



Law Society
of Scotland

Law Society Scotland Response

UK Withdrawal from the European Union (Continuity)
(Scotland) Act 2021 Policy Statement and Annual
Report

November 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Law Society of Scotland's Constitutional Law Sub-committee has the following comments to make to the Scottish Parliament's Constitution, Europe, External Affairs and Culture Committee inquiry into the Draft Statement of Policy Lead before the Scottish parliament by Scottish ministers in accordance with section 7(3) and the Draft Annual Report under section 10 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

General Comments

Question 1: What are your views on the draft Policy Statement

Legal Basis for the Policy Statement

Section 6(1) of the UK Withdrawal from the European Union (Continuity)(Scotland) Act 2021 ("the Continuity Act") requires Scottish Ministers to publish a statement of their policy on:

- (a) the approach to be taken,
- (b) the factors to be taken into account, and
- (c) the process to be followed,

when considering whether to use the power under section 1(1).

Section 1(1) confers a power upon SM to make regulations "to keep devolved law in line with EU law" after the end of the implementation period (para 29 of the Explanatory Notes

Section 7 of the continuity act sets out the procedure for publication of the policy statement.

Approach to be taken

The approach taken in the draft Policy Statement is that maintaining alignment with EU law can be achieved in various ways;

- i. that Scottish Ministers" will make use of whatever means is the most appropriate in the circumstances of each case";

- ii. that “Specific domestic powers [that cover the subject matter of the EU legislation] should be preferred, unless there is good reason for not using these powers”.
- iii. that the regulation making power in section 1(1) would only be used as a backstop where it was not appropriate to use primary legislation (e.g., due to the limit of legislative time in the Parliament) and “specific powers are not available, or not appropriate, to give effect to the policy intention of the measure proposed”.

Our Comment

In paragraph 7 of the draft report, it is stated that the power under section 1(1) of the Continuity Act has not been used during the reporting period. Moreover, in paragraph 9 it is stated that the Scottish Ministers have no current plans to use the power in the upcoming reporting period, adding “however use of the power may be considered within the upcoming reporting period as necessary”.

The Policy Statement is vague as to when it would not be appropriate to use primary legislation or specific powers where they are available. Is it only not appropriate to use available specific powers where there is a “good reason” for not doing so? It is suggested that the Scottish Government might be asked for further clarification.

There is no mention of how the division between devolved and reserved powers in an area might affect any proposed changes in search of alignment or the policy approach across an area of activity. Similarly, there is no mention of the potential impact of the United Kingdom Internal Market Act 2020.

We note the following paragraph:

Scottish Ministers default position, for the reasons set out above, will be to align with EU law. There will however be occasions, such as technical provisions only relevant to EU member states, where such alignment would not assist the intended outcome, or where the constraints under which Scottish Ministers currently operate, in particular because of the working of the UK Internal Market Act, mean that they judge that to align in full at this time would not serve Scotland's wider interests.”

What criteria will Scottish Ministers apply to determine legislation which is only relevant to Member States? There could also be more clarity as to how the UK Internal Market Act 2020 is considered a constraint on Scottish Ministers.

We also note that EU law is not static, and it is important to emphasise the scale of its ongoing change. There is significant change on a year-to-year basis. In 2020 there were a total of 1356 legal acts adopted and a further 734 amending acts adopted: <https://eur-lex.europa.eu/statistics/2020/legislative-acts-statistics.html>. It is important to distinguish between UK wide divergence with the EU and divergence within the UK. The latter could occur because a

devolved administration has chosen to align with the EU rather than the rest of the UK. It is also worth emphasising that keeping pace with EU law, as the Scottish Government has legislated to do, will require scrutiny from the Scottish Parliament. Even if Scottish Ministers were to adopt only a small fraction of the laws adopted by the EU this could be a significant undertaking.

Factors to be taken into account

The four specified and numbered factors (Legislation, Purpose, Existing Legislative Obligations, Consultation) could be clearer. Some are expressed not as factors to be taken into account “when considering whether to use the power under section 1(1)” but rather as factors for using that power. We also suggest that the factor of Consultation should really form part of the Process mentioned below.

Process

No mention is made of consultation with the Parliament or with other persons as part of the decision-making process in determining whether to use the power in section 1(1).

Question 2: What are your views on the Annual Report?

Legal Basis for the Annual Report

Section 10 of the Continuity Act requires Scottish Ministers to publish a report for each reporting period. The report should explain:

- (a) how the power under section 1(1) has been used during the reporting period,*
- (b) how that use of the power under section 1(1) contributes or has contributed towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e),*
- (c) how they intend to use the power under section 1(1) in the period (of such length as they may determine) following the reporting period,*
- (d) how their intended use of the power under section 1(1) would contribute towards maintaining and advancing standards in relation to the matters mentioned in section 2(1)(a) to (e), and*
- (e) any use of the power under section 1(1) that has been considered by the Scottish Ministers during the reporting period.*

Our Comment

It would be useful to ask Scottish Ministers whether, during the period of the report, there have been occasions when they have considered it necessary (or desirable) to amend domestic law in order to align, or keep pace, with new EU law but they have decided, in light of their Policy Statement, that it would be more appropriate to use primary legislation or specific powers in order to do so rather than the power mentioned in section 1(1).

It would be useful to ask Scottish Ministers whether, during the period of the report, there have been occasions when they have considered EU law and decided not to exercise the powers to align or keep pace with EU law and that they should provide details of the EU law so considered.

The Scottish Minister's default position is to keep pace with EU law and the EU has been legislating since the UK's departure (see the table below). What assessment have Scottish Ministers made of EU law in 2020/2021 to see what, within devolved competence, should be reflected in Scots law, in accordance with their "keeping pace" policy?

Should the Scottish Ministers not state in the annual report their reasons for not having exercised their power in the reporting period and for having no plans to do so in the upcoming reporting period?

There should be more detail on things being discussed (and possible issues on the devolved/reserved boundary). For example, the forthcoming EU ban on lead shot (agreed in late 2020), to be implemented through REACH. Is Scotland going to align with this?



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