John Scott, the member for Troon, where my former school is, has arrived. Brian Whittle, Gerald Byrne, who is one of my officials, and I are former pupils of Marr college. I make that point because my sixth-year music teacher, when I presented a composition exercise, used to say that it looked like it had been done between the soup and the fish. Obviously, it is a very grand school that has many courses at dinners for the music teachers, but I must say that the amendments look as though they have been done between the soup and the fish, and I will explain why.

First, although I am sure that Murdo Fraser cares deeply about the fiscal framework, nothing at all in the continuity bill affects the matters to which his amendment refers, including the operation of the Scottish consolidated fund, the tax powers that are set out in the Scotland Acts or the operation of the Scottish Government's fiscal framework, which underpins the powers that are set out in the Scotland Act 2016. The amendment is therefore completely redundant.

I am sure that Mr Fraser has read the financial memorandum. It states that any preparatory

> "Expenditure incurred under ... section 18 ... will be required to be confirmed in the annual Budget (Scotland) Act or the regulations ... for revisions"

made under it, and existing financial

> "Accountability and governance arrangements ... must continue to be adhered to."

Nothing in the bill removes

> "the requirement for the Budget Act processes under the Public Finance and Accountability (Scotland) Act 2000 to be followed",

and the provisions of the Scottish public financial manual would continue to apply.

Changes to the framework are not within the gift of the Scottish Parliament, the Scottish Government or this piece of legislation. Furthermore, Patrick Harvie has pointed to their review. The amendment is completely redundant.

I agree with James Kelly. On the information on loans, I would have thought that it would be best to ask those who are lending the money—that is, the European Investment Bank. The lack of access to the European Investment Bank will be a considerable problem for Scotland. That is another consequence of Brexit that those backing Brexit should have thought about before they created the circumstances. We are already seeing difficulties, because the money is not available. Mr Greene has perhaps unwittingly pointed to yet another downside of Brexit but, in reality, the people to ask for the information are those at the EIB.

The amendment is also drafted so that it does not require the Scottish Government to say anything about its own loans. If it had done that, at least, it might have been competent. The Scottish Government is only one recipient of the loans that exist across Scotland. The EIB has already said that it has provided more than £3 billion for direct investment in Scotland, with additional investment for UK-wide programmes. Not only is the amendment redundant and unnecessary, it is not even possible to achieve what it sets out to achieve.

With respect, I suggest that neither amendment should be proceeded with, because neither is

necessary and both of them were a waste of the time of this chamber, frankly.

Murdo Fraser: I think that Mr Russell is starting to lose his temper a little bit at this stage in proceedings.

I will respond to a few of the points that have been made. First, Mr Harvie made three specific points. He criticised the word “undermine” as being too subjective. If he had read on, he would have seen that “undermine” is defined in subsection (2)(b) of the section that amendment 200 would introduce as

“any regulations, enactment or act by the Scottish Ministers that materially changes the fiscal framework.”

Mr Harvie is correct to say that, as time goes on, whether because we have a review or because of something in the bill, the fiscal framework will have to change. However, that change must come by negotiation, not by any unilateral action on the part of the Scottish ministers by exercising the powers under the bill, so this amendment is appropriate.

The worst criticism that Mr Russell could come up with of the amendment is that it is unnecessary and redundant. That is not our view. Our view is that having a clear statement in the bill that the fiscal framework is unaffected makes a lot of sense in order to provide assurance that nothing that the Scottish ministers do will affect the fiscal framework. If the worst that can be said about the amendment is that it is redundant, it makes it highly superior to many of the other amendments that Mr Russell has himself proposed to the bill, or indeed to the entire bill itself. On that basis, I press amendment 200.

The Convener: We are obviously coming close to the end and people are getting a wee bit demob happy. Let us keep to the tone that we had previously managed to achieve.

The question is, that amendment 200 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 200 disagreed to.

Section 19—Power to provide for fees and charges

Amendment 52 moved—[James Kelly].

The Convener: The question is, that amendment 52 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 52 disagreed to.

Amendment 201 moved—[Adam Tomkins].

The Convener: The question is, that amendment 201 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 201 disagreed to.

The Convener: The question is, that section 19 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members’ opposition is noted.

Section 19 agreed to.

The Convener: The question is, that section 20 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 20 agreed to.

Section 21—Scrutiny of regulations under sections 19 and 20

Amendment 53 moved—[Tavish Scott].

The Convener: The question is, that amendment 53 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 53 disagreed to.

The Convener: The question is, that section 21 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 21 agreed to.

Section 22—Relationship to other powers

Amendment 54 moved—[James Kelly].

The Convener: The question is, that amendment 54 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 5, Against 6, Abstentions 0.

Amendment 54 disagreed to.

The Convener: The question is, that section 22 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 22 agreed to.

After section 22

The Convener: I ask Jamie Greene to move or not move amendment 202.

Jamie Greene: If the minister thinks that amendment 202 is a waste of time, that begs the question, where are the amendments from his back benchers?

The Convener: Do you want to move the amendment?

Amendment 202 moved—[Jamie Greene].

The Convener: The question is, that amendment 202 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 202 disagreed to.

Sections 23 to 26 agreed to.

Section 27—Interpretation: general

Amendment 203 moved—[Alexander Burnett].

The Convener: The question is, that amendment 203 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 203 disagreed to.

The Convener: The question is, that section 27 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 27 agreed to.

Section 28—Meaning of "exit day"

The Convener: If amendment 204 is agreed to, I will not be able to call amendment 55.

Amendment 204 moved—[Jamie Greene].

The Convener: The question is, that amendment 204 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 204 disagreed to.

Amendment 55 moved—[James Kelly]—and agreed to.

Amendment 205 moved—[Donald Cameron].

The Convener: The question is, that amendment 205 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 205 disagreed to.

Section 28 agreed to.

The Convener: The question is, that section 29 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 29 agreed to.

Section 30—Regulations

Amendment 206 moved—[Liam Kerr].

The Convener: The question is, that amendment 206 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 206 agreed to.

The Convener: The question is, that section 30 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 30, as amended, agreed to.

Section 31—Scrutiny of regulations in urgent cases

The Convener: Amendment 56, in the name of Tavish Scott, is grouped with amendments 57, 207 to 211 and 213.

Tavish Scott: I will be very brief indeed. Amendment 56 relates to scrutiny in urgent cases, and the two points that I will make relate to section 13. Amendments 56 and 57 make it clear that ministers cannot use the powers of urgency for section 13 proposals. I simply wish to close down short cuts in scrutiny for ministers who want the bill to equip them with the powers to keep pace with EU law. The amendments are entirely consistent with the themes that we have been pursuing over the hours for which we have been here today.

I move amendment 56.

Ross Greer: In situations that a minister considers to be urgent, under section 31 the bill will permit regulations that would usually be subject to affirmative procedure instead to be introduced immediately and subject only to an affirmative vote 28 days later, in order to confirm that the change is made permanent. As the bill stands, ministers are obliged to lay regulations before Parliament

"as soon as practicable after"

signing them, which is a very open-ended term. Regulations can become law upon being signed, so the urgency provision would permit a change in the law to be in effect for an unspecified time before it was even laid before Parliament.

Amendment 207 would oblige ministers to lay any regulation that was made under the urgency provision within three working days. I hope that members agree with that, in principle. Although they may have an issue with the period of three working days, we could work out any issues with the timing through a technical amendment at stage 3. Ministers would still be required to lay the regulation

"as soon as practicable",

but there would be a new legally defined time limit for that.

Amendment 211 would permit Parliament to suspend the urgency provision by resolution if it believed that the provision had been misused in any way—for example, if a minority Government were thought to have circumvented appropriate scrutiny of an issue on which a parliamentary majority may have been lacking. I am not suggesting that the current minority Government would do that, of course. Parliament could then reinstate the urgency provision by resolution, if it believed that sufficient steps had been taken to resolve the problem that had in the first place led to the misuse of the urgency provision.

In line with other amendments that I have lodged, the purpose of amendments 207 and 211 is to strengthen parliamentary scrutiny and oversight, thereby affirming the role in the process of this elected body in relation to the Government. The amendments would not place an undue burden on the Government, but would ensure transparency for Parliament and, thus, the public, by ensuring that essential scrutiny would take place in a timely and appropriate manner.

Murdo Fraser: Amendments 208 and 209 deal with the question of regulations being introduced by the Scottish ministers in what are described in the bill as "urgent cases". Section 31 provides that such regulations shall

"cease to have effect at the end of the period of 28 days ... unless ... the regulations are approved by resolution of the Scottish Parliament."

As drafted, the provision will grant powers to the Scottish ministers to make emergency powers that will have immediate effect but will thereafter require approval by Parliament. If that is not done, the regulations will cease to have effect. Amendment 208 does not object in principle to the Scottish ministers having those emergency powers. Nevertheless, I feel that the period of 28 days in which to get parliamentary approval is simply too long.

20:15

This is about proper parliamentary scrutiny of ministerial powers. Accordingly, my amendment 208 would reduce the period in section 31(4) from 28 days to 14 days. That would still give Scottish ministers the power to make regulations in urgent cases, but it would also require that the regulations be approved by Parliament within 14 days, which seems to be a reasonable period that strikes a balance between the need for proper parliamentary scrutiny and the freedom of ministers to act in urgent cases.

Amendment 209 is a consequential amendment that would amend section 31(5) by changing "28 days" to "14 days" to bring it into line with amended subsection (4), should amendment 208 be agreed to.

Jamie Greene: Section 31(2) states:

"The regulations may be made without being subject to the affirmative procedure if the regulations contain a declaration that the Scottish Ministers consider that, by reason of urgency, it is necessary to make the regulations without being subject to that procedure."

My amendment 210 would do two things. For the purposes of section 31, "urgency" should be better defined. We know that there has been much

discourse around the definition of words such as “emergency” and “urgency”, and the words “consider that” leave it open to ministers to decide and declare whether something is urgent. Secondly, amendment 210 would ensure that all such regulations would be subject to affirmative procedure.

I urge members to adopt that additional layer of security so that due process is followed. Affirmative procedure is by far the best way to deal with regulations, especially those that are declared to be “urgent”. I appreciate that the minister may, as he has done previously, fall back on the defence that amendment 210 would make the bill unworkable or inoperable, but as it relates to the passing of regulations that are deemed to be urgent, I strongly propose that affirmative procedure is the best way to deal with them.

The Convener: Adam Tomkins will speak to amendment 213 and the other amendments in the group.

Adam Tomkins: Amendment 213 has been lodged in error. The error is mine, and I apologise for it. However, I record my support for the other amendments in the group.

Neil Bibby: The eight amendments in the group deal principally with section 31, and I am minded to support all of them. As we know, section 31 relates to scrutiny of regulations in urgent cases. Given the concerns about scrutiny and transparency that members have expressed throughout stage 2, it is important that section 31 be robust. I will support the amendments in the group to ensure that section 31 is fair, proportionate and robust.

Patrick Harvie: There is general agreement that there is a need for procedures in relation to urgent matters but they need to be limited. I am not convinced by Jamie Greene’s argument and I worry that, whatever its intentions, his amendment 210 might have the effect of preventing something urgent from being addressed urgently: it might have a very serious practical effect.

I see some merit in the other amendments in the group; naturally, I am happy to support my colleague Ross Greer’s amendments. The three-day requirement in amendment 207 is in line with existing guidance. As members will be aware, the matter has been discussed at committee previously. I think that the normal expectation is for a period of two working days. The Delegated Powers and Law Reform Committee is able to take action if an instrument has not been laid by the third day after it has been made, so a requirement for three working days would be very helpful.

I hope that we would never feel that we need to use the emergency brake provision, but its being available to us would give the Government an incentive to ensure that we do not need to use it.

I am certainly open to Tavish Scott’s amendment 56; I am sympathetic to the argument that, in relation to the keeping-pace provisions, urgency is not necessary relevant.

I am also certainly open to hearing the minister’s response to Murdo Fraser’s arguments on reducing the time limit, in which I see some merit.

Michael Russell: First, I am glad that I did not decide to agree to Adam Tomkins’s amendment 213. It would have been a little embarrassing to have accepted an amendment that was not meant to be there. However, I want to be very constructive, so I approach the amendments to the last two sections in a mood of wishing to be helpful and being conscious of the time.

The amendments that I have problems with—I will come briefly to the rest in a moment—are Ross Greer’s amendment 207 and Jamie Greene’s amendment 210. I will explain why. It is not that I do not recognise the need to do what amendment 207 proposes, but the target of three days would be impossible to meet. Standing orders allow the laying of instruments during days when the office of the clerk is open, but there are periods of three days and more when the office is not open. The amendment does not make clear what the consequences of a failure to lay within three days would be. In those circumstances, it is entirely legitimate that doubt could be cast over the validity of instruments.

The current arrangements are robustly policed in practice by the Delegated Powers and Law Reform Committee. If a rule of three days is included in the bill, that will mean that some instruments will be questioned in a way in which they cannot be questioned at the moment. I therefore ask Ross Greer not to press amendment 207. If he wants to proceed with a more workable proposal, I will be happy to discuss that urgently over the next two or three days. However, amendment 207’s proposal regarding three days is simply impossible because of other regulations that exist.

Murdo Fraser’s amendments 208 and 209 would reduce from 28 days to 14 the period in which Parliament has to approve or not approve regulations under the urgent procedure. The procedure need not take 28 days and could be done more swiftly, so I do not think that there is any great harm in the proposal. I hope, however, that Murdo Fraser will accept that I want to reflect on the proposal over the next few days and might come back at stage 3 with an amendment that changes the period from 28 days to 21 days, or something like that. I am not averse to including his proposal in the bill at this stage while we think

about it. I do not want him to think that I regard the amendment as unnecessary or as wasting time in any way. I am absolutely sure that it is—I will not say "in contrast to some others"—a genuine and serious amendment that could be helpful. I see that he is indicating that he accepts that I will reflect on the proposal over the next few days and come back on it.

I recognise the point of Jamie Greene's amendment 210 and understand the anxiety about the situations in which urgency might arise. However, the amendment is misconceived because "urgency" speaks for itself, so I doubt whether any attempt to define it statutorily would make things clearer. It might instead introduce unnecessary and destabilising uncertainties on the question of when section 31 might be used. I have said before, and I say it again, that we do not want to have to rely on section 31 and would do so only when absolutely necessary—when there is urgency. However, like the UK Government in its withdrawal bill, we recognise that leaving the EU is exactly the sort of situation in which we might have to move very swiftly indeed.

Tavish Scott's amendments 56 and 57 are intended to prevent the urgency procedure from being used for keeping pace with regulations. We have been here before, but I am happy to accept the amendments. I am also inclined to accept amendment 211, but under the condition—again—that a conversation about some of the details in the proposal is required. I think that they need to be tidied up and improved.

I am trying to be positive—given that it is 8.23 pm—by indicating that there are only two areas that I find difficult. I therefore hope that Ross Greer might seek to withdraw amendment 207, which would be helpful, and I hope that Jamie Greene might be persuaded to seek to withdraw his amendment 210 on the grounds that I do not think that it clarifies anything and that it could make things more difficult.

Tavish Scott: I thank the minister for the tone of his remarks to colleagues here and thank his officials for the way in which they have conducted themselves over the past couple of days.

We started on the issue of scrutiny; I will finish on it. I acknowledge that the minister has gone a long way in acknowledging the concerns that Parliament has expressed on a number of occasions. Colleagues who have led on amendments will wish to reflect on the position that they are in vis-à-vis having the Government's support or not. However, we have certainly moved a long way.

Finally, I thank you, Mr Crawford, for your careful consideration over the past couple of days and your handling of what has been a long period of discussion.

The Convener: Thank you. Are you pressing or seeking to withdraw amendment 56?

Tavish Scott: I am pressing amendment 56, just so that you will have a bit more work to do.

Amendment 56 agreed to.

Amendment 57 moved—[Tavish Scott]—and agreed to.

Amendment 207 not moved.

Amendments 208 and 209 not moved.

Amendment 210 not moved.

The Convener: The question is, that section 31, as amended, be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 31, as amended, agreed to.

After section 31

Amendment 211 moved—[Ross Greer]—and agreed to.

Section 32—Ancillary provision

Amendment 212 moved—[Liam Kerr].

The Convener: The question is, that amendment 212 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Bibby, Neil (West Scotland) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
Tomkins, Adam (Glasgow) (Con)

Against

Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 212 agreed to.

Amendment 213 not moved.

The Convener: The question is, that section 32, as amended, be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 32, as amended, agreed to.

Section 33—Repeal of spent references to EU law etc

Amendment 214 moved—[Adam Tomkins].

The Convener: The question is, that amendment 214 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 214 disagreed to.

Section 33 agreed to.

Schedule 1—Further repeals of spent references to EU law

Adam Tomkins: Is it possible to move and vote on amendments 215 to 225 en bloc?

The Convener: The clerks have advised me that it is not.

Amendment 215 moved—[Adam Tomkins].

The Convener: The question is, that amendment 215 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 215 disagreed to.

Amendment 216 moved—[Adam Tomkins].

The Convener: The question is, that amendment 216 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 216 disagreed to.

Amendment 217 moved—[Adam Tomkins].

The Convener: The question is, that amendment 217 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 217 disagreed to.

Amendment 218 moved—[Adam Tomkins].

The Convener: The question is, that amendment 218 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 218 disagreed to.

Amendment 219 moved—[Adam Tomkins].

The Convener: The question is, that amendment 219 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 219 disagreed to.

Amendment 220 moved—[Adam Tomkins].

The Convener: The question is, that amendment 220 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 220 disagreed to.

20:30

Amendment 221 moved—[Adam Tomkins].

The Convener: The question is, that amendment 221 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 221 disagreed to.

Amendment 222 moved—[Adam Tomkins].

The Convener: The question is, that amendment 222 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 222 disagreed to.

Amendment 223 moved—[Adam Tomkins].

The Convener: The question is, that amendment 223 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 223 disagreed to.

Amendment 224 moved—[Adam Tomkins].

The Convener: The question is, that amendment 224 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 224 disagreed to.

Amendment 225 moved—[Adam Tomkins].

The Convener: The question is, that amendment 225 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 225 disagreed to.

The Convener: The question is, that schedule 1 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Schedule 1 agreed to.

Section 34 agreed to.

The Convener: The question is, that schedule 2 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Schedule 2 agreed to.

Before section 35

Amendment 226 moved—[Adam Tomkins].

The Convener: The question is, that amendment 226 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 226 disagreed to.

The Convener: The question is, that section 35 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 35 agreed to.

The Convener: The question is, that schedule 3 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Schedule 3 agreed to.

The question is, that section 36 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 36 agreed to.

After section 36

The Convener: Amendment 227, in the name of Jamie Greene, is grouped with amendment 228.

Jamie Greene: It seems quite apt that, at the final hurdle in stage 2, we are discussing the penultimate section of the bill, which, in this case, provides for the repeal of the act. By the end of the debate, the committee will have discussed 231 amendments on the implications and consequences of the bill, and it will be subject to further amendment at stage 3. However, despite our best intentions, there may be notable issues that we will not have foreseen or that will have been overlooked before the bill is passed, if it does so.

I propose a simple addition to the bill, calling for a review of the act. Unlike other bills, which do not specify a review but rely on the usual post-legislative scrutiny process, the continuity bill, once it is enacted, will be subject to fast-moving changes in the political and constitutional landscapes. I hope that it seems as sensible to others as it does to me that we ask ministers to review the act as soon as practical to see whether it is achieving its objectives. Whether the act should be reviewed first by the Parliament or the courts is perhaps another matter.

I have not specified a timescale, in the hope that the minister will agree to the principle, without any prescribed period. Notwithstanding amendment 227, section 37, "Repeal of this act", will remain in place, mutatis mutandis.

I thank the parliamentary staff and you, convener, for your diligence and patience throughout the meetings. I also thank committee members for considering the 23 amendments in my name. On that note, I am out.

I move amendment 227.

The Convener: You are not quite out, Mr Greene, because you still have a wind-up speech to do.

Liam Kerr: Amendment 228, in my name, would remove from section 37(1) the words

"or any provision of this Act".

The stated purpose of section 37 is to allow ministers to repeal the act. That is fine. However, the specific phrase allows for the deletion of any provision of the act. It puts no limit on what provisions are to be repealed. That creates the clear risk that Scottish ministers could decide to repeal part of the act, for example the provisions that improve scrutiny of regulations or those that limit their financial powers.

In short, we should keep the idea that the act could be swiftly repealed. However, without vacillation, the committee should strip out that partial and dangerous ability to pick and choose which bits of the act can or cannot be repealed, by agreeing to amendment 228.

Emma Harper (South Scotland) (SNP): Thank you for your birthday wishes earlier, convener.

Over the past two days I have listened carefully to speeches by members of the committee, members in the chamber and the minister. I have taken many notes, which I am sure that I will make use of as the bill proceeds. The language of the bill and the amendments is very technical. As I am new to the committee and this is my first experience of stage 2 scrutiny, it has been a valuable and engaging experience. I would like to thank everyone involved in the process, including parliamentary staff, committee clerks, the convener, members, the ministerial team and the minister.

Amendment 227, in the name of Jamie Greene, would insert after section 36 a requirement for Scottish ministers to

"review the Act as soon as practicable after exit day",

which would present an opportunity to provide Parliament with a report.

Jamie Greene used the word "practical" although the text says "practicable", so that might require some clarification. I sought the definition of "practicable" from "Webster's Dictionary" and the definition, which might be meaningful to my colleague Liam Kerr MSP, is as follows:

"Something capable of being done or accomplished with available means or resources".

Given that definition, I consider amendment 227 to be reasonable as it will make the bill more open and transparent, allowing the Parliament continued scrutiny after exit day.

James Kelly: I will be brief. On my behalf and that of Neil Bibby, I thank you, convener, for the thorough way in which you have overseen proceedings. I also thank the parliamentary staff who have worked through these long meetings. I am sure that proceedings have moved efficiently, if not quickly—that is because of the politicians and their long speeches.

I support amendment 227. A review is eminently sensible. I oppose amendment 228, in the name of Liam Kerr, because it pushes us towards a position of full repeal as opposed to partial repeals, which may be required in certain circumstances.

Patrick Harvie: I echo the warm comments and the thanks that have been expressed to the convener, committee colleagues, clerks, officials and all the Parliament staff who have made these extraordinary meetings possible and who have helped us through it all.

On amendment 228, it seems odd to allow ministers, by regulations, to repeal the whole act but not, for example, to decide that the urgency provisions—or provisions on some other aspect—are no longer required and should be repealed. I am not convinced by amendment 228.

On amendment 227, I am surprised that there is so much appetite for a review. It seems to me that we are all going to have plenty to do just after exit day. However, if people want to review the act, fine. Who am I to stand in their way?

The Convener: No other member wants to speak, so I bring in the minister.

Michael Russell: Thank you, convener, for your inspirational chairing of this committee over the past two days. You have managed to keep order in a very effective way and to calm the passions that showed signs of breaking out from time to time—you stamped on them very professionally indeed.

Thanks go, too, to all the officials, including parliamentary officials from this committee, official report staff, the staff who have been in charge of the audiovisual services, the staff who provided sandwiches—particularly this evening, when there was an ample sufficiency; last night we perhaps had slightly fewer than we required—and all others who have taken part.

I also thank members who came to observe the proceedings. Committees are not often spectator sports, particularly not for other MSPs. Whether we owe Conservative members' presence to solidarity with only their Conservative colleagues, a genuine interest in the proceedings of this Parliament or a combination of the two, I am grateful for the ever-changing—something that will not have been observed by most people—cast of Conservative MSPs who have flitted across the chamber. Perhaps "flitted" is generous; some came and stayed, and some left early. However, they took part, as did some other members. For example, I saw Christina McKelvie observing here yesterday. This has been a unique event, and let us hope that we keep it unique.

Before I come to the amendments, I want to comment on what will happen next. The Presiding Officer will set a date for stage 3 amendments, and stage 3 is scheduled for next week. I want to make a general statement of intent. I am very aware of the decisions of this committee, and it is not my intention to reverse any decision of this committee unless it makes the bill inoperable. I make that commitment, and I hope that it will be matched by a commitment from members to accept the rejection of ideas that were proposed at stage 2, so that we can come to stage 3 fresh, with the intention of making a better bill.

I entirely accept that some members do not want the bill to succeed and will vote against it. However, I see no need for repetition of a situation in which 232 amendments are lodged. We now know where we are with the bill, therefore it would be right to lodge amendments that would genuinely improve the bill and would have a chance of success. I make the commitment that I will not go into stage 3 in any other spirit.

Let me deal with the amendments in this group. It is a pity that Jamie Greene did not consult his colleague Maurice Golden, because we accepted amendment 186 on a reporting function in the bill. However, I do not want to end the proceedings on a churlish note—that would be very unlike me—so I will accept amendment 227. It would be helpful if Jamie Greene and Maurice Golden got together to see whether they can combine their ideas and come up with one procedure for reporting. That would help everyone and cut out unnecessary bureaucracy, which I know is a Tory aim.

On amendment 228, in Liam Kerr's name, I am tempted to say that, having considered the word "practicable", I am happy to add another dictionary to the pile, which is Dwelly. "Practicable" in Gaelic is "dhèanta". However, as that would not help Liam Kerr's understanding of these matters, particularly in the pubs that he frequents, I will just say that I have no great difficulty with his amendment. The purpose of the bill, undoubtedly, is to provide the circumstances that are needed should the Parliament refuse legislative consent and there is no agreement on the UK bill. It is an either/or situation. In those circumstances, and again in a spirit of generosity, I will accept amendment 228, so that we do not have to divide on either of the amendments in the group, unless members want to do so.

We will meet again shortly. I am giving evidence on the bill to two parliamentary committees tomorrow, and we will have the stage 3 proceedings next week. I really hope that we can do that in the spirit that the convener has set in the past two days, and in a way that is full and thoughtful, while perhaps not spending quite as long on the bill as we have spent in the past more-than-24 hours.

20:45

Jamie Greene: There is always the temptation to make a retort to the minister, but I will maintain the higher ground and say thank you for the feedback and for the support for amendment 227.

In all seriousness, I say that in the past few days the minister has made to members across the board a number of commitments to revisit many aspects, particularly those covered by amendments that were withdrawn, and I hope that he will revisit them. It is no secret that the Conservatives opposed the bill's introduction, but I hope that our actions in the past few days have proved that we have been playing a productive and proactive part in shaping the bill as it goes into stage 3.

Amendment 227 agreed to.

Section 37—Repeal of this Act

Amendment 228 moved—[Liam Kerr].

The Convener: The question is, that amendment 228 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harper, Emma (South Scotland) (SNP)
McKee, Ivan (Glasgow Provan) (SNP)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)

The Convener: The result of the division is: For 8, Against 3, Abstentions 0.

Amendment 228 agreed to.

Amendment 229 moved—[Alexander Burnett].

The Convener: The question is, that amendment 229 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 229 disagreed to.

Amendment 230 moved—[Alexander Burnett].

The Convener: The question is, that amendment 230 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 230 disagreed to.

Amendment 231 moved—[Jamie Greene].

The Convener: The question is, that amendment 231 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Bibby, Neil (West Scotland) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Denham, Ash (Edinburgh Eastern) (SNP)
Harper, Emma (South Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Kelly, James (Glasgow) (Lab)
McKee, Ivan (Glasgow Provan) (SNP)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 231 disagreed to.

Section 37, as amended, agreed to.

The Convener: The question is, that section 38 be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Section 38 agreed to.

The Convener: The question is, that the long title be agreed to. Are we agreed?

Members: No.

The Convener: Conservative members' opposition is noted.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. Before we depart, I note that we have subjected the bill to significant and substantial scrutiny. I thank all the parliamentary staff who have supported the committee through our proceedings; all members of the Parliament who have contributed or attended at any point; and the minister and his Government officials for the way in which they have gone about their business. I particularly thank the clerks for helping me to clamp down on any unnecessary passions that might have been in danger of causing problems and for keeping me right. I genuinely thank everyone.

Meeting closed at 20:48.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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