



The Scottish Parliament  
Pàrlamaid na h-Alba

**Finance and Constitution Committee**

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By email

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Dear Cabinet Secretary

The Finance and Constitution Committee has agreed to write to you with a summary of the outcome of our recent parliamentary exercise to explore the impact of Brexit, if it happens, on devolution and parliamentary scrutiny. This builds on our previous work in relation to the LCMs for the EU (Withdrawal) Bill and the Trade Bill in which we suggested the need for an urgent need for a transparent and consultative debate about whether or not devolution is robust enough to deal with Brexit.

The decision to write to you reflects the impact of the increasing level of intergovernmental working which will be required as a consequence of Brexit and how this will impact on the scrutiny function of the Scottish Parliament given current concerns about the effectiveness and transparency of inter-governmental relations. Some of these issues will be a matter for the Scottish Parliament and the Scottish Government to resolve solely and in some cases they will require the co-operation of the UK Government to be resolved fully.

## **Background**

The Committee agreed at our meeting on 20 March 2019 to explore a more coordinated approach with other Scottish parliamentary committees to developing the Scottish Parliament's scrutiny role in relation to the new powers arising from the UK's withdrawal from the EU. The Committee also wrote to the constitution committees in the House of Commons, House of Lords and the National Assembly of Wales. The approach covers three main areas—

- Legislation in devolved areas which previously would have been within the competence of the EU;
- International Treaties including trade deals which cover devolved areas and which would previously have been negotiated by the EU; Common UK frameworks which the UK Government and the Scottish and Welsh Governments agree will be needed post-Brexit.

The Committee welcomes the responses received and these are summarised below. The responses are also available on our website<sup>1</sup>. Many of the issues raised are broadly similar and consistent with the recommendations in our reports on the LCMs on the EU (Withdrawal) Bill and the Trade Bill.

## **Legislation**

The Scottish Parliament's committees generally agree with the principle that, as a minimum, the Scottish Parliament must be consulted prior to consent being given by Scottish Government Ministers to UK Ministers to make subordinate legislation relating to non-reserved matters currently subject to EU law.

Most of the subject committees provided helpful comments on the operation of the existing SI protocol which applies to legislation made under the EU (Withdrawal) Act.

There is a general view that the existing protocol has worked well and clearly sets out the role of committees. It should be used as a starting point for the development of a

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<sup>1</sup> Coordinated approach responses: Finance and Constitution Committee, The Scottish Parliament: <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/102054.aspx>

similar protocol to apply to the exercise of all powers on UK Ministers to legislate in devolved areas that are currently within the competence of the EU.

At the same time a number of concerns were raised regarding the operation of the protocol. These primarily relate to the levels and timing of the information provided to the Scottish Parliament. Some committees pointed out that in some cases there has been much less than 28 days to carry out scrutiny and that the level of information provided was variable. It was also noted that timing issues in particular are likely to become more of an issue once scrutiny moves away from technical fixes and is more focused on policy changes.

Suggestions regarding improving the operation of future similar protocols included –

- The level of scrutiny should be proportionate and should be a matter for the Scottish Parliament;
- There needs to be more clarity regarding the circumstances in which the powers conferred on UK and Scottish Ministers concurrently, might be exercised by a UK Minister;
- There needs to be some flexibility to allow for more than a 28 day scrutiny period where there are significant issues to consider;
- Sufficient time should be provided to allow committees the opportunity where appropriate to consult with external bodies;
- Consideration could be given to the length and clarity of the documents being provided;
- Greater clarity is needed in terms of what the Scottish Parliament is being asked to consent to including the possibility of having access to draft SIs prior to being laid;
- Consideration could be given to the sharing of information with clerks at an earlier stage in the process on a confidential basis;
- Further consideration should be given to the level of resources available to committees including clerking, research and legal support.

It was also noted by some committees that there are some matters currently within the competence of the EU, where there is disagreement between the UK Government and the Scottish Government about where competence lies in the event of Brexit. Some committees propose that, as a minimum, the Scottish Parliament should be informed of such disputes and further consideration should be given to its role in resolving such disputes.

The House of Commons Public Administration and Constitutional Affairs Committee (PACAC) agree that devolved legislatures should expect in principle to be consulted by their respective governments before consent is given by devolved government Ministers. They also suggest that as with other principles or convention in the UK political system, this principle is insisted on and protected jealously from governments seeking to make exceptions.

The House of Lords Select Committee on the Constitution has raised concerns about UK bills that provide powers to UK Ministers to legislate in areas of devolved competence without any requirement to consult devolved institutions. The Constitutional and Legislative Affairs Committee in the National Assembly for Wales raise a wider issue about the extent to which the Sewel Convention retains any constitutional validity and whether it needs to be reviewed or alternatively replaced with new arrangements.

**The Committee would welcome the views of the UK and Scottish Governments on the above issues and, in particular, whether, as a minimum, the Scottish Parliament must be consulted prior to consent being given by Scottish Government Ministers to UK Ministers to legislate in no-reserved matters currently subject to EU law. If so, whether both Governments commit to providing sufficient time and information to allow effective parliamentary scrutiny prior to consent being given.**

**The Committee also asks whether there have been any inter-governmental discussions about reviewing the Sewel Convention.**

## **International Treaties**

A number of Scottish Parliament committees supported the view that the Scottish Parliament should have a role in the development and agreement of international treaties in relation to areas which are devolved. This should include areas such as security and policing where international co-operation may be required.

In relation to trade deals some committees noted that the UK Government has recognised that the devolved legislatures have a strong and legitimate interest in future trade arrangements. However, there is some concern regarding the level of information provided and consultation undertaken by the UK Government to date.

For example, in relation to the tariff schedule in the event of a no deal Brexit.

It was also noted that the UK Government has committed to establishing a new intergovernmental Ministerial Forum to provide a formal mechanism for UK and devolved government Ministers to discuss and provide input to future trade negotiations. The UK Government has also indicated that it is a matter for each devolved legislature to determine how it will scrutinise their respective government's role in the trade negotiation process.

Suggestions regarding the role of the Scottish Parliament in relation to international treaties included the following –

- A formal process needs to be developed as a matter of urgency between the Scottish Government and the Scottish Parliament to allow parliamentary committees an opportunity to influence the formulation, negotiation and agreement of international treaties in terms of how they relate to devolved issues;
- The process must include sufficient opportunity for stakeholder and public engagement;
- The process should also include opportunities to take evidence from UK Ministers where appropriate;
- The Scottish Parliament should have a role in reviewing proposals at an early stage for international co-operation and cross-border arrangements in areas such as civil law, security and policing;

- The scrutiny procedures that the Scottish Parliament adopts in relation to international agreements should, as a minimum, be equivalent to those in the UK Parliament.

The House of Lords Select Committee on the Constitution has recommended that the UK Government will need to consult the devolved governments about their interests when opening negotiations.

**The Committee would welcome the views of the UK and Scottish Governments on the above issues and, in particular, whether each will commit to providing sufficient time and information to allow the Scottish Parliament and its committees an opportunity to influence the formulation, negotiation and agreement of international treaties in relation to devolved issues.**

### **Common Frameworks**

The Scottish Parliament's committees generally agree that there is a need for parliamentary consent prior to the UK and devolved governments agreeing both legislative and non-legislative frameworks and that a protocol between the Scottish Government and Scottish Parliament needs to be developed to deliver this. Other suggestions included –

- Initial scrutiny of Brexit-related SIs and SSIs should not be viewed as agreement to common frameworks in these areas;
- Committees should have the opportunity to influence common frameworks at an early stage in their development;
- Regular written and oral updates should be provided by the Scottish Government to the relevant committee on the development of each common framework including specific concerns previously raised by committees;
- Draft frameworks should be published;
- There needs to be greater clarity about the interaction between common frameworks and international treaties including trade deals;
- Non-legislative frameworks need to include sufficient information to allow for effective parliamentary scrutiny;

- Some common frameworks are likely to be cross-cutting which is likely to require a joint scrutiny approach;
- There needs to be a more effective dialogue between government and parliament on the UK Government's framework analysis including explaining any changes.

PACAC have recommended that the UK Government should publish a set of principles for the governance and operation of Common Frameworks. PACAC is also clear that the UK Government needs to be more transparent in regards to Common Frameworks and that both legislative and non-legislative frameworks should undergo full and detailed scrutiny. The House of Lords Select Committee on the Constitution recommends that in order to influence the development of common frameworks —committees may wish to seek regular reports from their ministers on the negotiations of the frameworks and to scrutinise ministers' actions and decisions.

**The Committee would welcome the views of the UK and Scottish Governments on the above issues and, in particular, whether there is a need for Parliaments to have a role in process for developing, agreeing and implementing both legislative and non-legislative frameworks. If so, whether both Governments commit to providing sufficient time and information to allow for effective parliamentary scrutiny prior to frameworks being agreed.**

## **Conclusion**

The Committee invites both the UK Government and the Scottish Government to respond to relevant issues raised above. At the same time, the Committee notes that many of the issues raised above are process related. While there is an urgent need to develop effective scrutiny processes, especially if there is a no deal Brexit, this does not answer the fundamental question of whether or not the existing devolution settlement is robust enough to deal with Brexit.

It is very challenging to develop robust scrutiny processes when the constitutional arrangements in the event of Brexit remain unclear. The lack of progress of the review

of inter-governmental relations is a case in point. The Committee asks both Governments to also address this point in their respective responses.

The Committee intends to explore these issues further at an informal committee event in late August when we will reflect on the impact of any Brexit on devolution and the implications for the role of the Scottish Parliament. The Committee views this event as an ideal opportunity for informal dialogue with key stakeholders and both Scottish Government and Cabinet Office officials. The committee clerks will be in contact with your officials to discuss arrangements.

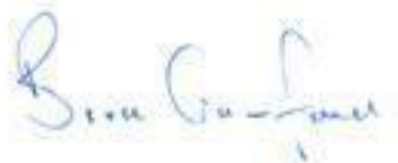
It would also be helpful to have a response from you by **Friday 16 August**.

The Committee will also continue to develop a more co-ordinated approach to these issues with other committees in the Scottish Parliament and in Westminster and the National Assembly of Wales.

This letter has also been sent to Rt Hon David Lidington CBE MP, Minister for the Cabinet Office and copied to the committees who provided responses to us.

I look forward to your response.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Bruce Crawford".

**Bruce Crawford MSP**  
**Convener**