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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Supplementary Legislative Consent Memorandum for the European Union (Withdrawal) Bill**



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# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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# Introduction

1. The European Union (Withdrawal) Bill (“the EUW Bill”) was first published on 13 July 2017 and completed its passage through the House of Commons on 17 January 2018. The EUW Bill will receive its Third Reading in the House of Lords on 16 May 2018.
2. The Scottish Government lodged a Legislative Consent Memorandum (LCM) for the EUW Bill on 12 September 2017.
3. LCMs are lodged in relation to bills under consideration in the UK Parliament, which contain what are known as “relevant provisions”.
4. The Bill is a relevant bill within Rule 9B.1.1 of the Scottish Parliament’s Standing Orders as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament and alters that legislative competence and the executive competence of the Scottish Ministers.
5. As the Bill contains provisions that confer new powers to make subordinate legislation, the remit of this Committee was engaged.
6. The Committee published a report<sup>i</sup> on the LCM for the Bill on 17 November at which point the EUW Bill was still at Committee Stage in the Commons.
7. That report was based on the EUW Bill as introduced. Since then there have been amendments to the EUW Bill.
8. Since then the Committee has also considered the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (“the Continuity Bill”), introduced by the Scottish Government and passed by the Scottish Parliament on 21 March. The Continuity Bill provides for the continuity of EU-derived law, insofar as within the Parliament’s legislative competence, and gives the Scottish Government powers to prepare the statute book for withdrawal from the EU.
9. A [supplementary LCM on the EUW Bill](#) was lodged on 26 April 2018.
10. In its original report on the EUW Bill the Committee raised a number of concerns about the delegated powers in the EUW Bill and the scrutiny attached to them. This report considers whether the concerns raised in that report have now been alleviated.
11. The supplementary LCM has been considered in the absence of any certainty about which Bill or which combination of bills (the EUW Bill and/or the Continuity Bill) will be relied upon by the Scottish Ministers to make the necessary legislative changes for the purposes of the UK’s withdrawal from the European Union. In that context, this report also considers the challenges around the different legislative options.
12. The Committee’s role is to focus on the supplementary LCM. The Finance and Constitution Committee is the lead committee for consideration of the

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<sup>i</sup> [DPLR Committee Report on the Legislative Consent Memorandum for the EU \(Withdrawal\) Bill, 17 November 2017, 54th Report](#)

supplementary LCM and therefore the Committee directs this report to that Committee.

## The EUW Bill

13. The Explanatory Notes to the EUW Bill state that the Bill performs four main functions. It:
- repeals the European Communities Act 1972;
  - converts EU law as it stands at the moment of exit into domestic law before the UK leaves the EU;
  - creates powers to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement; and
  - maintains the current scope of devolved decision-making powers in areas currently governed by EU law.

## Supplementary LCM

14. The supplementary LCM explains the proposals of the UK Government concerning the EUW Bill's approach to the devolution settlement and the Scottish Government's view on those proposals. It also sets out relevant changes made to the EUW Bill since the Scottish Government's previous memorandum.
15. The supplementary LCM states that the Scottish Government is not able to recommend that the Scottish Parliament consent to the EUW Bill on the basis of the UK Government's proposals at this time. At the same time, the Scottish Government advises that its preferred outcome remains acceptable changes being made to the EUW Bill which would allow it to recommend consent to the Bill as a whole to the Parliament. The supplementary LCM contains further proposals which it suggests would allow it to recommend consent.
16. However, the supplementary LCM presents three options to the Parliament, in the event that the Bill is not revised in line with either of the Scottish Government's suggested sets of amendments. The three options are:
1. the Parliament could refuse to give consent to the EUW Bill. In that case, the Continuity Bill would provide the legislative framework for continuity of retained EU law in devolved areas, and the powers for Scottish Ministers to fix deficiencies;
  2. the Parliament could give partial consent to specific provisions in the EUW Bill (for example, those allowing UK Ministers to use their powers to fix deficiencies in retained EU law in devolved areas). In that case the Continuity Bill would again provide for continuity of retained EU law and the Scottish Ministers' powers to fix deficiencies, but UK Ministers would have concurrent power to make fixes in devolved areas under the EUW Bill; or

3. the Parliament could give consent to the EUW Bill for everything apart from clause 11 and Schedule 3. In that case the EUW Bill would be the principal vehicle to deliver continuity of retained EU law and both the UK Government and the Scottish Ministers' powers to fix deficiencies, and it would be for the Scottish Parliament to consider the other aspects of the Continuity Bill, for example whether aspects of the Continuity Bill should be repealed, but other provisions, which are not provided for in the EUW Bill (such as a "keeping pace" power) should be re-enacted.

## Consideration of the EUW Bill

17. The Committee has taken the same approach to consideration of this Bill as it would normally take on a bill. The Committee recognises the importance and unusual nature of the Bill. The Committee also recognises that its consideration has taken place in the context of considerable uncertainty about which legislation is to be relied upon by the Scottish Ministers.
18. Irrespective of that uncertainty, the Committee has focussed on the same four questions it asks on all bills.
  - Firstly, the Committee has considered whether it is appropriate to delegate the powers the Bill proposes to confer on the Scottish Ministers. The Committee has considered whether the matters proposed to be delegated are appropriate for delegation or whether they would more appropriately be set out on the face of the Bill. Is the need for such wide powers warranted and has sufficient justification been provided? Has the right balance been struck between what is on the face of the Bill and what has been left to secondary legislation?
  - Secondly, the Committee has considered the breadth of the powers. It has sought to assess whether they are appropriately drawn and whether they could be expressed in a way that makes it clearer how the powers will be exercised.
  - Thirdly, the Committee has considered the correlation between the policy intention as expressed in the Delegated Powers Memorandum and what the Bill enables the Scottish Ministers to do in exercise of the powers.
  - And fourthly, the Committee has considered whether the powers are subject to an appropriate level of parliamentary scrutiny.
19. However there are further issues which arise due to the unique nature of this Bill, concerning the powers of UK Ministers, which the Committee has taken into account.
  - The Bill confers powers on UK Ministers, concurrent with those of the Scottish Ministers, to make regulations relating to matters within devolved competence. The Committee has accordingly considered questions about scrutiny of the choice which will allow either UK or Scottish Ministers to bring forward legislation in devolved areas.
  - The Committee has also considered the question of scrutiny by the Scottish Parliament, in those cases where the choice is exercised in favour of bringing

forward subordinate legislation in the UK Parliament rather than the Scottish Parliament.

20. The focus of the Committee's consideration of the supplementary LCM has been two fold. Firstly, the Committee has focussed on issues arising out of its report on the LCM. And secondly, the Committee has considered the implications of the different legislative approaches set out by the Scottish Government in its supplementary LCM.
21. To inform its consideration of the supplementary LCM, the Committee took evidence from the Minister for UK Negotiations on Scotland's Place in Europe (1 May 2018) and the Secretary of State for Scotland and the Minister for the Constitution (3 May 2018).
22. The timescale for considering the supplementary LCM was very short and the Committee accordingly thanks the Ministers for attending at such short notice.

## Interaction of delegated powers under each option

23. As set out above, the Scottish Ministers have presented three options to the Parliament in the event that the EUW Bill is not amended in line with the Scottish Government's proposals.
24. At the same time, as the supplementary LCM notes, and as the Minister for UK Negotiations on Scotland's Place in Europe reiterated in evidence to the Committee, the preferred option of the Scottish Government continues to be to rely on the powers in the EUW Bill. This would, however, in the view of the Scottish Government, only be an option if the EUW Bill is amended in line with the Scottish Government's proposals.
25. Failing that, the Scottish Government has advised that one of the three options set out in the supplementary LCM should be pursued.
26. The Minister explained to the Committee what any legislation in the context of the UK's withdrawal from the EU needed to achieve—
  - ” The issue breaks down into three things that need to be achieved. The first is continuity: to make sure that the laws work. The second is to make sure that powers for ministers exist in order for that to happen. The third is to set up the frameworks and the functions that will need to exist post-Brexit to allow those things to happen.<sup>ii</sup>
27. Further to that, the Minister expanded upon the nature of the two options, which would involve consent to some aspects of the EUW Bill and how they would achieve the objectives he set out—
  - ” ...there would be a mix of possibilities. For example, the continuity bill plus clause 7 would allow us to meet the first objective, which is to make sure that the powers come back. That would allow co-operation between ministers, because it would empower UK ministers to act in devolved areas. That is workable. The withdrawal bill minus clause 11 would also be workable: the first two objectives would be met, but we would deal with the third one ourselves.<sup>iii</sup>
28. The Committee asked the Minister which of the three options would best provide the Scottish Ministers with the necessary tools and which would allow the greatest opportunity for effective parliamentary scrutiny of broad delegated powers.
29. The Minister indicated that any of the options would give the Scottish Ministers the necessary tools to achieve continuity and establish frameworks. Moreover, he indicated that all of the options would allow for effective parliamentary scrutiny. The Committee noted this reassurance.
30. That being said, the Minister recognised that reliance solely on powers under the continuity bill would create greater complexity and inefficiencies—

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<sup>ii</sup> Delegated Powers and Law Reform Committee, Official Report, 1 May 2018, Column 34

<sup>iii</sup> Delegated Powers and Law Reform Committee, Official Report, 1 May 2018, Column 34

” ...complexity will be added if we are not able to rely on joint activity between the two sets of ministers and the two Governments. It will require that a large number of technical instruments be laid and scrutinised in the Scottish Parliament while the same is being done in the UK Parliament. Clearly, for reasons of efficiency that would be better done jointly. We would like to co-ordinate the instruments.<sup>iv</sup>

31. He also drew the Committee’s attention to paragraphs 19 and 20 of the Policy Memorandum for the Continuity Bill, which further highlight some of challenges of reliance on powers under that Bill—

” The third is relying on the Bill alone following the withholding of legislative consent. If the Scottish Parliament were to withhold consent to the EUWB entirely then it would have to be amended so that the provisions of it requiring legislative consent did not extend to Scotland. Powers given to UK Ministers in the EUWB would have to be modified so that they could not be exercised within devolved competence. As a result, every change necessary to devolved laws in anticipation of UK withdrawal would have to be made using the powers in this Bill. Even where the changes required were technical or where identical changes were necessary across the UK’s jurisdictions, separate instruments would be required in the UK and Scottish Parliaments to ensure an operating body of law after UK withdrawal.

The Scottish Government has made clear that this third route is a scenario it wishes to avoid. It would add to the complexity of the post-exit position for those who need to operate and work with the legislation. It would also require a large number of technical instruments to be laid and scrutinised in the Scottish Parliament where the same or similar provision was being made in the UK Parliament. The co-ordination of these instruments across the UK’s jurisdictions, particularly where they were intended to produce identical, co-ordinated or compatible effects across the UK, would present serious logistical challenges. That complexity would, however, flow from the refusal of the UK Government to amend its Bill in a manner which respects the position of the Scottish Parliament within the constitution. If, however, preparation for UK withdrawal from the EU ultimately requires to be done on this basis, then the Bill provides a framework for doing so.<sup>v</sup>

32. The Committee also asked UK Ministers about the workability of the three alternative options. The Secretary of State for Scotland did not offer a view on the three alternative options, but instead highlighted his view that the best option would be to reach agreement that would allow reliance upon powers under the EUW Bill.

**33. The Committee notes the preferred legislative routes of the UK and Scottish Ministers. Whichever legislative approach is adopted, Ministers must have the powers necessary to deliver this programme of secondary legislation, that programme should be delivered efficiently, clearly and co-ordinately**

<sup>iv</sup> Delegated Powers and Law Reform Committee, Official Report, 1 May 2018, Column 36

<sup>v</sup> UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, Policy Memorandum, page 5

**and there must be an appropriate opportunity for Parliament to undertake effective scrutiny of that legislation.**

## Broad Powers

34. In its report on the LCM for the EUW Bill, the Committee highlighted the concerns about the broad powers the Bill confers on both Scottish and UK Ministers.
35. However, the Committee concluded that the unprecedented task of modifying domestic legislation to preserve the statute book on leaving the European Union and the short timeframe in which it has to be done necessitates such broad powers.
36. Nonetheless, the Committee was clear that the powers should be as tightly defined as possible and there must be an opportunity for effective scrutiny. With that in mind, the Committee notes that (as a result of amendments to the EUW Bill agreed in the Lords) the powers in clauses 7 (correcting deficiencies) and 9 (implementing the withdrawal agreement) are no longer available to create new public authorities or impose or increase fees. The Committee welcomes that equivalent amendments have been tabled to apply the same restrictions to the equivalent powers of devolved administrations in schedule 2.
37. The Committee also welcomes that the powers have been restricted in that clause 8 (power to implement international obligations) has also been removed.
38. The Committee specifically expressed concern about the potential for the powers to be used to make significant policy changes.
39. That concern centred on the fact that the powers allowed Ministers to make changes they considered “appropriate” rather than “necessary”. The Committee welcomed the commitment from UK Ministers in evidence to the Committee on the LCM that the powers would not be used to make policy changes, but nonetheless urged consideration of a change in the Bill to provide for a “necessity test” rather than an “appropriateness test”. This echoed the recommendations of the Lord’s Delegated Powers and Regulatory Reform Committee and Constitution Committee.
40. Accordingly, in the course of its consideration of the Continuity Bill, the Committee welcomed that that Bill enables Ministers to exercise powers only where it is *necessary* to make a change. In the Continuity Bill where a change is necessary (for example to correct deficiencies), powers may be exercised to make the provision which Ministers consider *appropriate*.
41. The Committee understands that amendments have been tabled in the House of Lords to constrain the exercise of powers under clause 7 so that the powers are no longer available where “the Minister considers appropriate” but rather where the provision “is necessary”. No amendments have been lodged to the equivalent power of the devolved administrations in schedule 2.
42. The Committee asked the Minister for UK Negotiations on Scotland's Place in Europe whether he would welcome a similar restriction on the exercise of the Scottish Ministers powers. The Minister indicated that he believed that the limitations on the powers in the Continuity Bill provided a better position than the approach taken in the EUW Bill. The Minister advised that the Scottish Government would be supportive of its powers being restricted in the way proposed, provided that the UK Government was minded to accept the amendments. The Minister was

clear the powers available to UK Ministers and the Scottish Ministers should be equivalent.

43. In light of the Minister's willingness to accept such restrictions on the exercise of Scottish Ministers powers, the Committee asked the UK Ministers whether they would be willing to amend the Bill accordingly.
44. The Minister for the Constitution advised the Committee that, while the UK Government would reflect on the changes made in the House of Lords to apply a necessity test to the exercise of the powers, the UK Government was not minded to adopt the approach taken in the Lords. With that in mind, the UK Government would not be extending this approach to the exercise of powers by the Scottish Ministers, but did commit to reviewing the limits on the exercise of powers in this way.

**45. The Committee continues to believe that the powers of UK and Scottish Ministers should be constrained by way of a necessity test rather than an appropriateness test. It considers that the powers should only be available where Ministers can show that it is necessary to make a change to the statute book, even if they cannot show that the particular alternative chosen is itself necessary. The Committee notes the willingness of the Minister for UK Negotiations on Scotland's Place in Europe to accept such restrictions on the exercise of the Scottish Ministers powers. The Committee understands that UK Ministers may have concerns about the amendments agreed to in the House of Lords, but invites the UK Government to give thorough consideration to applying a necessity test to the exercise of the powers. Those restrictions should also be applied to the exercise of powers by the Scottish Ministers.**

**46. The Committee welcomes the other amendments tabled to restrict the exercise of Ministers' powers under the EUW Bill.**

## Protection of constitutional statutes

47. The EUW Bill as introduced protected the Northern Ireland Act from amendment by powers under this Bill. Such protection was not afforded to the Scotland Acts and Wales Acts. In its report on the LCM, the Committee recognised that the Scotland Acts are already subject to amendment by way of secondary legislation. Crucially, however, in those circumstances the Scottish Parliament as well as the UK Parliament has the opportunity to consider the secondary legislation. At introduction, such secondary legislation could be considered in the UK Parliament alone. The Committee argued that this was not appropriate for matters of such constitutional import to be considered in the UK Parliament alone.

**48. The Committee therefore welcomes that the EUW Bill has been amended, so that powers to correct deficiencies may not amend or repeal the Scotland Act 1998 or the Government of Wales Act 2006, unless the regulations make ancillary provision or are amending or repealing provisions of those Acts which modify another enactment.**

## Fees and charges

49. Schedule 4 of the Bill confers a wide power on UK Ministers and devolved authorities to create fees and charges in connection with functions which public bodies in the UK take on exit day, and also to modify those fees and charges. In its report on the LCM, the Committee recommended a change to the parliamentary procedure for this power. The Committee recommended that the power be subject to the affirmative procedure not just for new fees, but also for significant increases to existing fees.
50. This was a concern that the Committee also explored in the context of the Continuity Bill.
51. The Committee asked the Minister for UK Negotiations on Scotland's Place in Europe whether the EUW Bill would be amended to change the procedure applying to regulations making increases to existing fees. The Minister suggested that such amendments would be forthcoming. However, the Minister for Constitution was not able to confirm that such amendments would be forthcoming.
52. **It is quite conceivable that subsequent exercises of this power will make provision for significant increases in fees. Accordingly, providing for the affirmative procedure only to apply to the first exercise of the power is in the Committee's view unsatisfactory.**
53. **The Committee therefore continues to support the amendment of the Bill in this way.**

## Made affirmative procedure

54. The proposed scrutiny procedures for all the powers are set out in Schedule 7, Parts 1 and 2.
55. The Schedule provides for a made affirmative procedure to apply to instruments made under powers conferred on UK Ministers in certain urgent cases.
56. The made affirmative procedure enables Ministers to bring legislation into force before it is approved by Parliament. After making it must be laid before Parliament for approval. The approval must be given within one month of laying otherwise the instrument ceases to have effect.
57. At introduction of the EUW Bill this procedure was not available to the Scottish Ministers. In its report on the LCM, the Committee concluded that there would be value in the Scottish Ministers having this power—
  - ” The Committee considers that there could be merit in such a procedure being available for affirmative regulations laid in the Scottish Parliament. It appears that the Scottish Ministers are just as likely, if not more likely, to have to make urgent instruments as the UK Ministers. For example, there may be circumstances where the Scottish Ministers will have to wait to see an approach taken by UK Ministers before making instruments, due to the requirement for Scottish Ministers to legislate consistently with modifications made to certain retained EU law by UK Ministers. Accordingly the time for the Scottish Ministers to make instruments may be even more constrained.<sup>vi</sup>

58. **The Committee therefore welcomes that amendments have been tabled to provide that the made affirmative procedure (for urgent instruments) is to be extended to the Scottish Ministers, along with requirements to explain why it is necessary to make use of the procedure.**
59. **At the same time, as the Committee highlighted in its report on the LCM, the Committee would not wish to see widespread use of this procedure. Such urgent procedures should only be used where necessary and should not be an alternative to thorough planning and timetabling.**

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<sup>vi</sup> [DPLR Committee Report on the Legislative Consent Memorandum for the EU \(Withdrawal\) Bill, 17 November 2017, 54th Report](#)

# Co-operation and co-ordination and deliverability of the programme of secondary legislation

60. The report notes that there are three different routes to address EU law deficiencies applying to Scotland and having a devolved purpose:
- Regulations made by UK Ministers acting alone and scrutinised in the UK Parliament;
  - Regulations made by the Scottish Ministers acting alone and scrutinised in the Scottish Parliament;
  - Regulations made by the UK Ministers and Scottish Ministers acting jointly and scrutinised in both Parliaments.
61. The Bill does not regulate how a decision will be reached on which route to follow. The Committee's report on the LCM encouraged co-ordination and co-operation between governments in the delivery of secondary legislation. It also encouraged co-operation between legislatures to hold governments to account for the choices they have made.
62. Given the ongoing uncertainty about which delegated powers are to be relied upon, it remains uncertain how a decision will be reached on which legislative route to take.
63. The Committee explored with both sets of Ministers how they would intend to work together and both sets of Ministers recognised the value and necessity of joint working in this context.
- 64. The Committee recognises that there is very little time left before exit day and in that context it reiterates the sentiments it expressed in its report on the LCM. Even if some of this programme of secondary legislation is to be delivered in the course of a transition period, with such a challenging and complex programme of secondary legislation to be delivered, it is essential that Governments work together co-operatively to deliver that programme.**
- 65. The Committee also continues to advocate joint parliamentary working. In that regard, the Committee welcomes the contribution of the Interparliamentary Forum.**
66. The forum is made up of the chairs or members of committees in the UK Parliament, Welsh Assembly and the Scottish Parliament considering issues relevant to the UK's withdrawal from the EU.
67. It has met so far on three occasions with most of the focus on the consideration of the EUW Bill.

68. **The Committee would encourage more joint working of this kind.**

## Ensuring effective scrutiny

69. In its report on the LCM, the Committee reflected that the Scottish Parliament's processes for the scrutiny of secondary legislation were robust and provided sufficient flexibility to enable them to be built upon and enhanced.
70. In a number of specific areas the Committee made recommendations as to how to build upon existing procedures.
71. The Committee, and the Finance and Constitution Committee, tasked its officials to work to deliver suggested processes to meet the Committee's recommendations. The Minister for UK Negotiations on Scotland's Place in Europe committed his officials to working with Scottish Parliament officials to develop these processes.
72. Two protocols have been developed by Scottish Parliament and Scottish Government officials working together to give effect to the recommendations of the Committee. These protocols were provided to the Committee at the same time as the supplementary LCM with an accompanying letter from the Minister for UK Negotiations on Scotland's Place in Europe.<sup>vii</sup>
73. The protocols have been prepared on the basis of reliance on delegated powers under the EUW Bill. At the same time, the Minister noted that they were equally applicable to other legislative approaches. Moreover, he highlighted that both protocols note that they can be reviewed and amended.
74. In that letter the Minister explains the purpose of the first protocol—
  - ” The first protocol sets out the arrangements for the Scottish Parliament to scrutinise instances where Scottish Ministers wish to give consent for the United Kingdom Government to correct a Brexit legislative deficiency via a UK Statutory Instrument.<sup>viii</sup>
75. As it stands there is no statutory requirement on the face of the EUW Bill for UK Ministers to obtain the consent of the Scottish Ministers before legislating in a devolved area. In its report on the LCM, the Committee supported the amendment of the Bill to provide for consent to be sought and given before UK Ministers can legislate. An amendment to that effect was tabled at Committee Stage in the Commons, but not agreed to. However the UK Government's Delegated Powers Memorandum indicates that, in the context of clause 7, UK Ministers would “not normally” use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority.
76. The Committee considered how it would hold the Scottish Government to account for consenting to UK Ministers legislating in devolved areas. The Committee

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vii [Letter from Michael Russell MSP \(Minister for UK Negotiations on Scotland's Place in Europe\) to the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee, 27 April 2018.](#)

viii [Letter from Michael Russell MSP \(Minister for UK Negotiations on Scotland's Place in Europe\) to the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee, 27 April 2018.](#)

concluded that there must be an opportunity for the Parliament to consider the Scottish Ministers' position before consent is given.

77. This first protocol seeks to give effect to that recommendation. Specifically, it provides that where the Scottish Ministers propose to consent to the UK Ministers making secondary legislation in devolved areas, Ministers will normally lay a proposal before the Parliament for 28 days for consideration. It is for a committee to consider whether it approves of the Scottish Ministers giving their consent. In the event that a committee does not approve, it can recommend that the instrument is laid for joint consideration or is made by the Scottish Ministers for consideration in this Parliament.
78. The Committee explored the protocol with UK Ministers and was pleased to note that the Minister had an awareness of it.

79. **The Scottish Parliament must have an opportunity to consider a proposal by the Scottish Ministers to consent to UK Ministers legislating in a devolved area. Both Scottish and UK Ministers must work in co-ordination to ensure that the Scottish Parliament has sufficient time to undertake that scrutiny of that proposal.**
80. **The Committee considers that this protocol could provide the Parliament with the necessary tools to ensure that it can require the Scottish Ministers to obtain the Parliament's approval before consenting to the UK Ministers legislating in devolved areas.**
81. **At the same time, there remains uncertainty about which powers are to be relied upon. There is also uncertainty about the frequency with which the Scottish Ministers will be seeking to consent to UK Ministers legislating in devolved areas.**
82. **The Committee welcomes the opportunity that the protocol affords to review and revise it at a future date.**

83. The second protocol arises out of the Committee's recommendations in its report on the LCM on the scrutiny of Scottish Statutory Instruments (SSIs) made under the EUW Bill.
84. The letter from the Minister also sets out the purpose of the second protocol—
- ” The second protocol sets out guiding criteria to enable Scottish Parliamentary committees to prioritise their scrutiny of Brexit SSIs should there be a large volume of these requiring scrutiny within a short time period.<sup>ix</sup>
85. The Committee's concerns were about how to manage the volume of instruments while ensuring effective scrutiny. The Committee recommended increased notice of forthcoming instruments, additional information to support instruments and a “flagging” role to be played by this Committee.

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<sup>ix</sup> Letter from Michael Russell MSP (Minister for UK Negotiations on Scotland's Place in Europe) to the Finance and Constitution Committee and the Delegated Powers and Law Reform Committee, 27 April 2018.

86. The second protocol makes provision for all of these recommendations. Further to that, amendments have been tabled to the EUW Bill to provide specified explanatory information to accompany SSIs.

**87. As with the first protocol, the Committee welcomes the measures that this protocol puts in place to meet its recommendations. However, it also welcomes the opportunity to review and revise the protocol at a future date.**

# Issues arising out of the consideration of the Continuity Bill

88. If sole reliance is to be placed on the powers under the EUW Bill, then there would be a number of aspects of the Continuity Bill which would not be provided for under the EUW Bill.
89. For example, the amendments tabled to the EUW Bill make provision for specified accompanying material that the Scottish Ministers must provide to accompany SSIs. That accompanying information is less onerous than what was committed to under the Continuity Bill. The Minister gave a commitment to provide that additional information and explained the nature of it—
- ” We committed to providing further statements under the continuity bill, such as the statement about whether the regulations affect employment or health and safety matters—I think that those amendments were from Labour during the passage of the bill. We will be held to that even if the continuity bill is not in effect.<sup>x</sup>
90. In addition, the Continuity Bill made provision for there to be a Parliamentary “sifting role” to decide whether the appropriate procedure had been attached to the instrument at the point of laying.
91. Moreover, the Committee recommended in its report that there should be a role for the Parliament in setting the procedure attached to instruments although it did not specifically recommend a model for the sifting of instruments.
92. At the same time the Committee suggested that the Scottish Parliament’s procedures were sufficiently robust to allow it to scrutinise instruments irrespective of the procedure attached.
93. The Committee explored with the Minister his views on making provision for a sifting committee process. He indicated that it would not be for the UK Parliament to set the process for scrutinising instruments in the Scottish Parliament. He also suggested that the sifting process in the Continuity Bill was preferable to the one set out in the EUW Bill to apply to the laying of instruments in the UK Parliament.
94. The Committee notes the Minister’s comments on this matter and awaits the outcome of further discussions on a sifting process.

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<sup>x</sup> Delegated Powers and Law Reform Committee, Official Report, 1 May 2018, Column 40

## Conclusions

95. **Consideration of the EUW Bill is expected to be completed in the UK Parliament in the near future.**
96. **This report has been agreed at a time when there continues to be uncertainty about which bill or which combination of bills will be relied upon.**
97. **Irrespective of which bill or combination bills is ultimately pursued, there are a number of fundamental principles that the Committee would expect to be at the centre of the approach to the delivery of the package of secondary legislation required for the purposes of the UK's Withdrawal from the EU.**
98. **Firstly, as recognised by both sets of Ministers, there must be coordination and cooperation between governments for this process to work.**
99. **Secondly, while the Committee accepts that broad powers are necessary to deliver this programme of secondary legislation, those powers must still be tightly defined and both Scottish and UK Ministers should only have the capacity to do what is necessary for the purposes of this exercise.**
100. **Finally, instruments and proposals for instruments (where appropriate) should be laid in a way that allows for effective parliamentary consideration and enables stakeholders to contribute to that consideration.**

