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Dear Andrew

UK Withdrawal from the European Union (Continuity) (Scotland) Bill

Thank you for your letter of 19 August 2020 to my colleague, James Hynd, concerning the above Bill which is currently undergoing Stage 1 scrutiny in the Scottish Parliament. As the Bill falls within my responsibilities, I am responding. You advise that the Delegated Powers and Law Reform Committee considered the Bill at its meeting on 18 August 2020 and is now seeking clarification on several points. The questions detailed in your letter, and our responses, are set out below.

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

Power conferred on:	**the Scottish Ministers.**
Power exercisable by:	**regulations made by Scottish statutory instrument.**
Parliamentary procedure:	**affirmative where provision is made that falls within section 4(2); otherwise negative unless Ministers lay in draft under affirmative procedure.**

There are significant differences between section 2(2) of the European Communities Act 1972 (the "ECA") and the power in section 1(1) of the Bill. Section 2(2) of the ECA does not permit much, if any, choice regarding policy development and implementation of EU law.

In addition to enabling the technical adjustment of aspects of retained EU law, section 1(1) also allows the Scottish Ministers to choose whether to adopt entirely new or significantly revised EU laws in a highly diverse range of devolved policy areas. The involvement of the Scottish Government or Scottish stakeholders in the development of the policies leading to such EU laws is likely to be reduced when the UK is no longer a Member State.

The power also affords the Scottish Ministers discretion as to whether, and how, to implement these new EU laws/policies – for example, to omit functions of EU entities or provide for them differently.

Since, fundamentally, it is for the Parliament to legislate, where it agrees to delegate that role to the Scottish Government, there should be good reasons for doing so, and the limits of the delegation should be strictly defined. As a matter of principle, delegated powers should not be taken as a substitute for policy development.

1. Could you explain whether the power in section 1 of the Bill strikes an appropriate balance between the Parliament's power to legislate and powers exercisable by the Scottish Government when considered in light of these factors, and if so, why?

1. The Scottish Government believes the power at section 1 strikes an appropriate balance between the Parliament's power to legislate and powers exercisable by the Scottish Ministers. It is a largely technical, pragmatic and practical power and, in recognition that the UK has withdrawn from the EU, it is discretionary, time-limited, and will be subject to Parliamentary scrutiny.

Scottish Ministers consider there will be many fields where we will want to keep our laws aligned, in so far as possible, with EU rules.

At the end of the transition period the power under section 2(2) of the European Communities Act 1972 ("the ECA") will no longer be available. Section 2(2) has been used in a wide range of policy areas and those policy areas will continue to require regulation following the end of the transition period. With all the complexities, uncertainties and potentially unforeseen circumstances caused by Brexit, it is sensible for Scottish Ministers to take forward this time limited power – to largely mirror the regulatory power which will be lost at the end of the transition period.

It is intended that the power under section 1(1) will complement other powers which already exist in certain policy areas, while removing the risk that these existing powers are not sufficient to allow Scottish Ministers to do everything which may be needed to continue to align with EU law or refine retained EU law, as appropriate.

We recognise that the context of the power under section 2(2) of the ECA is different to that in the current Bill and we did consider whether taking forward primary legislation on a case by case basis could be a viable option. However, it is the breadth of the issue which Scottish Ministers consider justifies the temporary need for the power in section 1(1) of the Bill. EU law covers a wide range of policy areas and to aim to create bespoke domestic powers in all relevant areas where other powers are not sufficient; or to seek to make necessary or desired legislative changes – however small and technical they might be – each time through primary legislation would be disproportionate and inefficient.

As the Committee notes, the power affords the Scottish Ministers discretion as to whether and how, to implement these new EU laws - for example, to omit functions of EU entities or provide for them differently. Given the context of the power in section 1(1), this element of the power is considered important to enable Ministers to adapt provision so that it operates effectively in Scots law despite the UK no longer being a member state of the EU. Many instruments or aspects of instruments passed by the EU are inoperable or will not operate properly outwith the EU. Therefore, the Scottish Government believes it is appropriate that the power at section 1(1) allows a degree of flexibility in how to implement EU law to best benefit Scotland. Section 2(2) does also allow flexibility around how to implement, albeit the powers are not identical. Section 1(1) also remains focused on, and so limited with respect to, the EU law the provision made would correspond to.

It is also considered important for the power under section 1(1) to be discretionary, partly to address the fact that some aspects of EU law will be inoperable or will not operate properly outside of the EU, and partly because we will need to consider broader implications, such as in relation to any other international obligations by which we are bound. Before deciding to align with an EU measure the Scottish Government will consider the practical implications, economic and social benefits and costs, resource

implications as well as whether alternative approaches could achieve equivalent, or better, outcomes for Scotland.

We recognise that this is a broad power and have therefore built safeguards into it. Firstly, the power will sunset after 10 years unless the Scottish Parliament votes to extend that period.

Secondly, sections 5 and 6 of the Bill require all instruments made under section 1(1)to be accompanied by written explanatory statements setting out, amongst other things, why Scottish Ministers consider there are good reasons for making the instrument. Also, by virtue of section 7, Ministers are required to lay before Parliament an annual report explaining how the power in section 1(1) has been used.

In addition, in developing any proposals for regulations under this power, the Scottish Government will consult appropriately on its proposals, as is normal practice for policy development.

Therefore, in exercising the power under section 1 of the Bill, the Scottish Government will consult as appropriate, as with any policy development, and in addition to the normal policy note and impact assessments, additional statements will have to be published to accompany any SSI. The Parliament will scrutinise any instruments made under the Bill, should it be passed.

Paragraph 32 of the Policy Memorandum recognises that it is not possible to entirely replicate the existing influence that the Scottish Government was able to exert over the development, monitoring and implementation of EU law in circumstances where the UK is no longer a member of the EU.

The Scottish Government would be able, through regulations made under the power in section 1, to apply EU law in Scotland despite having little ability to influence the development of that law.

There is only a limited ability in certain circumstances to change EU law as it would apply to Scotland.

2. Given that Scotland has limited ability to influence EU law, could you provide further explanation of how this power is justified in principle?

3. Could you provide further information on how the Government plans to track EU law?

2. The Scottish Government has always had to work hard at influencing in less formal ways as the UK was the Member State. Scottish Government officials and Ministers will continue to engage with counterparts where possible.

The Scottish Government considers there is a strong democratic mandate for this Bill given the overwhelming support for continued EU membership in 2016 and subsequent elections. The Scottish Parliament previously scrutinised and passed a very similar power in the 2018 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill ("the 2018 Continuity Bill") and a similar power has been brought back as a result of commitments made by Mr Russell following discussions with representatives of each of the parties within the Parliament.

The power in section 1(1) of this Bill is being introduced as there will be areas within devolved competence where legislative powers will not be available, or sufficient, once powers to regulate using the the ECA are lost at the end of the transition period. The power will complement powers which already exist in certain policy areas, while removing the risk that these existing powers are not sufficient to allow Scottish Ministers to do everything which may be needed to align, as appropriate, with EU law.

Replacing the power to regulate which we will lose at the end of the transition period will allow Ministers an appropriate way to recognise in domestic law the high international best practice standards represented by EU standards and regulations in many areas.

In addition to enabling provision to be made corresponding to EU law as it develops after the implementation period where appropriate, the power at section 1(1) also enables the Scottish Ministers to make provision in relation to existing EU laws, which have been implemented or have effect domestically already. With such a large body of EU law about to be retained in domestic law by the provisions of the European Union (Withdrawal) Act 2018, the ability to be able to regulate to refine an existing EU law scheme will enable continuing improvements to be made efficiently by secondary legislation, where appropriate.

In terms of the justification for the power despite the UK not being a member state, it is important to stress that the power does not require Scottish Ministers to implement each and every EU Directive or EU Regulation. This is about bringing forward a temporary power to enable Scottish Ministers to legislate efficiently when EU developments or refinements could be implemented to benefit Scotland.

3. The Scottish Government already has to keep abreast of developments in EU law in areas of devolved competence – even where EU legal acts currently have direct effect and do not need to be transposed into domestic legislation. To that extent, the task of keeping itself informed is not a new or additional one. There is good knowledge and expertise of EU matters and procedures in Scotland House Brussels and throughout the Scottish Government, Scottish public bodies and other relevant institutions. Scottish Government officials will also continue to engage with their European Commission colleagues. Despite EU exit, the Scottish Government will take any necessary steps required to keep itself informed of relevant EU developments.

The Scottish Government's ability to keep pace with EU law may be subject to the following statutory and non-statutory constraints:

- *Compliance with UK international obligations including future trade deals and other international agreements;*
- *Statutory and non-statutory common frameworks;*
- *The functioning of a UK internal market;*
- *The manner of replacement of EU funding.*

4. Could you explain the extent to which you consider that these, or any other factors, could constrain the Scottish Ministers' ability to use the keeping pace power?

4. The Committee will be aware of the Scottish Government's concerns about the approach of the UK Government to many of the matters raised in this question.

Compliance with UK international obligations including future trade deals and other international agreements

The Bill ensures we can legislate effectively after the end of the transition period to be able to align with developments in EU law and refine and update retained EU law, as appropriate, within devolved competence. The impact of any deals or legislation on the ability to use the power at section 1(1) will depend on what, specifically, is contained within those deals or legislation, and how they are to be implemented. It is the Scottish Government's view that the UK Ministers should take into account the Scottish Parliament's and the Scottish Government's views and responsibilities for devolved matters and standards before they agree any deals, or before they bring forward legislation which would impact on devolved areas. This view is of course supported by the Memorandum of Understanding and Concordat on International Relations between the UK Government and the devolved administrations, as well as through the legislative consent process in relation to UK Parliament Bills.

Statutory and non-statutory common frameworks

With regard to the development of, and agreement on, common frameworks, the four governments have been clear that these are to enable co-operation between the governments after EU exit. These arrangements, in whatever form they take, will not alter or constrain devolution in any way and will not prevent the Scottish Parliament from making alternative arrangements in these areas should they judge that to be necessary in the future. On the basis of continuing joint progress and collaboration on future frameworks, the UK Government has concluded that it does not need to bring forward any regulations under section 12 of the European Union (Withdrawal) Act 2018; as a result, the Scottish and Welsh Governments have reconfirmed their commitment not to create divergent policy in ways that would cut across future frameworks, where it has been agreed they are necessary or where discussion continues. In reaching such agreement, the Scottish Ministers have been clear that they will always make decisions in the best interest of Scotland and that the Scottish Parliament should have the opportunity to properly scrutinise all frameworks.

The Scottish Government remains committed to this process which has shown that substantive progress can be made where the four administrations come together as equals and proceed on the basis of agreement, not imposition.

In assessing whether or not to align with any given EU measure, Ministers will consider things such as:-

- Practical implications
- Economic and social benefits and costs
- Resource implications (budget and Government / Parliamentary time)
- Whether an alternative approach would demonstrably deliver the same, or more ambitious outcomes than the relevant EU measure

The effect of possible divergence in ways which could cut across framework areas will be considered as part of potential practical implications, although the Scottish Government is clear that the frameworks process aims to deliver the most effective way to manage potential divergence.

Although the current public health crisis has impacted on the ability of the UK Government and the devolved governments to progress work completely as planned, the four governments have agreed on a revised delivery plan. It is now anticipated that seven frameworks, six of which relate to Scotland, will be fully developed, agreed and implemented by the end of December 2020, with provisional frameworks being established in the 25 remaining policy areas before being finalised for agreement as full frameworks after 2020.

The functioning of a UK internal market

It is the Scottish Government's view that the proposals for a new legislative regime for the UK's internal market, published by UK Ministers on 16 July, represent a significant threat to the devolution settlement and to the common frameworks process. Therefore the Scottish Government does not support these proposals and will oppose them if, after consideration of responses to the consultation, legislation is brought forward at Westminster.

The manner of replacement of EU funding

The Scottish Government has been clear that any costs related to EU exit should not have a detrimental impact on Scotland's public finances. The UK Government has yet to provide any clarity on future arrangements for EU funding. Assurances are required that all lost EU funding will be replaced in full, and that devolution will be respected by taking full account of the Scottish Government's position on all future funding arrangements.

The Scottish Government's own policy choices on devolved matters will require funding from within existing Scottish budgets and appropriate cost benefit analysis will therefore have to be undertaken.

Paragraph 21 of the Policy Memorandum states that the keeping pace power "would ensure consistency and predictability" for people and business both in Scotland and in the EU.

5. Could you explain how consistency and predictability can be achieved where the power in section 1(1) is so broad that it is difficult to foresee the areas in which it will likely be used, and the decision as to whether or not to keep pace with EU law is discretionary?

6. Could you also explain whether the Scottish Government can and should be required to report to the Scottish Parliament on areas where Scots law does not align with EU law and where a decision has been taken not to maintain alignment?

5. The measures in the Bill are aimed at enabling or providing for continuity of provision that would otherwise be lost at the end of the transition period as a result of withdrawal from the EU. Many areas are regulated under section 2 of the ECA and when that power is lost at the end of the transition period, our regulatory powers will contain

gaps. The Scottish Government believes it is sensible to seek to fill those gaps and the power in Part 1 can, in many ways, be seen as a continuation of the existing power to implement EU law under the ECA. In that sense, the power, by providing for continuity of provision, achieves consistency and predictability.

However, the Scottish Government is of the view the power at section 1(1) provides a necessary degree of flexibility as many instruments will be inoperable, or will not operate properly, outwith the EU. Moreover, as already discussed in relation to question 4, any future EU/UK agreement, any agreed common frameworks, or any possible future UK internal market requirements might impact on the ability to align with EU law, therefore the discretionary nature of the power at section 1(1) is appropriate. This allows current and future circumstances to be taken into account when considering whether to align with EU measures on a case by case basis. While we cannot predict in which specific areas the power is likely to be used in future, with all the complexities, uncertainties and potentially unforeseen circumstances caused by Brexit, as already noted, it is sensible for Scottish Ministers to take forward this time limited power to largely mirror the regulatory power which will be lost at the end of the transition period.

This will provide a measure of stability as it will enable the Scottish Ministers to continue to be able to regulate in areas where existing powers are lost or insufficient. It is the Scottish Government's view that the power under section 1(1) is:

- a **practical** measure as it allows retained EU law to be updated (and refined) if necessary to ensure it continues to work effectively in the light of changes to EU law, to the benefit of those in Scotland or in Europe working with Scotland.

- this is a **prudent** measure as there might well be a need to keep pace with EU law as a result of future agreements with the EU by the UK.

- this is a **pragmatic** measure which mirrors arrangements under the ECA for implementing EU law and enables the Scottish Ministers to continue to take forward new initiatives from the EU. The alternative would often be primary legislation which could take up a considerable amount of Parliamentary time for relatively minor and desirable updating of current legal frameworks

6. Not every EU legal act will be replicated in Scots law using the power under section 1 of the Bill. The majority of EU legal acts are either matters which relate to the internal workings of the EU and its institutions, or are in reserved areas, so that the Scottish Parliament would not be able to legislate for them. It would therefore not be proportionate, or an appropriate use of time and resource, to identify and detail each of those EU legal acts that were not being taken forward.

In addition to the Parliament exercising all of its normal functions in scrutinising the effectiveness of policies, and in considering any secondary legislation made under this Bill, sections 5 and 6 of the Bill require all instruments made under the power at section 1 to be accompanied by written explanatory statements, while section 7 requires Ministers to lay before Parliament an annual report explaining how the power in section 1(1) has been used.

The Scottish Government does not provide Parliament with details of legislation it has decided not to progress, or ways in which powers have not been utilised. It is open to MSPs, Committees and others to make proposals to the Government for possible legislation, in the normal way. However, the Scottish Government has noted the calls from stakeholders for greater transparency about how the power might be exercised. In particular, the Faculty of Advocates suggested that it may be helpful for the Scottish Government to issue forward guidance about the manner in which they anticipate exercising the new power. This suggestion, and the others made by other stakeholders, will be further considered ahead of Stage 2.

Paragraph 21 of the Policy Memorandum states that Scotland should be able to keep pace with EU law "where appropriate".

7. Is there any criteria that could and should be applied on the face of the Bill to assess whether or not to replicate any particular EU law into domestic law?

7. In assessing whether or not to align with any given EU measure, Ministers will consider things such as:

- Practical implications;
- Economic and social benefits and costs;
- Resource implications of both budget and Government / Parliamentary time;
- Whether an alternative approach would demonstrably deliver the same, or more ambitious outcomes than the relevant EU measure.

However, the Scottish Government does not believe that provision on the face of the Bill setting out criteria to be applied would be helpful or appropriate. The risk of setting out an explicit decision-making framework in such a way is that it would be unable to take account of future circumstances. As a consequence, it could become overly-prescriptive, potentially rendering the power ineffective. This position is supported by the Faculty of Advocates which stated that it considered *"the range of EU law that might be the object of such regulations - both as to subject matter and nature of the instrument – is such that the definition of criteria within the Bill would be an impossible task".*

That said, Scottish Ministers will always take decisions in the best interests of Scotland – taking into account the full impacts of any such decision – and sections 5 and 6 of the Bill require Ministers to set out their reasoning for reaching any decision to align.

The power in section 1 of the Bill allows the Scottish Ministers to sub-delegate legislative power to a Scottish public authority (whether or not established for the purpose), or to any person whom the authority authorises to carry out functions on its behalf. There is no equivalent power to sub-delegate legislative power in section 2(2) of the ECA.

8. Could you explain why a power to sub-delegate legislative power is considered appropriate when such an express power does not exist in section 2(2) of the ECA?

8. Whilst the power in section 1(1) is largely based on the power in section 2(2) of the ECA which we will lose at the end of the transition period, there are differences between the powers in recognition of the point that the context of the powers is also

different. As the Committee notes, unlike section 2(2), the power under section 1(1) does not preclude legislative sub-delegation.

At the end of the transition period, similarly to the position which arose in relation to correcting deficiencies of retained EU law under the European Union (Withdrawal) Act 2018, there will be some areas of EU law which will not be operable or which will not operate properly given that the UK is no longer a member state of the EU.

Section 1(2) of the Bill, therefore, allows Ministers to adapt provision made under section 1(1) so that it operates effectively in Scots law despite the UK no longer being a member state. The Scottish Government considers it necessary to allow for these adaptations in order to ensure that the power is sufficiently flexible to be able to incorporate future EU laws in a way that is workable. This includes the ability for regulations under section 1(1) to sub-delegate where appropriate: for example by transferring the functions of EU authorities to Scottish public authorities. These functions might include the ability to set rules or create standards, which are otherwise made by the EU as non-legislative acts (delegated and implementing acts).

The Government appreciates that the power is wide and, where regulations under section 1(1) create or amend a power to legislate, the Government is clear that the affirmative scrutiny procedure should apply as we recognise that Parliament will want full assurance that legislative sub-delegation is done in an appropriate manner. Any such instrument will therefore have to be debated and approved by Parliament.

Section 1(6) establishes that the power in section 1(1) may be used to make any kind of provision that could be made by an Act of the Scottish Parliament. Under the European Union (Withdrawal) Act 2018 as amended, powers to amend, repeal or revoke primary legislation or retained direct principal EU legislation are subject to the affirmative procedure.

9. Do you consider that it would be more appropriate that the affirmative procedure, which already applies in relation to some regulations made under the power in section 1(1) of the Bill, is extended to all regulations under the power that amend, repeal or revoke primary legislation or retained direct principal EU legislation.

9. The Scottish Government thinks the scrutiny provisions which apply to the power in section 1(1) in the Bill are proportionate. The Bill specifies types of provision which, if contained in regulations under section 1, will be subject to affirmative procedure. Anything not listed will be subject either to the affirmative or the negative procedure. In those cases there is a choice of procedure (a so-called “either way” provision).

In many cases, we agree that it will be appropriate for the affirmative procedure to apply when regulations under section 1(1) amend, repeal or revoke primary legislation or retained direct principal EU legislation. However, some of the changes which may be made to primary legislation or retained direct principal EU legislation will be fairly straightforward and non-substantive, such as amending references. For those kind of amendments which are principally mechanistic and minor, the Government considers the negative procedure is appropriate.

The introduction of an either-way procedure is a sensible approach as it will allow for flexibility to choose which procedure is most appropriate for the particular changes being

made to primary legislation and the Scottish Government considers this represents a good balance between allowing for effective and thorough scrutiny of the use of the power whilst ensuring there is sufficient flexibility to allow the Government to exercise judgment as to the appropriate procedure in any particular case.

Regulations made under the keeping pace power in section 13 of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (the "first Continuity Bill") are subject to the affirmative procedure. In contrast, under the Bill, only keeping pace regulations containing certain types of provision are subject to the affirmative procedure. All other regulations under section 1 of the Bill are subject to the negative procedure unless Ministers decide to lay them under the affirmative procedure.

In addition, unlike this Bill, the first Continuity Bill provides that certain provision made in regulations under the original keeping pace power were subject to a 60-day super-affirmative procedure. This applied where, among other things, the regulations abolished a function of an EU entity or public authority in a member State without providing for an equivalent function to be exercisable by any person. By way of contrast, such provision made in regulations made under section 1 of this Bill are only subject to the affirmative procedure.

10. Could you explain why these differences exist between the parliamentary procedures that apply to the power in section 1 of the Bill compared to the similar power in the first Continuity Bill?

10. The Government considers that the procedures which apply in this Bill to the use of the power in section 1(1) represent a better balance between scrutiny and flexibility than that which was achieved in the first Continuity Bill.

In contrast to the 2018 Continuity Bill, rather than all provisions under section 1(1) being subject to a default affirmative procedure, the current Bill specifies the types of provision which, if contained in regulations under section 1, will be subject to affirmative procedure. Anything not listed will be subject to either the affirmative or negative procedure. In those cases, there is a choice of procedure (a so-called 'either way' provision).

The Government has chosen this approach because it is considered likely that many of the changes which may be made under section 1(1) could be of a minor or technical nature and to attach affirmative procedure to all such provision would be disproportionate. For such changes the negative procedure is considered to be more appropriate.

On the other hand, we recognise that changes brought forward under section 1(1) which would involve a more significant policy change would likely merit increased scrutiny and therefore the use of the affirmative procedure. This either-way provision would give Ministers the opportunity and flexibility to make a judgment about which procedure is most appropriate for the particular provision in question in a way which would otherwise be difficult to provide for legislatively.

The flexibility of this either-way provision would also allow Ministers the option of using the negative procedure for changes that have to be made more urgently.
The Scottish Ministers are of the view that an enhanced 'super-affirmative' procedure would be disproportionate and could render planning for legislation more difficult and less

manageable. It also does not allow for the flexibility which could be required should legislative changes be needed quickly.

Section 5(6) provides that an explanatory statement does not need to be laid with an instrument made under the power where "an equivalent" instrument or draft instrument has previously been laid. There is no time limit on this exception.

11. Is the effect of this provision that equivalent instruments may be made on a cyclical basis without the need to update the Parliament on the Scottish Ministers' views as to why there are good reasons for making the provision (among other things) in spite of the fact that the policy and legislative landscape in the area may have changed since the last regulation was made?

11. Section 5(6) reflects a provision which was in the 2018 Continuity Bill in section 16(9) which also provided that Scottish Ministers would not have to comply separately with the requirement to make an explanatory statement if they had previously done so for an equivalent instrument. An example of where section 5(6) might be relevant is where a draft of an instrument has been withdrawn and re-laid with minor modifications.

This provision is not about seeking to avoid the requirement to provide explanatory statements in relation to separate (albeit similar) instrument in a scenario where the policy and legislative landscape in the area may have changed since the last regulation was made.

Section 13B(1) of the first Continuity Bill states that the keeping pace power was to be exercised having regard to animal welfare and the guiding principles of the environment. By way of contrast, while section 10 of the Bill states that Scottish Ministers must, in developing proposals for legislation, have regard to the guiding principles on the environment, there is no equivalent provision in relation to animal welfare.

12. Why has a more limited approach has been taken in the Bill compared to the first Continuity Bill?

12. While the 2018 Continuity Bill was the Scottish Parliament's alternative to the UK Government's EU (Withdrawal) Bill, and therefore contained additional provision, such as the domestic retention of EU law in devolved areas and the corresponding power to deal with legislative deficiencies resulting from withdrawal, this Bill has a narrower focus.

In Part 1, this Bill contains a discretionary power to align Scots law with EU law in devolved areas, where appropriate. The focus of Part 2 is that of strengthening environmental protection in Scotland by ensuring there continue to be guiding principles on the environment in Scotland and establishing an environmental governance body to secure full and effective implementation of environmental law. These provisions reflect two of the commitments made in April 2019 by the Cabinet Secretary for Government Business and Constitutional Relations as noted in paragraph 17 of the policy memorandum.

The power in section 1(1) is a general power and there will be many factors which Scottish Ministers will have regard to when deciding to exercise that regulation-making power to align. We decided against having specific provision requiring Ministers to have

regard to animal welfare principles because we did not want to impinge on the generality of the power or in any way imply that, by specifying that animal welfare had to be considered, that other matters were of less importance or did not warrant similar consideration.

The four EU principles of polluter pays, rectification at source, prevention and precaution are enshrined in Article 191(2) of the Treaty on the Functioning of the European Union (TFEU) and underpin the development of EU policy. After the end of the implementation period, the EU environmental principles will cease to have legal effect on the development of environmental law and policy in Scotland. Following the consultation on environmental principles and governance in 2019, there was clear and strong support for the four core EU environmental, principles to be incorporated into Scots law.

The Bill establishes guiding principles, informed by the four EU environmental principles, as a matter of domestic law. Scottish Ministers must have regard to the guiding principles on the environment in developing all policy and legislation, subject to limited exceptions. This is not specific to the power at section 1(1). UK Ministers must have regard to the guiding principles in developing policy so far as extending to Scotland. The Bill also places a duty on public authorities to have regard to the guiding principles when doing anything, which would require a strategic environmental assessment, under section 1 of the Environmental Assessment (Scotland) Act 2005.

The Scottish Government is committed to maintaining or exceeding environmental standards following EU exit. By placing a duty on Ministers and a further duty on public authorities, the Bill seeks to ensure a continued role for domestic environmental principles, informed by the four EU environmental principles, following the end of the implementation period. The Bill ensures that environmental principles continue to inform the development of policy and legislation in Scotland.

While responses to the consultation indicated a general appetite amongst stakeholders for the addition of further environmental principles, there was no overwhelming consensus from anyone, or for any particular set of environmental principles to be included at this point in time. However, the Bill makes provisions for further environmental principles to be embedded into Scot's law should this change.

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

Power conferred on:	**the Scottish Ministers**
Power exercisable by:	**regulations made by Scottish statutory instrument**
Parliamentary procedure:	**affirmative**

Section 3(1) of the Bill provides that the duration of the keeping pace power in section 1(1) is 10 years, with an option of extending by five years and then extending any extended period by a further period of five years by regulations made under section 3(2).

By way of contrast, the keeping pace power in section 13 of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill was limited in duration to three years with an option to extend twice by one year to a maximum of five years in total.

13. Could you provide an explanation of the circumstances that justify this significant extension of the sunset provisions that apply in the wide power in section 1(1) of the Bill?

14. Could you also explain why no maximum period of extension has been set in section 3 of the Bill, unlike section 13(8A) of the first Continuity Bill?

13. The Scottish Government recognises that it will take some years for the UK's future relationship with the EU to be settled properly, and for the full impact on domestic legislation resulting from attempting to replace or amend 40 years of EU-derived legislation to be fully realised. Therefore, the 10-year timeframe, which roughly translates to two parliamentary sessions, is a sensible attempt to provide a stable framework to allow Scots law to remain aligned with EU law in devolved areas, and for retained EU law to be refined and updated as necessary.

The future relationship between the UK and the EU is currently unknown and uncertain. No future relationship has been negotiated, nor are there new free trade agreements with other countries, common frameworks are not yet in place. The UK Government's internal market proposals have just recently been published and pose a significant threat to devolution. Negotiations between the UK Government and the EU have not provided certainty about the relationship at the end of the transition period, which represents the start, not the end, of the process of the UK establishing its relations with the EU and the wider international community, and the development of the constitutional arrangements within the UK.

Given that over four years have elapsed since the 2016 referendum was held without any clarity emerging, the Scottish Government believes that having a replacement for the provision at section 2 of the ECA, and enabling continuing alignment with EU and refinement of retained EU law in devolved areas, where appropriate, provides one element of stability in this uncertain and evolving landscape. It is sensible and pragmatic to ensure that these powers are available for a sufficient period of time to take account of the timescales for progress so far, and to recognise EU law has a development cycle that can take some years. The Scottish Government therefore considers that 10 years is a reasonable period to allow continuing alignment by way of secondary legislation.

The ability to extend, by affirmative regulations, the period in which the power at section 1(1) is available is also intended to provide for future stability, should it be required. Having the power available for a shorter time, or not having the ability to extend the

period if necessary, would, in the Scottish Government's view, increase the risk of similar legislation having to be passed again in the near future.

However, as things begin to clarify, and it becomes clearer how the Parliament might wish to legislate, having the power at section 1(1) in place would not stop specific powers being taken in subject areas through primary legislation. The Government's policy is that such bespoke powers would supplement, or even replace, the section 1(1) power.

Moreover, should the Scottish Ministers feel that the power is no longer required they can, under section 46, repeal the power with the agreement of the Scottish Parliament by affirmative regulations.

The approach the Scottish Government is proposing therefore provides stability, reflects the democratic support in Scotland to maintain alignment with EU law and enables that alignment to be secured over the next 10 years using similar mechanisms to now. It also recognises that retained EU law will be a part of the system of Scots law for some years after the end of the Transition Period and will need refined and updated over time. This approach maintains a robust but proportionate level of parliamentary scrutiny and provides the degree of flexibility which will be needed.

14. The 2018 Continuity Bill was brought forward as an alternative to the UK Government's EU (Withdrawal) Bill. And importantly, it was brought forward at a time when the UK Government was committed to negotiating a close relationship and close working with the EU. The future UK-EU deal was intended to be negotiated during a transition period lasting from March 2018 till at least December 2020, with the possibility of that period being extended by 1 or 2 years if necessary. It was within that context that an initial 3 year period with a maximum period of extension was felt to be appropriate.

However, now, over four years have elapsed since the EU referendum and the future relationship between the UK and EU is currently unknown and uncertain. The point at which an extension to the transition period could have been extended under the Withdrawal Agreement has passed and no future relationship has been negotiated, nor are there new free trade agreements with other countries, and common frameworks are not yet in place. The UK Government's internal market proposals have just recently been published and pose a significant threat to devolution. And significantly in relation to the power at section 1(1), the current UK Government is clear that its policy is not to establish close working or alignment with the EU.

Therefore, it is within this context that the Scottish Government feels it is necessary, sensible and pragmatic to ensure that these powers are available for a sufficient period of time to take account of the timescales for progress so far, and to recognise EU law has a development cycle that can take some years. The Scottish Government therefore considers that 10 years is a reasonable period to allow continuing alignment by way of secondary legislation, and that it will be for future Parliaments to decide if the power remains valuable at the point that any extension might be considered.

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

Power conferred on:	**the Scottish Ministers**
Power exercisable by:	**regulations made by Scottish statutory instrument**
Parliamentary procedure:	**negative**

Section 10(4) of the Bill allows the Scottish Ministers by regulations to make further provision about matters or circumstances where the duties on the Scottish Ministers and UK Ministers to have regard to the guiding principles on the environment do not apply. This power is currently subject to the negative procedure.

Paragraph 35 of the Delegated Powers Memorandum states that this power is likely to be used for technical matters. However, the power, which is to restrict the scope of duties in primary legislation (i.e. the duties in section 10(1) and (2) to have regard to the guiding principles on the environment), is not restricted in such a way as to guarantee that it will always be used for technical matters.

Furthermore, although the regulations would not be capable of amending section 10 of the Bill as enacted, they could have the same effect by allowing further provision to be made in regulations about matters or circumstances where the duties do not apply.

15. Could you therefore explain whether it might be more appropriate that the power in section 10(4) is amended to only permit amendment to section 10(3) of the Bill as enacted, and is made subject to the affirmative procedure to provide the opportunity for enhanced scrutiny?

15. Section 10 of the Bill imposes on the Scottish Ministers and Ministers of the Crown, as far as they are acting with respect to Scotland, a duty to have regard to the four guiding environmental principles when developing policies, including proposals for legislation. Exempt policy areas of national defence or civil emergency and finance or budgets are listed in subsection (3). Subsections (4) and (5) provide for Scottish Ministers to make regulations, subject to the negative procedure, to disapply the duty to additional matters or circumstances. The Scottish Government will give further consideration to the points raised about section 10(4).

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

Power conferred on:	**the Scottish Ministers**
Power exercisable by:	**regulations made by Scottish statutory instrument**
Parliamentary procedure:	**affirmative**

Section 39 defines "environmental law" for the purposes of Chapter 2 of Part 2 of the Bill as any legislative provision to the extent that it is "mainly concerned" with environmental protection and is not concerned with an excluded matter.

Section 39(5) allows the Scottish Ministers by regulations to provide that a legislative provision specified in the regulations is, or is not, within the definition of "environmental law" in section 39(1).

16. Please explain why the Bill does not provide a more comprehensive definition of "environmental law" with reference to relevant provisions on the domestic statute book and EU law to ensure greater legal certainty for Environmental Standards Scotland ("ESS"), those subject to enforcement by ESS, and the courts. Could and should the power be framed instead to permit modification of a fuller definition of "environmental law" set out on the face of the Bill in light of future developments in environmental law (for example, following a future agreement between the UK and the EU)?

16. The definition of “environmental law” in section 39 of the Bill cannot be read in isolation. The key definitions in the Bill – namely those of “environmental law”, “environmental protection”, “environmental harm” and “the environment” - interlink. When read together, these definitions provide clarity to the reader of the Bill as to the meaning and extent of “environmental law”.

“**Environmental law**” is defined in the section 39 of the Bill as:

> *“(1) In this Chapter, “**environmental law**” means any legislative provision to the extent that it—*
>
> *a) is mainly concerned with environmental protection, and*
>
> *b) is not concerned with an excluded matter.*
>
> *(2) Excluded matters are—*
>
> *a) disclosure of, or access to, information,*
>
> *b) national defence or civil emergency,*
>
> *c) finance or budgets.*
>
> *(3) In subsection (1), “legislative provision” means—*
>
> *a) provision contained in, or in an instrument made under, an Act of the Scottish Parliament, and*
>
> *b) provision contained in any other enactment which, if contained in an Act of the Scottish Parliament, would be within the legislative competence of the Parliament.*
>
> *(4) But the definition of “environmental law” in subsection (1) does not include Parts 1 to 3 of the Climate Change (Scotland) Act 2009.”*

Section 39(1)(a) provides that in order to be “**environmental law**” within the definition of the Bill, a legislative provision must be mainly concerned with “environmental protection”.

Section 40 provides definitions of “environmental protection” (subsection (1)), which links to the definitions of “environmental harm” (subsection (2)), and “the environment” (subsection (3)).

“Environmental protection” is defined in subsection (1) as::

> *“(1) In this Chapter, “environmental protection” means—*
>
> *a) protecting, maintaining, restoring or improving the quality of the environment,*
>
> *b) preventing, mitigating, minimising or remedying environmental harm caused by human activities,*
>
> *c) monitoring, considering, assessing, recording, reporting on or managing data on anything relating to paragraphs (a) and (b).”*

“Environmental harm” is defined in subsection (2) as:

> *“(2) In this Chapter, “environmental harm” means—*
>
> *a) harm to the health of human beings, animals, plants or any other living organisms,*
>
> *b) harm to the quality of the environment, including—*
>
> *i. harm to the quality of the environment taken as a whole,*
>
> *ii. harm to the quality of air, water or land, and*

iii. other impairment of, or interference with, biodiversity or ecosystems,

c) offence to the senses of human beings,

d) damage to property, or

e) impairment of, or interference with, amenities or other legitimate uses of the environment."

"The environment" is defined in subsection (3) as:

> *"(3) In this Chapter, "the environment" means all, or any, of the air, water and land 20 (including the earth's crust), and "air" includes the air within buildings and the air within other natural or man-made structures above or below ground."*

The definitions of "environmental law" is read with the definition of "environmental protection", "environmental harm" and the "environment", the Scottish Government believes that when read together, these provide the reader with a clear description of what constitutes environmental law and, as such, the user of the legislation can determine whether a specific legislative provision falls within the term as defined by the Bill.

Environmental regulation is broad ranging and the definition of "environmental law" is framed in the way that it is to ensure that it is comprehensive. Environmental regulation is also dynamic – new legislative provisions, which would fall within the definition of "environmental law", will be added to the statute book in future. The task of updating a definition of "environmental law" with every new relevant provision would be onerous and an inefficient use of parliamentary time. Furthermore, if the definition was framed by reference to specific legislative provisions or required to be updated every time a relevant provision was added to the statute book, there would be a risk that relevant provisions – either currently on the statute book or those made in the future – could be inadvertently missed from the definition. An inadvertent omission of a relevant legislative provision or a delay in updating the definition would undermine ESS's governance role.

For all of these reasons the Scottish Government is of the view that the approach to the definition of "environmental law" currently taken is necessary and appropriate. As currently drafted the definition both ensures that the provision is and remains comprehensive and provides the reader with sufficient clarity. It is also flexible enough to respond to future developments in this area of law, and avoids the disadvantages created by defining the term by reference to specific legislative provisions.

There is also the possibility that the section 39(5) power could be used to provide further clarity on whether particular matters do or do not fall within the definition, if necessary in light of experience.

Section 39(5) provides Scottish Ministers with the power to make regulations specifying legislative provision, which does, or does not, fall within the definition of "environmental law". This power is expected to be used infrequently. At present the only legislative provision that is expressly excluded from the definition of "environmental law" is "Parts 1 to 3 of the Climate Change (Scotland) Act 2009.

Subsection (6) provides that regulations made under subsection (5) may specify that Parts 1 to 3 of the Climate Change (Scotland) Act 2009 are within the definition of "environmental law" and modify subsection (4), accordingly. This is one potential use of the regulation making power at subsection (5). It is not anticipated that that the power in subsection (5) will be used frequently to remove legislative provision from the remit of ESS. However, the provision gives Scottish Ministers appropriate flexibility to do so, as they have done for Parts 1 to 3 of the Climate Change (Scotland) Act 2009, if it becomes necessary to do so.

The question refers to developments in environmental law stemming from a future agreement between the UK and the EU. As noted above, the definition of "environmental law" is intentionally broad and comprehensive, including with a view to accommodating future developments, whether those be developments in environmental law following a future agreement between the UK and the EU or otherwise. The section 39(5) power provides sufficient flexibility to make adjustments, if necessary, to specify that a legislative provision is or is not within the definition of environmental law.

It may be also be helpful to note that, should the need arise, section 17 of the Bill provides Scottish Ministers with the power to make regulations to modify ESS's functions for the purpose of implementing an international obligation that arises or may arise under an agreement or arrangement between the UK and the EU following the withdrawal of the UK from the EU.

I hope that this is helpful in addressing the issues raised by the committee.

Yours sincerely

Donald Cameron