



OFFICIAL REPORT
AITHISG OIFIGEIL

Finance and Constitution Committee

Wednesday 25 November 2020

Session 5



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Pàrlamaid na h-Alba

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FINANCE AND CONSTITUTION COMMITTEE
30th Meeting 2020, Session 5

CONVENER

*Bruce Crawford (Stirling) (SNP)

DEPUTY CONVENER

*Murdo Fraser (Mid Scotland and Fife) (Con)

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)

*Tom Arthur (Renfrewshire South) (SNP)

*Jackie Baillie (Dumbarton) (Lab)

*Alexander Burnett (Aberdeenshire West) (Con)

*Angela Constance (Almond Valley) (SNP)

*Patrick Harvie (Glasgow) (Green)

*Dean Lockhart (Mid Scotland and Fife) (Con)

*John Mason (Glasgow Shettleston) (SNP)

*Alex Rowley (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Liam McArthur (Orkney Islands) (LD)

Mike Rumbles (North East Scotland) (LD)

Michael Russell (Cabinet Secretary for the Constitution, Europe and External Affairs)

CLERK TO THE COMMITTEE

James Johnston

LOCATION

Virtual Meeting

Scottish Parliament

Finance and Constitution Committee

Wednesday 25 November 2020

[The Convener opened the meeting at 09:00]

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

The Convener (Bruce Crawford): Good morning and welcome to the 30th meeting in 2020 of the Finance and Constitution Committee. The only item on our agenda is stage 2 consideration of the UK Withdrawal from the European Union (Continuity) (Scotland) Bill. We are joined by Mike Russell, Cabinet Secretary for the Constitution, Europe and External Affairs, and by Mike Rumbles and Liam McArthur, who have lodged amendments to the bill. Welcome, everyone.

We have a lot to get through this morning, but it will work well if we take it nice and steady and with a bit of patience. I remind members to take a wee breath before speaking, to allow your microphones to be switched on. You can request to speak by tapping R in the BlueJeans chat function as soon as I call the relevant group of amendments.

Only committee members are eligible to vote. Voting will take place using the BlueJeans chat function. Once I have read out the result of a vote, if you think that your vote has been incorrectly recorded, please let me know as soon as you can. I will pause to allow time for that.

Depending on how long proceedings take, I might suspend the meeting for a comfort break at a suitable juncture. Given the time constraints, I encourage everyone who speaks to make succinct contributions.

As agreed by the Parliament, the Environment, Climate Change and Land Reform Committee considered amendments to part 2 of the bill at its meeting yesterday. Today, we will consider amendments to the remainder of the bill.

Before section 1

The Convener: Amendment 6, in the name of Angela Constance, is grouped with amendment 10.

Angela Constance (Almond Valley) (SNP): Good morning. In the committee's stage 1 report, there was majority support in principle for the

proposed keeping pace power. There was also widespread support from stakeholders.

However, we heard from stakeholders such as Scottish Environment LINK and the Human Rights Consortium Scotland that the bill could provide greater clarity on what the power is for and when it would be used. As things stand, there is no direction for ministers as to the power's use, and transparency and accountability could be improved.

Most of us want Scotland to align with the best of what comes out of the European Union. The Scottish Government shares that commitment. The concern is that, on leaving the EU, we take a step backwards and Scotland becomes the poor man of Europe on rights or the dirty man of Europe on the environment. It seems reasonable, therefore, to give ministers a clear indication that the keeping pace power should be used to deliver on the Government's commitment and allay such concerns.

Keeping pace powers are not the whole answer, but I believe that they could be part of the solution. By putting such a purpose in the bill, we would provide more certainty, predictability and clarity for businesses, public agencies and others. Of course, we must be careful to ensure that, in putting a purpose in the bill, we keep the flexibility that will be needed to deal with future uncertainties. I agree with the committee's observation in its stage 1 report that making the keeping pace power into a simplistic duty would create an "inflexible" and "inoperable" approach. However, I think that we can achieve flexibility and clarity in the bill if we work hard to strike the right balance.

Amendment 6 seeks to provide that clear sense of direction in the form of a statutory purpose that ministers must seek to achieve in their use of the power in section 1. Members should note that amendment 6 does not seek to limit the power's use for other reasons.

Amendment 10 is complementary, in that it seeks to amend section 7 to ensure that reports on the use of the power, which that section requires, also set out how the power's use has or has not helped to deliver on the purpose.

The two amendments have been lodged in the spirit of probing amendments so that we can hear from the minister on and better understand his thinking, and I look forward to doing that. I am sure that the amendments could be improved, and it may be that ministers feel able, after hearing this debate, to agree in principle to what I am proposing and to commit to producing stage 3 amendments.

That said, I commend to the committee the concept of a purpose, in order to bring transparency, accountability, certainty and clarity.

The Convener: Would you like to move the amendment, please?

Angela Constance: I would like to hear the minister's response first.

The Convener: No—it will be possible for you to withdraw the amendment after you have heard the minister's response.

Angela Constance: I move amendment 6.

Dean Lockhart (Mid Scotland and Fife) (Con): Amendments 6 and 10 raise a number of concerns about the keeping pace provisions in the bill. The amendments, together with the powers in section 1, would allow the Scottish ministers to keep pace with future European Union laws in relation to which they have had no influence or input, and to do so without any scrutiny from Parliament or consultation with key stakeholders. That would mean the Scottish Parliament becoming a passive rule taker across a number of key sectors of the economy, and those future EU laws might not be appropriate for the particular needs of those sectors in Scotland.

We believe that the proposals would also create further regulatory divergence from the rest of the UK. We heard evidence from key stakeholders such as NFU Scotland that the United Kingdom market is the single most important market for its members' produce, with more than 60 per cent of their products going to the rest of the UK. Keeping pace with some, but not all, future EU laws—as it will be impossible to keep pace with all future EU laws that come through in the future—would create myriad different regulations for Scottish companies to comply with, which would increase the cost and complexity of doing business.

We agree that Scotland and the rest of the UK have some of the highest standards in the world in those various areas, and we think that that should continue to be the case. However, we do not believe that the bill and, through it, the granting of unprecedented powers to the Scottish ministers to pass secondary legislation without scrutiny or consultation represent the best way to achieve that. For those reasons, we are unable to support amendments 6 and 10.

Patrick Harvie (Glasgow) (Green): I very much welcome Angela Constance's amendments. It is important to say clearly that if, as she says, they are intended as probing amendments and are not put to the vote today, something very much like them needs to be passed at stage 3.

Amendments 6 and 10 change the context of the whole of the rest of the bill. In fact, the arguments that we will hear when we debate many

of the issues that are raised in the later groups of amendments about the exercise of the power, scrutiny, duration and limitations are changed if a clear purpose is set out in the bill. That is the context that the power in section 1 very much needs.

Therefore, I welcome the two amendments and, if I had not seen amendments such as Angela Constance's in this group or the relevant amendments from Liam McArthur in a later group by the time the deadline arrived, my amendments would have been more substantial. Both those sets of amendments deal with very substantial matters.

It is telling that, only a few minutes into our discussion, we have heard the rather bogus argument about our being a rule taker. It is important to put on the record, once again, that the inability of Scotland and the UK to influence discussions at European level about what European rules and regulations will be is the result not of Scottish Government policy but of UK Government policy in pursuing Brexit in the way that it has done.

That changes nothing about a judgment on the value of maintaining those high European regulatory standards. I believe strongly in those values, and amendment 6 captures the objectives that I think that most of us across most of the political spectrum—including parts of the Conservative Party—share. There are those who do not share the view that we should maintain higher regulatory standards and for whom the purpose of Brexit is a race to the bottom. I think that we should say very clearly on the face of the bill what our purpose is—we know that it is not shared by the UK Government—and that we will stick to it. If amendment 6 is not agreed to at stage 2, something very like it must be agreed to at stage 3.

Alex Rowley (Mid Scotland and Fife) (Lab): I will wait to hear what the cabinet secretary has to say before deciding how to vote; nonetheless, I absolutely support the principle that is set out in amendment 6.

I had not intended to speak until I heard Dean Lockhart speak. It is important to say that there is a real risk of Scotland ending up in a race to the bottom. I support what Angela Constance said; it is important that we make that clear and that we protect the high standards that we have in Scotland as much as possible. I do not believe that the legislation that the UK Government has introduced so far—the United Kingdom Internal Market Bill—supports the highest standards. That is a great threat to the future of Scotland. Therefore, I support the principle of amendment 6, and I look forward to hearing what the cabinet secretary has to say.

The Cabinet Secretary for the Constitution, Europe and External Affairs (Michael Russell):

That opening exchange of fire has perhaps defined what we will hear for the rest of the morning. I will talk about that for a moment, if the convener will allow me.

The debate today will be between those who are absolutely clear that they want to maintain the highest of standards and see the bill as the vehicle for doing so, but who have not yet reached a common position on some of the important issues. Two of the most important issues have been presaged by Angela Constance and Patrick Harvie and lie in the amendments in group 1 and group 3, which we will come to later. The debate is about the balance between flexibility of operation and a more rigid definition of what we are trying to do. It is also, in essence, about securing appropriate and effective power for the Scottish Parliament and ensuring that there is appropriate and effective scrutiny by and engagement of the Parliament and wider Scottish society as we go forward, on which I think that we are united. That is where I find myself.

We will probably not come to a completely common mind on groups 1 and 3 today, but I hope that we will be able to do so between now and stage 3. That is what I aim to do, and I make that commitment explicit at the very beginning. Although I have reservations about this particular way of setting out the purpose and want to suggest some alternatives, I am committed to continuing to discuss it with Angela Constance, Patrick Harvie and the Labour Party, which has indicated its support through Alex Rowley, and we will try to take the matter forward.

I am afraid that I must reject what we heard from Dean Lockhart. I believe that a number of amendments that have been lodged are wrecking amendments that are designed to not allow the bill to operate effectively. I will say so when I see those; however, I hope that Dean Lockhart will not go back and simply fight the internal market fight and the Brexit fight but will look at the need for Scotland to have the highest regulatory powers and the ability to operate them as well as we can.

Although we in the Scottish Government do not have a monopoly on ideas in relation to how the power in section 1 may be used, I suggest that we need to look at three points in defining how we use the power and how the bill sets that out. We need to have a policy statement on the use of the power; we need to have a forward look to make sure that we are always scanning the horizon; and we need to agree a framework for the involvement of Parliament.

09:15

On the policy statement, I prefer Tom Arthur's amendment in group 3, which requires a statement of the policy and the factors to be taken into account in deciding whether to use the power over the whole spectrum. It would not be a policy statement that was published once and forgotten about; it would be a live document that would continue to change and improve, and it would ensure that we work with key stakeholders. I think that those things are in Tom Arthur's amendment, but it may not be perfect yet, so we need to do some work with him.

The second element of the approach is ensuring that there is a forward-looking report. We have always looked at the potential uses of the power not just in the initial forthcoming period, but in relation to EU legislative proposals that might still be at an early stage of development. There would be an opportunity for the Parliament to help to shape the Government's priorities through engagement with the EU.

The third element is the framework for involving the Parliament and wider stakeholders in Scotland. The forward-looking report would be one element of that, but there would be other elements to ensure that the appropriate parliamentary scrutiny procedure was put in place. Section 3 deals with that in particular.

I want to ensure that we move forward with the ideas in section 1 on purpose and the ideas in section 3 on how we do that. If we can do that over the next month or so after this stage, we will get a better bill.

There are some technical concerns about amendment 6 that worry me. The list is non-exhaustive and it requires ministers to exercise the power in certain ways, but it remains silent on others. It could lead to a skewing of priorities.

I am also concerned that the wording in amendment 6 on maintaining and advancing standards is problematic. It will mean different things to different people. I would like the bill to be more specific so that the opportunity to damage it, which its enemies will take, is not exploited, and I want to know what action will be required of ministers in a situation in which advancing one right or standard might directly reduce or conflict with a different standard. We need to consider whether there is an inherent contradiction in the wording that we can get rid of.

I would like Angela Constance not to press amendment 6. I am very clear that we have work to do on purpose and implementation. When we come to group 3, we will find that there are elements of the proposals by Liam McArthur, Patrick Harvie and Tom Arthur that can all be brought together. If we dovetail that with

consideration of Angela Constance's ideas, we will end up with a better bill.

If Angela Constance does not press amendment 6, I make the commitment to include those considerations and discussions, as I will also do when we come to group 3.

Angela Constance: I stressed at the outset that I am interested in practical legislative tools to guard against regression. I do not want inflexibility in dealing with the uncertainties of leaving the European Union, which we are, of course, leaving against our will.

In general, I am in favour of purpose clauses in domestic legislation—I think that they have a value—but I listened to what the cabinet secretary said about a united way forward, certainly among those of us with progressive voices. Given that there are a number of progressive voices that are interested in the area—it is not just me—I am content to seek to withdraw the amendment.

Amendment 6, by agreement, withdrawn.

Section 1—Power to make provision corresponding to EU law

The Convener: Amendment 7, in the name of Alex Rowley, is grouped with amendment 12.

Alex Rowley: Amendment 7 would delete section 1(4) of the bill, which allows Scottish ministers to make regulations that authorise any Scottish public authority that already exercises functions under the EU instruments to delegate those functions to another person or to arrange for any of those functions to be carried out by another person or by another Scottish public authority.

Paragraphs 69 to 72 of the Finance and Constitution Committee's stage 1 report noted that the Delegated Powers and Law Reform Committee had raised the issue of whether that

"power to sub-delegate is ... appropriate when there is no equivalent"

provision in section 2(2) of the European Communities Act 1972. The power of delegation will apply to future EU law, the content of which would be unknown, and is therefore inappropriate given the uncertainty about what that law might be.

Amendment 7 is therefore a probing amendment to remove the power from the bill. It allows the Scottish Government the opportunity to explain the need for that provision.

I move amendment 7.

Michael Russell: I thank Alex Rowley for his useful probing amendment. I know that both the Delegated Powers and Law Reform Committee and the Law Society of Scotland were concerned

that the power might not exist within the 1972 act. I hope to be able to set Mr Rowley's mind at rest.

Section 1(1) of the bill gives the Scottish ministers the discretionary power to continue to keep devolved law in line with EU law after the implementation period. Section 1(4) sets out some of the things that can be done using the power to amend existing EU law implementation.

That aspect of the power was drafted on the basis of a potential future need to amend domestic legislation as a consequence of existing EU requirements, rather than as a consequence of necessarily reflecting any developments in EU law.

I will give a general example. In implementing EU obligations, member states are often allowed a degree of discretion in determining how to implement a particular measure. It is possible that the Scottish ministers might, in the future, consider that they want to exercise a discretion differently. For example, ministers might have previously decided to appoint body X as a competent authority under an EU directive or regulation but, as a result of changing circumstances, might later consider it to be more appropriate to appoint body Y.

The power under section 1(4) is about enabling ministers to make that type of refining provision without the need for primary legislation. That sort of provision does exist elsewhere. It has recently been taken forward under the draft Feed (Transfer of Functions) (Miscellaneous Amendments) (Scotland) Regulations 2020, which were laid in Parliament in draft form on 9 November using the power that we have under the 1972 act. That draft Scottish statutory instrument transfers competent authority functions under EU law in the field of the enforcement of animal feed law in Scotland from local authorities to Food Standards Scotland. The SSI also takes powers to administratively sub-delegate those functions to certain local authorities where that is appropriate.

That is the sort of provision that could be made in accordance with section 1(4) of the bill. If that section is deleted and no other delegated powers are available, primary legislation would be required to take that sort of provision forward. That would not be a good use of parliamentary or Government time.

For those reasons, although it is useful to probe amendment 7 and to discover whether there is support for it in legislation, I do not believe that that amendment is appropriate. I ask Alex Rowley, having heard me explain the situation, not to press amendment 7 to a vote.

Amendment 12 in my name is a minor and technical amendment that is lodged solely to clarify the intended effect of section 1(5)(c).

Section 1(5) enables regulations under section 1(1) to make provision for the charging of fees or other charges in connection with the carrying out of a function conferred on a Scottish public authority by virtue of regulations made under section 1(1).

The amendment makes it clear that the ability to sub-delegate, which is provided for at section 1(5)(c), relates only to that specific power to make fee-charging provision, and does not relate to any other aspect of the power to make regulations under section 1(1).

Dean Lockhart: We will support the cabinet secretary's amendment 12.

Regarding Alex Rowley's amendment 7, we share his concerns about the uncertainty surrounding what the power might mean in future, given that we do not know which future EU laws would be kept pace with. That concern was also raised by the Law Society of Scotland.

I hear what the cabinet secretary said about provisions in other legislation but I remain unconvinced that his explanation addresses the issue. I will therefore wait to see whether Alex Rowley presses amendment 7.

Patrick Harvie: I was open to hearing Alex Rowley's rationale for amendment 7. It would be a serious concern if the deletion of the power in this section was to be permanent. The cabinet secretary has indicated the kind of scenarios in which it might be used so I am satisfied with the discussion that has taken place already.

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

Amendment 7, by agreement, withdrawn.

Amendment 12 moved—[Michael Russell]—and agreed to.

Section 1, as amended, agreed to.

After section 1

The Convener: Amendment 28, in the name of Dean Lockhart, is grouped with amendments 41, 11, 22, 23, 44, 45, 46, 24, 47, 25, 48, 26, 27 and 49.

I remind members of the procedural information that is noted in the groupings. If amendment 24 is agreed to, I cannot call amendment 47, and if amendment 27 is agreed to, I cannot call

amendment 49 because amendments 47 and 49 will be pre-empted.

Dean Lockhart: Amendment 28 provides for the Scottish ministers to prepare and lay before Parliament a statement of the criteria to be determined on whether to exercise section 1 keeping pace powers before the power is used for the first time. The amendment is based on the recommendation in paragraph 38 of the committee's stage 1 report, which states that the bill should be amended

"to provide guidance setting out the criteria which will apply to the use of the power."

It is also based on evidence given by Professor Keating and others that there is a need to know on what basis future EU laws will be selected. Amendment 28 seeks to address those issues.

Amendment 11, in the name of Liam McArthur, covers similar ground and requires ministers to publish a strategy for the use of keeping pace powers. We will support amendment 11.

Tom Arthur's amendment 41 also provides for the Scottish ministers to publish a statement of their policy that shows the factors that they will take into account when considering the use of section 1 powers. My personal preference is, however, the combination of amendments 28 and 11. They cover similar ground to amendment 41 but amendments 28 and 11 go further.

I have lodged amendment 46 on behalf of the Law Society of Scotland. It required additional information to be included in the Scottish Government's reports on the circumstances in which the keeping pace power is not exercised.

Concerns were raised during stage 1 evidence that there was no provision in the bill for the Scottish ministers to publish details about legislation that they decide not to follow in the future. Amendment 46 addresses those concerns by requiring the Scottish Government reports to set out the circumstances in which the section 1(1) powers are not exercised in the future.

09:30

We will support Patrick Harvie's amendments 44 and 45, which relate to additional reporting requirements. The cabinet secretary's amendment 24 pre-empts Patrick Harvie's amendment 47, but we prefer Patrick Harvie's amendments 47 and 48. They shorten the reporting period from one year to six months and provide for earlier and more frequent reporting to Parliament. We also prefer Patrick Harvie's amendment 49 to the cabinet secretary's amendment 27, which we believe seeks to dilute the reporting provisions in the bill. However, we will support the cabinet secretary's amendment 23 and welcome his intention to set

out how he will use those new powers in the future. We will also support his technical amendment 26.

I move amendment 28.

Tom Arthur (Renfrewshire South) (SNP):

There has been much discussion throughout the scrutiny of the bill about the need for Parliament to be sighted on the potential uses of the power to align. I think that all of us who support the principle of the bill agree that there is a need to ensure that that happens. That includes the Government and I thank the cabinet secretary for working with me on amendment 41.

There have been different suggestions as to how we might make it happen, but the danger in writing those into the bill in great detail is that, however well intentioned that approach might be, it ends up creating a restrictive provision that does not function properly and overburdens both Parliament and Government. Amendment 41 seeks to get to the heart of the matter in a way that is proportionate.

We are concerned with understanding the Government's intentions. We want to know how it will approach questions of alignment and the factors that it will take into consideration and we want to be able to measure its actions against that framework. The amendment requires ministers to

"publish ... a statement of their policy on the factors to be taken into account when considering whether to use the power"

to align

"under section 1(1)."

It deliberately does not go into specific detail about the precise contents of that statement because if the past few years have shown us anything it is that circumstances can change and change quickly. What seems to be a pressing issue today might be a footnote tomorrow, and vice versa. For that reason, the amendment also allows the Government to amend its policy statement whenever it is appropriate to do so and does not tie it to particular periods of time.

I appreciate that the cabinet secretary has indicated that he is very happy to agree a way of working that gives Parliament an early involvement in consideration of any potential alignment and I see the policy statement as being part of that process. I know that colleagues will not be shy in letting the Government know if they do not think that the approach is right. The policy statement required by amendment 41 is a key means of facilitating that in a way that does not tie the Parliament up in overly bureaucratic processes.

In conclusion, I see amendment 41 as a proportionate response to the concerns raised. It

will allow Parliament to be sighted on the Government's intentions in a way that does not render the bill inoperable and, on that basis, I ask colleagues to support it.

The Convener: I welcome Liam McArthur to the meeting and ask him to speak to amendment 11 and other amendments in the group.

You are still on mute, Liam; hold on a second. We are not quite there yet. We will suspend for five minutes to make sure that your sound is working.

09:35

Meeting suspended.

09:38

On resuming—

The Convener: We will start again. I welcome Liam McArthur to the Finance and Constitution Committee's meeting.

Liam McArthur (Orkney Islands) (LD): Thank you, convener. I hope that that is better. I apologise—it was all going so swimmingly until you invited me to speak.

Amendment 11 would require ministers to prepare and publish a strategy on their section 1 powers to make provisions that correspond to EU law. I welcome Dean Lockhart's and Patrick Harvie's earlier intimations of support.

As others have observed, the bill hands over substantial decision-making powers to ministers. The powers might be necessary for Scots law to keep pace with EU legislation but, as things stand, only ministers get to decide whether—[*Inaudible.*] Meanwhile, Professor Aileen McHarg reminded the committee that it is a power, not a duty. Amendment 11 seeks to address that and the concerns that were raised by others at stage 1 by ensuring that ministers are accountable for their decisions. It would require ministers to set out their priorities in a strategy, allowing the Parliament the chance to scrutinise and approve it.

At a previous meeting, Mr Russell told the committee that people who were opposed to keeping pace powers were frustrating the will of the people. In this bill, he is reserving for himself, as a minister, the power to frustrate the will of the people and not to keep pace.

If a strategy is published, the rest of the country could at least get a glimpse into the thinking behind decisions not to use the power. We must certainly avoid any undue delay in keeping pace, but Parliament has a duty to find out what ministers are planning to ignore for keeping pace

purposes, and to hear what ministers intend to regulate for.

All that power is in the hands of the minister. As of today, the minister is in a minority Government, which would have monopoly powers to trigger the keeping pace power. It therefore seems reasonable that ministers are not only held to account but—as the amendment provides—held to account in advance. I look forward to hearing what other members of the committee, as well as the cabinet secretary, have to say.

Michael Russell: I thank members for lodging their amendments. I make it clear—to repeat what I said at the outset—that I am keen that, in respect of this group and the previous group of amendments, we find a way forward together. I will therefore not indulge in name calling or other such exchanges with any members; we should try to find a way to make the provisions work for everybody. I accept that what we have so far is not right or enough, so let us see if we can get something better between now and stage 3.

I have listened to members' views on the need for greater clarity, and I have lodged amendments 22 to 27. The Government supports amendment 41, in the name of Tom Arthur. I believe that there are problems with the approach of Liam McArthur and Patrick Harvie, so I ask them not to move their amendments. I ask them instead to be part of trying to get—I make this commitment—a better set of amendments together for stage 3. I do not support Dean Lockhart's amendments. One of them in particular would, by and large—whether intentionally or not—wreck the whole process.

I start with the factors that will apply to any decision to use the powers. I agree with the Faculty of Advocates, which suggested in its submission that attempting to define criteria in the bill

“would be an impossible task.”

We need to find a thoughtful way to ensure that we know what the bill is for and that the power to use it is being effectively scrutinised. It is reasonable to ask that any Government sets out a statement of the factors that are taken into consideration in determining whether to use the powers in any situation, and that those reasons can be questioned, interrogated and, if necessary, contradicted.

The statement needs to cover things such as the overall intention to align and whether it would be in Scotland's best interests; the impact on any future free trade agreements and whatever arises from the—woefully misbegotten—United Kingdom Internal Market Bill; consideration of the economic and social costs and benefits; and practical considerations such as the Government's capacity to bring forward legislation.

Crucially—this is where I very much prefer Tom Arthur's amendment to Dean Lockhart's amendment—it is expected that the statement will need to be amended, possibly frequently in its early days, as developments in these areas continue to unfold. The Government must be open to that process and to listening to feedback from Parliament and others. Tom Arthur's amendment specifically provides for such a statement to be revised from time to time, which is necessary, given the uncertainty around some of those factors. There needs to be flexibility in uncertain circumstances that are not of our making.

Amendment 11, in the name of Liam McArthur, is broadly in line with amendment 41, and I welcome that. However, the key difference between the two amendments is that Mr McArthur's amendment also requires a statement of the process that ministers followed in determining whether to use the power. I am keen to engage with the Parliament, and I would want to arrive at a situation in which we all understood why the power was being used, but to go substantially further than that would add greatly to the burden.

I turn to the forward-looking report in which ministers would set out their intentions, which is addressed by amendments 22 and 23 in my name, amendment 11 in the name of Liam McArthur and amendments 44 and 45 in the name of Patrick Harvie. I think that we all agree that there should be a forward look, and that the Parliament should have greater visibility and knowledge of ministers' intentions and should be able to scrutinise them; that is why I lodged amendments 22 and 23. However, the key difference between those amendments and the amendments that have been lodged by Patrick Harvie and Liam McArthur is that, under amendments 22 and 23, the forward-looking aspect would not relate specifically to a fixed time period but would be wider.

The problem with requiring a report that sets out a very specific time period is that the Government will already have been engaged in making decisions. Therefore, those producing a report would need to do a wider horizon scan and ensure that they know all the things that are in the process of being developed. That is crucial, and therefore to limit the time would be difficult and unhelpful.

Those are the other reasons why I think that Tom Arthur's approach—and mine—is a better one.

09:45

There are some technical concerns—as there always are. Patrick Harvie's amendment 45

requires a first forward-looking report to be prepared and laid within two months of the power to align being commenced. The problem with that is that the usual processes that need to be completed following stage 3 proceedings mean that commencement is not expected until March 2021. Scottish Parliament elections are scheduled for 6 May 2021, and the usual pre-election period restrictions will apply during the period leading up to that. Therefore, there would be a collision between a requirement of legislation and what will be happening electorally.

Mr Harvie has attempted to address the fact that there need not be a first report until the end of the first reporting period, but the bill does not say that there would not be one. Amendments 24 and 25, in my name, address that issue. Including them would mean that the report would be prepared at the end of the first reporting period.

Amendment 47 seeks to change the first reporting period to six months. That would take us only to 31 August 2021, which is too soon, in my view. We need to allow time for the process. If the Parliament returns in late May, we simply will not have enough time to understand what we are trying to do and how we should do it. It would be an onerous reporting cycle and would not be particularly practical.

Amendment 49 requires publication of reports in that cycle and within two months of the end of a reporting period. We have been quicker than that on the emergency continuity legislation, for example. I think that we could do better than reporting in two months.

I also want to draw attention to the issue of proportionality. I have to say that amendment 46, in the name of Dean Lockhart, is far from being proportional. Whatever the intent behind it, it would bog down the reporting requirements in a level of detail that could not have been intended by Mr Lockhart.

On average, more than 2,000 EU legal acts are produced every year. We cannot even begin to consider the capacity of the Government and Parliament to legislate to align with all of those. Many of them relate to matters that are only of interest to the EU internally—such as appointments to boards and the adoption of negotiating positions—and which we would never consider bringing into the law of Scotland. Dean Lockhart's amendment requires us to, and to report on all those matters. That would be far from proportionate.

There is a lack of proportionality in the consultation period in Liam McArthur's amendment 11, which I think is unintentional. Some technical aspects of the amendment are vague, but there is an onerous nature to their

requirements. The broad intention of the amendment appears to be that the Government would be required to update its strategy every 12 months, and to lay it in draft for up to 120 days—that is four months of the year. If at the end of that period it decided that it was necessary to change the strategy, there would be a requirement to consult further. Carving out four months from 12 is far too much, and more time would be required if the strategy had to be reconsidered.

The practicality of Tom Arthur's amendments and mine makes me prefer them to those from Patrick Harvie and Liam McArthur. However, I accept that there are elements in both sets of amendments that could be useful. Therefore, if the bill remains unamended or is amended by myself and Tom Arthur, I commit to further consultation with Liam McArthur and Patrick Harvie to see if we can bring in some elements of what they have proposed.

On groups 1 and 3, I am not resistant to a situation in which members feel that they have greater engagement and more opportunity to influence and that they can change what is being done and scrutinise it. If we can get that into the final bill, I will be pleased.

Patrick Harvie: Clearly, a complex, interconnected set of issues is under consideration, not only in this group but in relation to the wider context. Whether we eventually have a purpose on the face of the bill changes some of the issues that are under discussion in this group.

I do not think that any combination of the amendments in the group should ultimately be the position in the bill when we pass it. That said, it might be sensible for the committee to agree to something that the Government does not like rather than agree only to amendments that it likes, so that the Government has a practical requirement to try proactively to reach an agreement before stage 3, rather than play a more defensive game.

Amendments 28 and 41 would do more or less the same thing: they would place a requirement on the Government to produce a policy to tell us its position, rather than a requirement to seek parliamentary approval for its position. That is the fundamental weakness of those amendments. Amendment 41 also makes it clear that the Government does not even need to tell us its position before using the power. Therefore, neither of those amendments achieves what we need to achieve, which is parliamentary accountability for the decisions that are made, rather than merely reporting.

Those of us who support the basic objectives of the bill have a responsibility to try to strengthen it in ways that are workable. At the same time, the

Government has a responsibility to recognise that the bill will not be acceptable to Parliament unless it is strengthened significantly in terms of accountability, rather than merely having ministers telling us what they want to do.

Liam McArthur's amendment 11 goes substantially further and would mean that a strategy for the use of the power in the bill would need to be approved by Parliament. The cabinet secretary asks a reasonable question about whether the process that is set out in the amendment is too onerous and unwieldy, because of the time involved. It might be possible to refine the amendment and achieve what Liam McArthur is looking for but without the extremely time-consuming aspects. The issue needs further work but, as with Angela Constance's amendments 6 and 10, something very like amendment 11 needs to be agreed to at stage 3.

My amendments in the group try to ensure not only that we shorten the one-year reporting period but that we require a report back as well as a look forward over the proposed six-month period. There would be no requirement for the reporting on the previous period to be consistent with what the Government expected at the outset of that period. If things changed between the Government's setting out the intended use of the power for the next six months and its reporting back on how that six-month period went, that would be fine and perfectly understandable. The cabinet secretary is right that things will change and that the situation will be dynamic, so it would be wrong if we said that the report back had to achieve 100 per cent consistency with what was expected at the outset. Therefore, the right way to go is not to link the two; it is to say that the Government must look forward and then report after the fact.

Dean Lockhart's amendment 46, which relates to decisions not to use the power, also intends to achieve something that I think needs to be achieved. However, my amendments do it better. As the cabinet secretary says, there will be many issues on which the Scottish Parliament and the Scottish Government would never consider using the power. My amendments would require the Government only to look forward or to report back on the use of the power that has been under consideration—that is a more proportionate way to achieve the objective.

Therefore, I will move some of my amendments in the group. I am not yet convinced on the other amendments. If Liam McArthur's amendment 11 is moved, I will probably abstain at this stage, but something very much like it needs to be agreed to at stage 3. If the Government is willing to work with Opposition parties, we will have a group of amendments that lead to a much stronger bill.

However, I caution the cabinet secretary that, if he does not work proactively with Opposition parties to seek that agreement, we will probably end up at stage 3 with another messy group of amendments and the risk of passing an incoherent bill.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): I will comment on amendment 11, in the name of Liam McArthur, and amendment 44, in the name of Patrick Harvie. I will make some of the same points about proportionality that Tom Arthur made in speaking to amendment 41, which I support.

I understand the motivation behind amendment 11, and I sympathise with the need to publish a strategy timeously. However, as others have pointed out, with 2,000 or so EU directives, I am not convinced that amendment 11 represents a proportional approach. I am also unsure how the envisaged reporting period would sit with the reporting periods in the bill.

Likewise, I sympathise with the intentions behind amendment 44 in seeking to align with reporting periods. However, again, it would seek to put too much in the bill. For instance, it would require ministers to anticipate what regulations are likely in the forthcoming six-month period, with what looks like an arduous requirement for detail.

I understand the motivation for those two amendments, but they put too much into the bill.

Alex Rowley: I am not sure that amendment 41, in Tom Arthur's name, goes far enough to recognise the importance of the role of Parliament. Therefore, I am of a mind to support Liam McArthur's and Patrick Harvie's amendments. I will wait to see whether they move them, but it is important that the cabinet secretary gets a clear message from the committee that the role of Parliament needs to be recognised and that we need to go further than what either he or Tom Arthur proposes.

The Convener: I call Dean Lockhart to wind up the debate and to say whether he will press or withdraw amendment 28.

Dean Lockhart: I welcome the cabinet secretary's recognition of the need for more transparency on the use of these significant powers. My amendment 28 and amendment 11, in the name of Liam McArthur, reflect concerns that were raised during the committee's evidence taking at stage 1. A number of stakeholders called for the Scottish Government to publish the factors that it would take into account in using the keeping pace powers and to take representations on that strategy. It is not overly burdensome on the Scottish Government to do that.

Amendment 46 in my name, which concerns any future EU laws that the Scottish ministers

decide not to follow, reflects concerns raised by the Law Society of Scotland. I am happy to work with the cabinet secretary on simplifying and considering the definition of which laws should be reported on with regard to the keeping pace powers not being used. However, as a matter of principle, I want that reporting requirement to be included in the legislation in some form.

I will press amendment 28, but I will not press amendment 46 at this stage.

The Convener: The question is, that amendment 28 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)
Lockhart, Dean (Mid Scotland and Fife) (Con)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

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

Amendment 28 disagreed to.

Section 2—Limitations on the section 1(1) power

10:00

The Convener: Amendment 29, in the name of Murdo Fraser, is grouped with amendments 4, 30 to 32, 13, 1, 14, 34, 5, 2 and 3.

Murdo Fraser (Mid Scotland and Fife) (Con): I have lodged three amendments in this group: amendments 29, 32 and 34, which all seek to clarify the use of the keeping pace power in section 1(1). They have no substantial policy impact; they would merely provide clarification, in the bill, on the Scottish ministers' ability to exercise the power. Dean Lockhart will speak to other amendments in the group.

Amendment 29 would clarify that the use of the keeping pace power in section 1 will be subject to the restrictions and limitations in the Scotland Act 1998, as amended, so that any use of the power is consistent with the reserved and devolved settlement in the 1998 act. The bill would therefore make clear that nothing can be done in relation to reserved areas—that might well be implied, but it would do no harm to make the limitation explicit.

Amendment 32 would clarify that the section 1 keeping pace power could not be used to

“modify, directly or indirectly, the fiscal framework”,

with the term “fiscal framework” being defined in amendment 34. I am sure that that would not be the Scottish Government's intention in using the keeping pace power, but having such provision in the bill would be an important safeguard, to ensure that the matter is beyond doubt.

I move amendment 29.

The Convener: I welcome Mike Rumbles and invite him to speak to amendment 4.

Mike Rumbles (North East Scotland) (LD): I am pleased to be here; I will speak only to amendments that I lodged.

Amendment 1 and consequential amendments 2 to 5 are very straightforward. I have been concerned about the Scottish Government's enthusiastic—let me put it that way—use of regulations in making the law of Scotland. Of course there is a place for using regulations. For example, when fees need to change because of inflation or when minor adjustments to statute law are needed, it makes sense to use regulations to update our laws.

However, that is precisely my point: regulations, as secondary legislation, should be used only in routine circumstances. I think that we all need to be reminded of that basic principle. If major changes are to be made to our laws, the proper place to do that is in primary legislation. I am always surprised to have to make that point. However, I suppose that I am not that surprised, because the predilection for using secondary legislation rather than primary legislation has not by any means been the sole preserve of the current Scottish Government.

I hope that the minister, Mike Russell, will remember, if he casts his mind back far enough, that both he and I often railed against ministers in the Labour-Liberal Democrat coalition Government for using secondary legislation when primary legislation was far more appropriate. I remember when Mike Russell was a rather articulate and vocal advocate for using secondary legislation appropriately.

Governments of all colours seem to find it incredibly convenient to use regulations when they should be using primary legislation. The single purpose of amendment 1 and my four consequential amendments is to limit the power of Scottish ministers to using regulations for the purposes for which they were intended. It has been my experience since I was first elected to the Scottish Parliament 21 years ago—as Bruce Crawford was, too—that Scottish ministers of all

colours do not like to have their powers limited. That is a truism, is it not?

The purpose of amendment 1 and consequential amendments 2 to 5 is simply to exclude the major provisions in section 4 from changes by regulations and ensure that, if and when changes are needed, they are made by primary legislation, which is why section 2 needs to be added to. Those changes are about abolishing a function of an EU entity or public authority, changing that function, creating or widening the scope of a criminal offence and creating or amending a power to legislate.

I trust that members will agree that those are major issues and, that being the case, that primary rather than secondary legislation should be used. It is not enough to imply, as the bill does, that those issues are important. The minister believes that they are important. Why? Because they are to be dealt with by the affirmative procedure and not the negative procedure. If he believes that, everyone must recognise that the minister accepts that those issues are important. If I may say so, the minister needs a gentle nudge; we need to gently nudge him away from the affirmative procedure in secondary legislation to where the issues should be dealt with, which is in primary legislation.

Finally, if there is an objection to dealing with those important issues in primary rather than secondary legislation because of time constraints, I can put any such concern to rest. All of us know all too well that the EU moves very slowly indeed. If the EU wanted to change any of those major issues that I have highlighted in my amendments, it would certainly take many months, if not years, to change them, so there would be plenty of time for the Scottish ministers to get primary legislation through the Scottish Parliament, as they should do.

I hope that members will recognise that any argument against my amendments on the grounds of the need for speed and flexibility from the Scottish Government simply does not hold water. I emphasise that this is not a party-political issue; it is simply about ensuring that we use secondary legislation for the purposes for which it is intended. I have made a case for my amendment 1 and its consequential amendments and I hope that the minister accepts it and the spirit in which I have argued for it. I hope that committee members will see its validity too.

The Convener: Thank you for reminding me that I have been here for 21 years. I guess that that makes me a veteran like yourself.

I call Dean Lockhart to speak to amendment 30 and other amendments in the group.

Dean Lockhart: My amendments 30 and 31 would prevent the use of the keeping pace powers by the Scottish ministers in circumstances where secondary legislation with no or limited parliamentary scrutiny could otherwise be used to implement significant new policy proposals that had no equivalent in retained EU law or to make provision that required a significant change to Scots law or Scottish Government policy.

The amendments are not intended to be wrecking amendments; I believe that they entirely reflect evidence that was heard at the committee. For example, paragraph 68 of the committee's report recommends the Delegated Powers and Law Reform Committee's view that

"primary legislation is the most appropriate vehicle for domestic law to implement significant new policy proposals that have no equivalent in retained EU law",

and my amendment 30 reflects that wording.

Amendment 31 also reflects concerns that the Law Society of Scotland and the Faculty of Advocates expressed that the bill as drafted provides inadequate powers for the Parliament to scrutinise substantial policy changes or significant changes to Scots law.

As a matter of parliamentary principle, I agree with what Mike Rumbles has just said. It is not appropriate for the Scottish ministers to have powers to introduce significant changes to policy or major changes of Scots law without parliamentary or stakeholder scrutiny. That is why we will support Mike Rumbles's amendments 1 and 4, which seek to remove a list of significant provisions from the keeping pace powers and from being subject to the affirmative procedure.

We will be happy to support the cabinet secretary's amendments 13 and 14.

The Convener: The cabinet secretary will speak to amendment 13 and other amendments in the group.

Michael Russell: I will begin with the amendments in the group that were lodged by Murdo Fraser and Dean Lockhart. As the committee is, I think, fully aware, the main purpose of the power in part 1 of the bill is to maintain the Scottish ministers' ability to make subordinate legislation where appropriate in order to keep devolved Scots law aligned with EU law as it develops. It will also allow for the refining and updating of retained EU law as appropriate within devolved competence. That is largely a replacement of the power that we lost at the end of the EU exit transition period.

Section 2 includes certain circumstances in which the power to align cannot be used. The restrictions cover a number of key policy areas, including imposing or increasing taxes, creating "a

relevant criminal offence” and establishing a new Scottish public authority. Those aspects are in the bill. To state in the bill that the power in section 1(1) cannot be used to legislate for reserved matters is, at best, redundant and would set an unhelpful legal precedent; at worst, if it seeks to expand on the competence restrictions that are already provided for by the Scotland Act 1998, it is entirely inappropriate.

Section 2(1)(h) prevents the section 1(1) power from modifying the Scotland Act 1998, to reflect the principle that certain matters are of such constitutional significance that changing them using that power would be inappropriate. However, because an act of the Scottish Parliament cannot make provision that relates to reserved matters—as provided for in schedule 5 to the Scotland Act 1998—it is not clear what amendment 29 seeks to achieve.

Amendment 32 is similarly unnecessary or entirely inappropriate. The fiscal framework is an agreement between the Scottish and UK Governments, which determines how the Scottish Government is funded. By mutual agreement between the parties, the agreement will be reviewed after the Scottish Parliament elections in 2021. It does not make any sense to include a provision in the bill that the power under section 1(1) cannot modify that agreement. I am not clear what it is trying to achieve, except to restate the obvious. It follows that attempting to define the agreement in an act of the Scottish Parliament, as amendment 34 seeks to do, should also be resisted.

In relation to amendments 30 and 31, as I said during stage 1, the Scottish Government would always use primary legislation where that is the most appropriate vehicle for legislative proposals. Possible examples might be were the EU to introduce a law in an area in which we had gained new competence or in areas of major innovation. However, the Government remains of the view that flexibility should be maintained, because primary legislation would not necessarily be appropriate in every situation.

As the committee is aware, the bill is intended for circumstances that fall short of justifying primary legislation and it recognises the overall limit of legislative time available to the Parliament to align with EU law that which would previously have been achieved by the European Communities Act 1972. Therefore, the bill provides flexibility, so that the most appropriate legislative vehicle can be used, depending on specific circumstances, while allowing alignment of EU law where that is in the best interests of Scotland. Attempting to limit the scope of the power to exclude “significant new policy proposals” would be neither practical, given the significance of

differences involved, nor possible—by definition—in the bill.

The concept and content of retained EU law are already complex. A limitation such as that proposed in those amendments would create further uncertainty and inflexibility in the ability to use the powers. Similar concerns apply to amendment 31, which refers to provision that would constitute a “significant change”.

10:15

There are huge difficulties with the terms in the amendments: “significant new policy proposals”; “new policy” areas; and “significant change to ... policy”. Those terms will all mean different things to different people. Accepting the amendments would undermine the entire purpose of the section 1(1) power, and one wonders whether that is their purpose. Their likely effect would be to proliferate, unnecessarily and disproportionately, the number of bills that would be required to avoid legal risk, with undesirable implications for the resources of the Government and the Parliament.

For all those reasons, and many more, I ask the committee to reject those amendments if they are moved.

I turn to Mr Rumbles’s proposals. The limitations set out in section 2 broadly replicate the restrictions that apply to the power in section 2(2) of the European Communities Act 1972; they also reflect the principle that certain matters are of sufficient importance or constitutional significance that changing them by using the power under section 1 of the bill would be inappropriate. The Government therefore believes that the limitations set out in section 2 comprise a proportionate balance. That is, of course, what we also believed of section 13 of the previous continuity bill.

Although I accept that Mr Rumbles has a long-standing objection to regulation, I know that he has a similar objection to the current continuity bill because he moved an amendment to remove section 13 in its entirety from the original continuity bill. I accept that Mr Rumbles recognises the uncertainty about when the power under section 1(1) would be used. That is an unfortunate consequence of Brexit, which I understood he opposed. However, it is precisely because of that uncertainty that the Government considered that such flexibility in the power is needed, to ensure its workability. In recognition of the width of the power, and where regulations under section 1(1) create or amend a power, the Government is clear that the affirmative scrutiny procedures should apply, as we recognise that the Parliament will want full assurance that legislative sub-delegation is done in an appropriate manner.

In drafting the bill, and particularly in considering appropriate limitations on the use of the power, we gave considerable thought to what was balanced and proportionate. That will be an entirely legitimate debate to continue as the bill goes through the legislative process. The significant additional limitations on the power to align that are proposed in amendment 1 would not help that matter; they would simply restrict it unduly. They would also undermine all our ability to respond effectively and proportionately to the challenge of maintaining the highest standards outside the EU, which I understood to be an objective of the Scottish Liberal Democrats.

The bill provides that the provisions that amendment 1 proposes should be restricted are to be subject to the affirmative procedure, which is balanced and proportionate. That is also the view of the Faculty of Advocates in its response to the call for evidence at stage 1. It said:

“Section 4(2) of the Bill lists a number of purposes for which legislation will require the affirmative procedure. We consider those are appropriately identified as requiring the affirmative procedure because of the importance of the subject-matter. There are no additional categories which suggest themselves as requiring the affirmative procedure.”

I agree with that view and am pleased that it supports the outcome of the considerable thought that went into drafting a balanced and proportionate approach. Amendment 1 fails to recognise that. Alas, Scotland is no longer part of the EU. The amendment completely undermines the purpose of the power to align and risks primary legislation being required for technical matters to ensure that our domestic law can operate effectively.

Amendments 2 to 5 are consequential on amendment 1. I cannot lend any more support to them than I can to amendment 1.

Finally, the amendments in my name are technical ones and have been made at the request of the Equalities and Human Rights Commission. As drafted, section 2(1)(i) of the bill provides that the power to align with EU law cannot be used to

“modify the Equality Act 2006 or the Equality Act 2010.”

Section 2(2) qualifies the limitation on the modification of equalities legislation if

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

Having section 2(2) apply to the 2006 act is intended to provide that, should provision in that legislation not be reserved, the protection afforded to it by section 2(1) would not prevent the removal of a protection, as long as equivalent alternative provision is made.

However, the Equalities and Human Rights Commission has expressed a desire that section

2(2) should not apply to the Equality Act 2006. The Government does not consider those amendments to be essential. Following discussions with the commission, we are happy to lodge technical amendments to provide that the qualification at section 2(2) of the continuity bill will no longer apply to the 2006 act. If that is agreed to, the result of those amendments will be that the power under section 1(1) cannot be used to modify the 2006 act in any way. I ask the committee to support those technical amendments.

John Mason (Glasgow Shettleston) (SNP):

The cabinet secretary has already touched on all the amendments in the group. I probably would have intervened on Murdo Fraser if that had been possible, and I would invite him to intervene on me if that were possible, because, frankly, his amendments 29, 32 and 34 puzzle me. Murdo Fraser is normally quite a logical person, but his amendments seek to set out that the Government or the minister cannot do something that is reserved. That is already absolutely clear in the law.

It is a political question—many of us would like to see different powers not reserved, but every member of the Parliament totally accepts the fact that certain powers are reserved. The Presiding Officer has a responsibility to ensure that we do not legislate in areas that are reserved. I express my real puzzlement as to why Murdo Fraser considered that it was necessary to lodge an amendment to say that we could not get involved in reserved matters. We all know that; that is already perfectly clear in legislation.

Similarly, as has been said on amendment 32, the fiscal framework is largely an agreement between the Governments, and it would become problematic if we try to define it too tightly. We know that a review will take place, which could be quite wide ranging. I am keen that both the Scottish and UK Parliaments should scrutinise the fiscal framework review. It should not be a stitch-up between the two Governments. I do not consider that this bill is the place for amendment 32 and do not see what it adds to what we already expect to happen.

The Convener: I see that Dean Lockhart wants to come back in. Do you have a question, or do you want to make a stronger point?

Dean Lockhart: My request was to do with my amendments, so there is no need for me to come in at this stage.

The Convener: Okay. I call Patrick Harvie.

Patrick Harvie: I would like to place on record why I will oppose all the amendments in this group with the exception of the two technical amendments, 13 and 14.

Mike Rumbles makes a fair point that Government generally likes to keep power to itself, and the use of secondary legislation is sometimes one means by which it does that, and that Parliament, regardless of which political party is in office at any one time, often seeks to curtail or constrain the powers that Government has taken to itself. However, Parliament should do so in a coherent way, and I fear that Mike Rumbles's amendments do so in a scattergun way, with perhaps a lack of respect for the basic principles of the bill. Most MSPs, and the committee, have supported those principles, but some amendments in this group, which could fairly be described as wrecking amendments, seek to undermine them.

As for Murdo Fraser's amendments, particularly the desire to restate the obvious fact of the reservations of powers in the Scotland Act 1998, I am not at all inclined to restate such an unhappy fact and do not think that we need to put those reservations in the bill.

Tom Arthur: I echo the cabinet secretary and John Mason's comments. Amendment 29, in the name of Murdo Fraser, is superfluous. In all my experience of legislating in this place, I do not think that I have ever had to specify that we would not legislate on a reserved matter. That is a given. I hope that I am wrong, but I suspect that a political motive might be behind the amendment. Similarly, I will not support amendment 32, which seeks to define the fiscal framework in the bill.

On amendment 31, in the name of Dean Lockhart, I simply note that we have not yet agreed on the long title of the bill. This is a continuity bill and, as such, it has to be dynamic and recognise how EU law will evolve, rather than try to freeze it at the point of retained law. For that reason, I cannot support amendment 31.

I recognise what Mike Rumbles is attempting to do, but the measures that he proposes, along with Dean Lockhart's amendments in this group, seek to render the bill if not inoperable then close to it. For those reasons, I cannot support those members' amendments.

I will, however, support the technical amendments in the name of the cabinet secretary.

Alex Rowley: I accept the arguments that the cabinet secretary makes about Murdo Fraser's amendments: I do not think that there is any need for them.

The fiscal framework that the Scottish Government negotiated must go down in history as an example of how not to negotiate and how to get a bad deal, so the sooner we can change the fiscal framework, the better. Irrespective of that, I agree that there is no need to include a provision on the framework in the bill.

When I heard Mike Rumbles eloquently argue his case, it reminded me of Tavish Scott coming to a Local Government and Communities Committee meeting to move an amendment. In doing so, he acknowledged that, when he was in Government, he had argued against the very same measure. It seems that members who are in Government take a different view from when they are in Opposition. The problem with what Mike Rumbles has said is that he goes too far the other way in seeking to strike a balance. We need the flexibility, so I would not be able to support his amendments.

Likewise, Dean Lockhart's amendments take away that flexibility, so I would not support them.

I am happy to support the cabinet secretary's technical amendments.

The Convener: Mike Rumbles wants to come back in. You have already had a chance to speak, but I will let you come back in to make a short comment, if you wish to do so.

Mike Rumbles: Thank you, convener—I appreciate being called. I want to respond briefly to Patrick Harvie and Alex Rowley's comments. I do not disrespect the bill at all; I support the bill, and I would like to vote for it. I think that Patrick Harvie misunderstands my point of view. I voted against the previous continuity bill because I supported the direction of the Presiding Officer, who said that parts of it were not legal. I would not support such a bill—I am a parliamentarian. That is why I am focused on that aspect, and it is why I would not support that bill. For the same reasons, I have lodged my amendments at this stage. They strengthen Parliament, as against the Executive.

I heard Alex Rowley say that I am going too far with my amendments—they do relate to major issues—and Patrick Harvie is generally supportive of the principle. I am not precious about it—I want us only to do things properly and to respect Parliament properly, rather than the Executive. Prior to stage 3, if my amendments are not successful today—as I say, I understand that people think that I have gone too far with my proposals—I will be happy to talk to those members and to propose amendments that they would, I hope, support at stage 3 if they really are supportive of the principle that I am trying to argue.

The Convener: I call Murdo Fraser to wind up, and to press or withdraw amendment 29.

Murdo Fraser: I will just wind up briefly on this group, as we have had a lengthy discussion on the matters that the amendments cover.

I have listened with great interest to what the cabinet secretary and committee colleagues have said. They did not seem to have any substantive argument against amendment 29 and my other

amendments, other than that they restate the current law and are therefore unnecessary on that basis. The biggest offence that my amendments cause is simply one of repetition: I would be repeating in the bill what the understanding of the law is. I do not think that that does any harm; I think that it is useful to remind people of the context of the bill and of the exercise of its powers. On that basis, I press amendment 29.

10:30

The Convener: The question is, that amendment 29 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)
Lockhart, Dean (Mid Scotland and Fife) (Con)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

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

Amendment 29 disagreed to.

Amendment 4 not moved.

Amendment 30 moved—[Dean Lockhart].

The Convener: The question is, that amendment 30 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)
Lockhart, Dean (Mid Scotland and Fife) (Con)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

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

Amendment 30 disagreed to.

Amendment 31 moved—[Dean Lockhart].

The Convener: The question is, that amendment 31 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)
Lockhart, Dean (Mid Scotland and Fife) (Con)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

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

Amendment 31 disagreed to.

Amendment 32 moved—[Murdo Fraser].

The Convener: The question is, that amendment 32 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)
Lockhart, Dean (Mid Scotland and Fife) (Con)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

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

Amendment 32 disagreed to.

Amendment 13 moved—[Michael Russell]—and agreed to.

Amendment 1 not moved.

Mike Rumbles: For your information, convener, I will not move amendments 2, 3 or 5 when we come to them.

The Convener: Okay, but I will still have to ask you when we get there, I am afraid.

I suspend the meeting for a five-minute comfort break.

10:38

Meeting suspended.

10:43

On resuming—

The Convener: Amendment 33, in the name of Dean Lockhart, is grouped with amendments 38, 39, 8, 9, 40 and 42.

Dean Lockhart: My amendments in this group seek to increase parliamentary and stakeholder scrutiny of the keeping pace powers, as recommended in evidence that we heard in the committee.

Amendment 38 seeks to increase parliamentary scrutiny by providing that the Parliament has the ability to consider the relevant procedure that should apply to regulations that are brought forward by the Scottish ministers and, should the Parliament consider it necessary, agree that a different procedure should apply to those regulations. In particular, the Parliament would be able to require that regulations be subject to the negative procedure, as set out in the bill, the affirmative procedure or the super-affirmative procedure, or that the proposals should instead be subject to primary legislation.

10:45

Amendments 39 and 42 set out the additional procedures that would apply if the Parliament decided that the super-affirmative procedure should apply. They include the requirement to undertake impact assessments and stakeholder consultations. Those amendments are based on submissions from the NFUS and other stakeholders. I remind members that a duty to consult was included in section 15 of the previous EU continuity bill, as drafted. I simply aim to restore the duty to consult.

At stage 1, the committee heard evidence that section 1 would transfer unprecedented power to the Scottish ministers to legislate by way of secondary legislation. The committee's adviser referred to those powers as substantial Henry VIII powers. Professor McHarg told the committee that

"secondary legislation is always sub-optimal"

and that

"the provisions in the bill are not justified in respect of their current breadth."—[*Official Report, Finance and Constitution Committee*, 26 August 2020; c 6, 10.]

Amendments 38 and 39 seek to address those concerns and restore power back to the Scottish Parliament to choose the appropriate level of scrutiny for regulations that the Scottish ministers bring forward under section 1.

My other amendments in the group are consequential to those amendments.

We will support Alex Rowley's amendments 8 and 9, which also seek to increase scrutiny of the

regulations by increasing consultation and requiring the Scottish ministers to lodge an explanatory statement in respect of the regulations with the Scottish Parliament.

I move amendment 33.

Alex Rowley: My amendments were lodged as a result of concerns that were set out by the Law Society of Scotland. Amendment 8 paves the way for new subsection (1A), and amendment 9 contains new subsection (1A).

Amendment 9 states:

"the Scottish Ministers must not lay before the Scottish Parliament draft regulations for approval unless they have ... consulted in accordance with subsection (1B) ... had regard to any representations that are made to them within 60 days of the date on which the copy of the proposals is laid before the Parliament ... laid before the Parliament an explanatory statement setting out ... details of the consultation undertaken ... a summary of any representations received"

and

"the changes (if any) made to the proposals".

New subsection (1B) requires the Scottish ministers to

"lay before the Parliament a document setting out their proposals ... make such a document publicly available ... consult ... such persons or organisations as appear to them to be representative of interests substantially affected by the proposals".

That also applies to bodies and "such other persons" as the Scottish ministers may think appropriate. That is important, because the EU law with which the Scottish ministers wish to align will not have been subject to any democratic input in the Scottish Parliament or, for that matter, in the UK Parliament. It might be possible for the Scottish Government or the UK Government to make representations or lobby the EU, but that is not the same as direct democratic engagement with commissioners, members of the European Parliament or the EU institutions.

Patrick Harvie: Alex Rowley's amendments in the group are a little bit of overkill. Essentially, they take a whole group of measures and in effect make them super-affirmative by default.

Dean Lockhart's amendments seek to achieve something that is important, but they do that in an unwieldy way. The cabinet secretary might say that they are entirely unworkable and unnecessary. They are unwieldy, but they are trying to achieve something that should be considered further at stage 3. Some form of sifting mechanism, and some type of requirement on Government to indicate what level of consultation has taken place, might be achievable.

I fear that those amendments, in the form in which they appear before us today, are unwieldy

and perhaps unworkable. I nevertheless urge the cabinet secretary, in responding to the amendments in this group, to indicate whether he would be open to other amendments that would seek to achieve something of the type that Dean Lockhart's amendments in this group are aimed at achieving.

The Convener: You have the chance to do so right now, cabinet secretary.

Michael Russell: I hope that I will be able to satisfy Alex Rowley and Patrick Harvie, although I do not think that I will be able to satisfy Dean Lockhart. The Scottish Government considers that the scrutiny procedures that have been chosen for the power represent a good balance between allowing for effective and thorough scrutiny and ensuring that there is flexibility. Flexibility is important, as it would enable us to respond quickly where legislative changes are needed.

As I set out this morning, we are committed to working with the Parliament to agree an appropriate and proportionate decision-making framework. That is a work in progress, and I think that we are all indicating that we want to get to stage 3 having done that.

It remains the Government's view that using such a framework to provide for an appropriate level of consultation at the earliest stage of policy development is preferable to devising and prescribing procedural requirements to take effect at the end of the process. We are committed to publishing information on the factors that will be considered when deciding whether alignment is appropriate. I have made clear the Government's support for amendment 41, in the name of Tom Arthur, which will require us to publish a statement. I have also indicated that the amendments from Liam McArthur and Patrick Harvie in the previous group, and elements within them, could be worked on in that regard.

I lodged amendments 22 to 27 to provide that the reporting requirements that are set out in section 7 should include a requirement to set out ministers' intended future use of the power. I have lodged amendment 20, which is in group 7, to provide that, alongside an instrument or draft that is laid using the power, ministers must make a statement that confirms whether there has been any consultation with local authorities and other persons, and if there has been, they must set out the details of that consultation.

The approach that amendment 20 sets out recognises the importance of consultation but, rather than being prescriptive, it allows for a proportionate and appropriate approach. However, it will expose to parliamentary scrutiny the nature of any consultation that has or has not taken place, and ministers will have to justify any

decisions in that regard. There is a strong commitment to consultation, which I know is an issue that Alex Rowley is concerned about.

We think that those measures, taken together with what I have said and the balanced scrutiny procedures, provide for a proportionate response and a proportionate balance. We agree that we should work together, so if Alex Rowley wishes to pursue further the question of ensuring that there is additional sanction and oversight, I am happy to discuss that as we move to stage 3. I think that we are pretty close to a solution, but if there is more that we need to do, I am happy to discuss the matter with him—and with Patrick Harvie, if he wishes to be part of that process.

Patrick Harvie correctly predicted that I would find Dean Lockhart's proposal unwieldy and overly burdensome. It is a rigid, inflexible system, and in some cases it might lead to 68 days of additional scrutiny on proposals that have already been made known to Parliament and consulted on in the policy development process. In my view, that would be unreasonable.

In addition, there would be no flexibility in such a system at all. If urgency was ever needed—this year has shown us that there are circumstances in which urgency is sometimes needed—it would simply be impossible under the amendments. I urge Alex Rowley not to move his amendment. I think that we are moving to an agreement in this area, and I am happy to do more. I urge Dean Lockhart not to press or move his amendments, which are wholly disproportionate to the issue that we are trying to resolve.

The Convener: I ask Dean Lockhart to wind up and indicate whether he wishes to press or withdraw amendment 33.

Dean Lockhart: I thank the cabinet secretary for his response. However, his response mainly dealt with reporting requirements in relation to how the Scottish ministers will use the powers, as opposed to the question of giving Parliament the power to consider the procedure that is applicable to regulations that are laid by ministers, thereby giving the Scottish Parliament additional powers of scrutiny.

I recognise that the provisions that I propose might be unwieldy, but there is no requirement that Parliament scrutinise every set of regulations that is made by the Scottish ministers. It is a residual power that would be available to Parliament if it was thought that the procedure that had been applied by the Scottish ministers did not allow sufficient scrutiny by Parliament, or provide enough opportunity to consult stakeholders on the process.

Before I decide whether to press my amendment, I should be grateful if the cabinet

secretary would indicate whether he would welcome a discussion between now and stage 3 about providing for a sifting mechanism, which would perhaps deal with his points about urgency, and address my concerns about increasing Parliament's power to scrutinise regulations.

The Convener: That is unusual but, in the interests of trying to find a consensus, I will allow the cabinet secretary to come back in.

Michael Russell: Yes, I am always open to discussions about any element of the bill. If there is a need to discuss sifting mechanisms with Dean Lockhart, I would be happy to do so.

The Convener: Dean Lockhart, are you pressing amendment 33?

Dean Lockhart: For the sake of understanding the views of committee members, I will press amendment 33.

The Convener: The question is, that amendment 33 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)
Lockhart, Dean (Mid Scotland and Fife) (Con)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

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

Amendment 33 disagreed to.

Amendment 14 moved—[Michael Russell]—and agreed to.

Amendments 34 and 5 not moved.

Section 2, as amended, agreed to.

Section 3—Duration of the section 1(1) power

The Convener: Amendment 15, in the name of the cabinet secretary, is grouped with amendments 35, 16, 36 and 37.

I remind members of the note that was issued on Monday to say that amendments 35 and 15 appear in the wrong order in the marshalled list and the grouping that were issued last week. We apologise for that error and for any inconvenience caused. Amendment 15 will be taken before

amendment 35. I also refer members to the procedural information noted on the groupings that amendments 15 and 35 are direct alternatives, which means that a decision will be taken on both amendments in that order. If both amendments are agreed to, amendment 35 will succeed amendment 15, and amendment 15 will cease to have effect. If amendment 16 is agreed to, I cannot call amendments 36 and 37 because they will be pre-empted.

11:00

I am sorry if all that was a bit convoluted. I now ask the cabinet secretary to move amendment 15 and speak to all the amendments in the group.

Michael Russell: On the contrary, convener, it was perfectly clear.

This is an important group of amendments. In the bill as introduced, the length of the sunset period was an attempt to provide some stability during all the current uncertainty, to avoid the potential need for numerous bills in a short space of time, to allow time for the Scottish Government to assess the impact of Brexit and to determine what more permanent legislative solutions might be needed. I am still of the view that the uncertainty and lack of clarity since 2016 means that the powers should be available, but I have given thought to the Delegated Powers and Law Reform Committee's recommendations in its stage 1 report and have lodged an alternative amendment that, I believe, addresses the concerns raised, although the solution is not exactly the same.

Amendments 15 and 16 are intended to restrict the maximum duration of the section 1(1) power to a total of 10 years from commencement, while reducing the initial duration of that power to a period of six years. I am not going to get involved in speculation about what might happen within the 10-year period that might affect that; I am simply going to address the legislation as it is now and as it might be.

Amendment 16 allows the initial six-year period to be extended, subject to the approval of Parliament, on one or more occasions. That power may not be used to extend the duration of the section 1(1) power so as to exceed the overall maximum of 10 years. That means that no single extension, or combination of extensions, may amount to more than four years in total. That will afford the incoming 2026 Parliament, if it remains a devolved Parliament, the opportunity to decide in its first year whether the power to align is still necessary. It will also ensure that the power is available to the 2021 Parliament, and will therefore provide the stability that was sought by introducing

the power. I invite the committee to support amendments 15 and 16.

Amendments 35 to 37, in the name of Murdo Fraser, would restrict the default duration of the power under section 1(1) to a period of just three years, with scope to extend that period twice using affirmative regulations for separate periods of up to one year. That means that the power would be available for an absolute maximum of five years from commencement. Given the instability and on-going uncertainty arising from our shambolic exit from the EU, I do not believe that it will be in Scotland's best interests to curtail this ability. Murdo Fraser's amendments do not take account of the circumstances in which we find ourselves, nor do they take account of the recommendations of the DPLRC. The Scottish Government cannot therefore support those amendments.

I move amendment 15.

Murdo Fraser: Amendments 35 to 37 seek to restrict the duration of the section 1(1) power—the keeping pace power—and are similar to amendments that I introduced during the earlier continuity bill, which were supported by the committee at stage 2 of that bill. The sunset provisions in the current bill are much more wide ranging than those in the previous continuity bill.

I listened with interest to what the cabinet secretary had to say about amendment 15. The cabinet secretary and I agree that the 10-year period in the bill as drafted for the duration of the power is too long. The cabinet secretary proposes to reduce that period from 10 years to six years, but that does not go far enough. I would prefer the proposal in amendment 35, which seeks to restrict the duration of the power to three years initially, including a power to extend that.

Amendment 36 seeks to restrict the power of the Scottish ministers to extend the keeping pace powers by regulation to one year, rather than five years, and amendment 37 seeks to restrict any further extension to one year, rather than five years; the extension would be for three years and then for one year and one year, with the potential for five years altogether. If that is deemed to be insufficient, the Scottish Government of the time could come back to Parliament with new legislation that seeks to extend the keeping pace power. However, it seems to me that a five-year period is more than sufficient for the very wide-ranging powers to introduce secondary legislation that are being given to the Scottish Government by Parliament.

I cannot support the cabinet secretary's position in amendment 15 and I cannot support his amendment 16, as it introduces a timeframe that is too long and too wide ranging.

In the interests of giving more control to Parliament than to ministers, I will move amendment 35.

Patrick Harvie: I place on record my support for amendments 15 and 16 and my opposition to the other amendments in the group.

There is a good case for limiting the time compared to what is currently in the bill, but the cabinet secretary's suggestion of six years with modest possible extensions is a reasonable one. I place on record my hope that, before we reach the end of that period, we will be well into negotiating Scotland's accession to the EU in our own right.

Michael Russell: The argument is clear and obvious. We require a reasonable period of time, and the definition of "reasonable" is longer than the one that Murdo Fraser suggests.

Amendment 15 agreed to.

Amendment 35 moved—[Murdo Fraser].

The Convener: The question is, that amendment 35 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)
Lockhart, Dean (Mid Scotland and Fife) (Con)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

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

Amendment 35 disagreed to.

The Convener: I remind members that, if amendment 16 is agreed to, I cannot call amendments 36 and 37 as they will be pre-empted.

Amendment 16 moved—[Michael Russell].

The Convener: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)

Harvie, Patrick (Glasgow) (Green)
 Mason, John (Glasgow Shettleston) (SNP)
 Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Burnett, Alexander (Aberdeenshire West) (Con)
 Fraser, Murdo (Mid Scotland and Fife) (Con)
 Lockhart, Dean (Mid Scotland and Fife) (Con)

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

Amendment 16 agreed to.

Section 3, as amended, agreed to.

After section 3

Amendments 38 and 39 not moved.

Section 4—Scrutiny of regulations under section 1(1)

The Convener: Does Alex Rowley wish to move amendment 8?

Alex Rowley: I am happy to take up the cabinet secretary's offer of further discussion before stage 3, so I will not move the amendment.

Amendment 8 not moved.

Amendments 9, 2 and 3 not moved.

The Convener: Does Dean Lockhart wish to move amendment 40?

Dean Lockhart: No. I will take up the cabinet secretary's offer to discuss the possibility of some form of sifting mechanism at stage 3.

Amendment 40 not moved.

Section 4 agreed to.

11:15

After section 4

Amendment 41 moved—[Tom Arthur].

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

Members: No.

The Convener: There will be a division.

For

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
 Arthur, Tom (Renfrewshire South) (SNP)
 Baillie, Jackie (Dumbarton) (Lab)
 Burnett, Alexander (Aberdeenshire West) (Con)
 Constance, Angela (Almond Valley) (SNP)
 Crawford, Bruce (Stirling) (SNP)
 Fraser, Murdo (Mid Scotland and Fife) (Con)
 Lockhart, Dean (Mid Scotland and Fife) (Con)
 Mason, John (Glasgow Shettleston) (SNP)
 Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Harvie, Patrick (Glasgow) (Green)

The Convener: The result of the division is: For 10, Against 1, Abstentions 0.

Amendment 41 agreed to.

Section 5 agreed to.

Section 6—Explanatory statements: good reasons, equalities etc.

The Convener: We come to the last group. We can probably manage to do it, if we rattle along. Amendment 17, in the name of the cabinet secretary, is grouped with amendments 18, 19, 20, 43 and 21.

Michael Russell: Thank you, convener. During stage 1, the Human Rights Consortium Scotland and Angela Constance raised concerns that the Human Rights Act 1998 is increasingly being challenged at the UK level, and Angela Constance felt that it was important that the act be secured in Scots law. The Scottish Government is committed to ensuring that everyone in our society can live with human dignity and enjoy their rights to the full. We have been consistently clear that we will do whatever is within our power to ensure non-regression on the rights guaranteed by membership of the European Union.

As Scotland's Government, we understand that ensuring that internationally recognised human rights have a meaningful everyday effect is a core function. Indeed, the national task force for human rights leadership, established by the First Minister following the recommendations made in December 2018 by the First Minister's advisory group on human rights leadership, is working to establish an ambitious new statutory framework for human rights that will bring internationally recognised human rights into Scottish domestic law. The key element of that advisory group's remit was to recommend next steps in the Scottish Government's human rights journey, particularly in relation to finding a way forward in the context of post-Brexit uncertainty. The advisory group recommended that the new legislative framework should include: civil and political rights and freedoms; economic, social and cultural rights; environmental rights; and further specific rights belonging to children, women and persons with disabilities, rights on race, rights for older persons and rights for lesbian, gay, bisexual, transgender and intersex communities.

The task force is developing proposals for the new statutory human rights framework to enhance the protection of the human rights of every member of Scottish society, to ensure that Scotland is a world leader at putting rights into practice. Members might wish to note that part of the task force's consideration is about reporting on and monitoring how committed the Scottish

Government is to being open and transparent on matters relating to human rights.

Therefore, significant work is happening in Scotland to protect human rights in the context of any challenges that the UK Government might make to the Human Rights Act 1998, but I appreciate the desire of the consortium and others to act now, through the bill and other steps, while the task force's work is on-going, especially given the concerns that have been raised by the actions and unpredictability of the current UK Government.

Human rights can never be taken for granted. They need to be protected, cherished and argued for. If we look around the world, we see that there is a genuine danger that these lessons are being disregarded, so it is more important than ever that countries such as Scotland stand up for human rights. By doing so, we can send an important signal to the wider world, and we can ensure that human rights make a real and meaningful difference to people's everyday lives.

Therefore, I am obliged to the Human Rights Consortium Scotland for raising the issue, which has resulted in the Government lodging an amendment that will require the Scottish ministers to publish a written statement when a draft SSI is laid before the Scottish Parliament under the section 1(1) power, in order to explain the effect on human rights, if there is any.

We have always been clear that Scotland should set standards and show leadership on human rights. Openness and transparency are essential components of being a human rights leader, which is why the proposed amendment to the bill is so important. Although the Scottish ministers will always act in accordance with their obligations—I remind members that any proposed legislation that did not adhere to convention rights would be outwith the competence of the Scottish Parliament and, therefore, could not be passed—I am pleased to have lodged amendment 17, which requires ministers to set out specifically what effect regulations that are made under section 1(1) might have on human rights.

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

Amendments 18, 19 and 21 are minor technical amendments that change the word “equalities” to “equality” where it appears in the bill. Although the

word “equalities” has occasionally been used as an alternative to “equality”, the use of “equality” is far more prevalent in Scottish legislation. The change will therefore provide consistency with the language of the Equality Act 2006 and the Equality Act 2010, which are the principal relevant statutes. I ask the committee to support those amendments.

In exercising the powers in the bill, it is clearly important that we listen to people who will be affected by them. Much of EU law impacts on local authorities. That is why we have lodged amendment 20, which requires that, when making or laying draft regulations using the power to align with EU law, ministers must make an explanatory statement that sets out the consultation that has taken place with local government and others. I referred to that in an earlier debate this morning.

Amendment 20 will not have the effect of requiring that consultation take place in every instance, given the breadth of EU law. Not all measures will affect a particular group, and some measures might be very minor and technical, so full consultation would be disproportionate in those circumstances. As the past few months have demonstrated, there might be unforeseen occasions when there is a need to legislate urgently. However, requiring such a statement to be made will expose the consultation—or lack of consultation—to appropriate parliamentary scrutiny, and it will ensure that the use of the power is transparent. I understand that the Convention of Scottish Local Authorities is supportive of such a measure. As such, I invite the committee to support amendment 20.

Amendment 43, which was lodged by Murdo Fraser, would require the Scottish ministers, when laying before Parliament a draft instrument that contained regulations under section 1(1), to publish a statement that explained the likely financial implications of the regulations. That would be unnecessary, given that a business and regulatory impact assessment would be published to provide the Parliament with the effects of the provision for business and regulation. Those assessments would be presented to Parliament in order to assist scrutiny, as is normal when making regulations.

However, I recognise that Murdo Fraser has sat through the entire meeting without having success with any of his amendments so far. There is no harm in amendment 43. Indeed, it might focus minds on the costs of Brexit, because such statements would point out how costly Brexit will be to every citizen in Scotland, so I am not minded to oppose amendment 43.

I move amendment 17.

The Convener: I call Murdo Fraser to speak to amendment 43 and the other amendments in the group.

Murdo Fraser: My amendment 43 is a simple amendment that seeks to ensure that affirmative regulations are accompanied by a statement of their financial implications. The amendment came out of something that the committee heard in its stage 1 evidence, which was that some uses of the keeping pace power in section 1 could have cost implications—for example, the transfer of regulatory functions to existing public bodies in Scotland, and the creation of new public bodies. My amendment will require the Scottish ministers to add a financial statement to regulations to allow the Scottish Parliament to adequately scrutinise them. I welcome the cabinet secretary's comment that he has no objection to the proposal, which is helpful.

I will briefly address the other amendments in the group. Amendments 17 to 19 and 21, which deal with human rights, will require the Scottish ministers to provide

"A statement explaining the effect ... of the instrument or draft on"

rights under the European convention or

"other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom."

The committee discussed that issue at stage 1.

We are happy to support those amendments, but we will not support the cabinet secretary's amendment 20, on the basis that it does not go far enough. It contains only a duty to report on whether a consultation has been carried out. It does not impose a duty to consult, and for that reason we do not believe that it is sufficient.

Patrick Harvie: I welcome the amendment on convention rights. It is an important restatement of the fact that most of our political landscape strongly supports the convention and the rights that it confers.

As for the other amendments in the group, I take the cabinet secretary's point that Murdo Fraser's amendment 43 might be manageable and tolerable even if it is not particularly necessary. I will happily support it as well, but it does reopen the question of whether some other amendments in which members have sought to place additional requirements on the Government might also be reasonable. We will probably return to those issues at stage 3.

I will also support amendment 20 but, again, I want to be clear that the requirement in that amendment to report on consultation is not the last word on the matter. We will probably return to that at stage 3 as well, and there may be a majority to

go further than the Government has gone with amendment 20. For the time being, however, I will support the amendments.

The Convener: I invite the cabinet secretary to wind up on the group.

Michael Russell: On the point of amendment 20, the matter has been discussed with COSLA, and I think that it will welcome the amendment. If there is a possibility of strengthening the amendment, I will be happy to consider that, but I would want to make sure that anything that we do is effective and that it does not add to the bureaucratic burden of the bill, but actually affects those who will be consulted. I think that that is the criterion that I will set for any further discussion on the matter. However, I am glad that members seem to be united on most of the amendments in the group.

I cannot understand Murdo Fraser's position that he will oppose amendment 20 because it does not go far enough. If the provision was not in the bill at all, it would mean that we would go no distance at all, so that position would seem to be illogical.

Amendment 17 agreed to.

Amendment 42 not moved.

Amendments 18 and 19 moved—[Michael Russell]—and agreed to.

11:30

Amendment 20 moved—[Michael Russell].

The Convener: The question is, that amendment 20 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Harvie, Patrick (Glasgow) (Green)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Lockhart, Dean (Mid Scotland and Fife) (Con)

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

Amendment 20 agreed to.

Amendment 43 moved—[Murdo Fraser]—and agreed to.

Amendment 21 moved—[Michael Russell]—and agreed to.

Section 6, as amended, agreed to.

After section 6

Amendment 11 moved—[Liam McArthur].

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

Members: No.

The Convener: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Lockhart, Dean (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

Abstentions

Harvie, Patrick (Glasgow) (Green)

The Convener: The result of the division is: For 5, Against 5, Abstentions 1.

I therefore have the casting vote and I use my vote against the amendment.

Amendment 11 disagreed to.

Section 7—Reports relating to the exercise of the section 1(1) power

Amendments 22 and 23 moved—[Michael Russell]—and agreed to.

Amendment 44 moved—[Patrick Harvie].

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

Members: No.

The Convener: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Lockhart, Dean (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

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

Amendment 44 agreed to.

Amendment 10 not moved.

Amendment 45 moved—[Patrick Harvie].

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

Members: No.

The Convener: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Lockhart, Dean (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

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

Amendment 45 agreed to.

Amendment 46 not moved.

The Convener: I remind members that, if amendment 24 is agreed to, amendment 47 will be pre-empted.

Amendment 24 moved—[Michael Russell].

The Convener: The question is, that amendment 24 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

In the brief pause while the clerks record the vote, it is time for me to have a wee drink of juice.

For

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

Against

Baillie, Jackie (Dumbarton) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Lockhart, Dean (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

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

Amendment 24 disagreed to.

Amendment 47 moved—[Patrick Harvie].

The Convener: The question is, that amendment 47 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Lockhart, Dean (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

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

Amendment 47 agreed to.

Amendment 25 moved—[Michael Russell].

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

Members: No.

The Convener: There will be a division.

For

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Lockhart, Dean (Mid Scotland and Fife) (Con)

The Convener: The result of the division is: For 7, Against 4, Abstentions 0.

Amendment 25 agreed to.

Amendment 48 moved—[Patrick Harvie].

11:45

The Convener: The question is, that amendment 48 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)

Lockhart, Dean (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

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

Amendment 48 agreed to.

Amendment 26 moved—[Michael Russell]—and agreed to.

The Convener: I remind members that, if amendment 27 is agreed to, amendment 49 will be pre-empted.

Amendment 27 moved—[Michael Russell].

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

Members: No.

The Convener: There will be a division.

For

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

Against

Baillie, Jackie (Dumbarton) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Lockhart, Dean (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

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

Amendment 27 disagreed to.

Amendment 49 moved—[Patrick Harvie].

The Convener: The question is, that amendment 49 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Burnett, Alexander (Aberdeenshire West) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Harvie, Patrick (Glasgow) (Green)
Lockhart, Dean (Mid Scotland and Fife) (Con)
Rowley, Alex (Mid Scotland and Fife) (Lab)

Against

Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Arthur, Tom (Renfrewshire South) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Mason, John (Glasgow Shettleston) (SNP)

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

Amendment 49 agreed to.

Section 7, as amended, agreed to.

Sections 8 and 42 to 47 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. The bill will be printed as amended at stage 2 and will be published at 8.30 tomorrow.

The Parliament has not yet determined when stage 3 will be held. When that is decided, members will be advised of the deadline for lodging amendments. In the meantime, stage 3 amendments can be lodged with the clerks of the legislation team.

I thank my colleagues, the clerks and the legislation team for helping me get through this process this morning.

Meeting closed at 11:50.

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.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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