

Briefing for Stage One Debate: The UK Withdrawal from the European Union (Continuity) (Scotland) Bill - Part One of the Bill

Summary

We welcome this Bill and specifically the **Part 1 keeping pace power**. **This is a necessary and practical tool that can enable the maintenance and progress of rights and standards in Scotland.** It helps to fulfil the Scottish Government's commitment to "maintain or exceed environmental standards"¹ post-Brexit and to stand up for human rights in the face of the risks created by Brexit². These commitments have been widely welcomed by stakeholders.

However, as currently presented, the Bill includes no indication of why or when these powers should be used and gives significant discretion to Ministers to decide themselves, without any direction or limitation on their use. The welcome commitments (above) may not be delivered by the existence, in itself, of this power. To provide an impetus to ensure this new power is used to maintain standards, we believe the Bill should be amended to provide a "purpose" for the power that must, if possible, be met.

Such a purpose would provide a "sense of direction" for the power – and associated reporting provisions would enhance transparency and the opportunity for Parliamentary scrutiny.

We also highlight that these powers should not only be viewed as being for small technical changes to adjust Scots law to being outside of the EU. Instead, we highlight that keeping pace powers are a key means to ensure that Scotland does not drift towards becoming the poor man of Europe on standards that affect people's quality of life.

Background

The European Union (EU) has played a vital role in progressing environmental, human rights and equalities standards in the UK. For example, it led to changes in UK law such as around:

- data protection - including greater protections for individuals around the information held about them;
- human trafficking - including greater protections for victims of trafficking;
- rights of victims of crimes - making sure that victims of crime, and their family, have the right to information, support and protection;
- disability rights - including improved protections at work and Braille labelling for medicine
- species and habitat protection, and the management of our natural environment;
- the cleanliness of our air and water, and pollution reduction in towns, cities, rivers and at sea; and
- environment assessment of plans, programmes and projects and the rights to environmental justice.

1 For example <https://www.gov.scot/publications/consultation-environmental-principles-governance-scotland-4/>

2 First Minister Nicola Sturgeon MSP, 2017, quoted <https://humanrightsleadership.scot/>

As a result, a key concern throughout the Brexit process has been the risk that Scotland, and indeed the whole of the UK, will lag behind its European neighbours on both environmental and human rights issues. For example, over 200 civil society organisations in the Scotland Declaration on Human Rights³ stated that they ‘share profound concerns about the potential loss of equality and rights protections as a consequence of the UK leaving the European Union’ and state that ‘human rights standards should be continually strengthened over time’. **There is a very real risk that, without the necessary mechanisms and duties in place, being outside of the EU will result in a decline in environmental and rights standards.**

Now is the time to take deliberate steps to keep up standards. We have already seen regression on human rights protections with the loss of the EU Charter of Fundamental Rights. At a UK level, attempts to legislate for high environmental standards have been resisted in e.g. the trade, agriculture and fisheries bills. The Scottish Government has, by contrast, repeatedly emphasised its commitment to high standards. In environmental issues, this has been underlined by its statements and, for example, by Part 2 of this Bill. The Scottish Government has also shown leadership in human rights, for example, in the establishment of the National Taskforce on Human Rights. With the future of the UK’s adherence to the European Convention on Human Rights also at risk and uncertainty over UK commitments to the environment, it is important that Scotland takes steps to clarify and give certainty to its commitment to high standards.

These keeping pace powers are a crucial tool for Scotland to use to keep up its high environmental and rights standards as we leave the European Union. Decisions about whether or not to use these keeping pace powers must therefore be judged by this: firstly, will to do so be reasonably practical; and secondly, will the regulations serve to either maintain environmental or rights standards (broadly defined, as set out below), or advance them. If the answer is yes to these questions, then Scottish Ministers should have a duty to use their powers in order to do so.

A purpose to “keeping pace”

The keeping pace powers in the Bill are welcome; however, they do not currently provide sufficient assurance that Scotland will maintain alignment with EU high standards. The Bill needs to be amended to put the Scottish Government’s objective of high environmental standards and human rights at its heart.

This can best be achieved by adding a “purpose” to Part 1 – a purpose that should, if possible and practical, be met by the use of the powers. This approach would underline the Government’s intent to use the power to maintain dynamic alignment with the European Union. It would act as a guide for future Scottish Ministers in determining which parts of EU law they should keep pace with, ensuring those decisions can be made strategically, and clarifies the positive outcomes that alignment would have for Scotland.

We therefore recommend that the Bill be amended to state that Scottish Ministers should use the keeping pace powers, so far as is reasonably practical, in order to maintain and advance standards in relation to matters including: -

- a Environmental protection;
- b Animal health and welfare;
- c Plant health;
- d Equality, non-discrimination and human rights;
- e Social protection; and
- f Judicial cooperation.

This purpose could be further enhanced by underlining the positive outcomes for Scotland and its people that would result – by, for instance, linking this maintenance and advance in standards to the UN’s Sustainable

³ See the Scotland Declaration on Human Rights and its signatories at www.humanrightsdeclaration.scot

Development Goals, as expressed as National Outcomes in the Scottish Government's National Performance Framework.

To complement this purpose, Section 7 should be expanded to ensure that reporting on use of the 'keeping pace' power includes an explanation of how the use/non-use of the power has contributed to the achievement of the purpose. This would include outlining the Government's reasons why decisions to not use the power were made.

Taken together, this approach of new purpose and an enhanced reporting provision would also improve transparency and Parliamentary scrutiny of the new powers. Regulations under Part 1 would need to be presented to Parliament in a way that made clear how the proposal was in keeping with the purpose. This scrutiny would be further enhanced by requiring the Government to report how they have sought to achieve the purpose and, if this has not been possible, why that is the case.

This approach is supported by many stakeholders represented by the networks supporting this briefing. It is also supported by evidence of other specialists to the Finance and Constitution Committee at stage 1; for instance: -

- The Law Society of Scotland stated that we "will not know, unless there is some additional position, what legislation the Scottish ministers have decided not to align with. It is not up to Parliament to decide that; it is a ministerial decision. It is uncharted territory, and the bill does not make it clear."⁴
- Professor Keating suggests that there is a need for "some sort of broad statement regarding the purpose of dynamic alignment and whether it is just to stay aligned with everything, is it so that we can we pick and choose, or is there some broad strategy that would make it important to stay in dynamic alignment." He goes on to state that we "need to know on what basis things are going to be selected."⁵

The Finance and Constitution Committee itself recognised the need for greater clarity on how these powers would be used, stating:

"the Committee does not accept that the use of this power should be entirely at the discretion of the Scottish Government and believes that there needs to be much greater clarity on how the Scottish Government proposes to use the power. The Committee notes that one of the aims of the Bill as set out in the policy memorandum is to ensure "consistency and predictability" for people and business both in Scotland and the EU. But at the same time the Scottish Government recognises that it will not be possible to keep pace with all future EU law in devolved areas." (paragraphs 36-37 of Stage One report).

Conclusion

Putting a purpose at the heart of the Bill, together with duties to report on decision-making against that purpose, brings vital transparency, scrutiny and accountability to use of these powers. It makes clear the Government's objective for the power and provides clarity and certainty to stakeholders. It also enhances transparency and Parliamentary scrutiny. Above all, as we leave the European Union, it ensures that Scottish Ministers and the Scottish Parliament use this practical legislative tool to guard against regression and continue to show leadership and commitment to high environmental and rights standards.

To discuss this briefing or the Bill, please contact:

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⁴ Michael Clancy (Law Society of Scotland), evidence to Finance and Constitution Committee, 26th August 2020 (<https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12767>)

⁵ Professor Michael Keating (University of Aberdeen), evidence to Finance and Constitution Committee, 26th August 2020 (<https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12767>)