



The Scottish Parliament
Pàrlamaid na h-Alba

Published 27 October 2022
SP Paper 243
53rd Report, 2022 (Session 6)

Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the UK Infrastructure Bank Bill



Published in Scotland by the Scottish Parliamentary Corporate Body.

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Delegated Powers and Law Reform Committee

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;

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

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



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Committee Membership



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Introduction and background to the Bill

1. At its meeting on 25 October 2022 the Committee considered the delegated powers that are relevant to Scotland in the UK Government's [UK Infrastructure Bank Bill](#) ("the Bill").
2. The Bill was introduced in the House of Lords on 11 May 2022. The Bill is currently at 2nd reading stage in the House of Commons.
3. The UK Infrastructure Bank ("the Bank") was established to support private infrastructure projects to help meet the UK Government's objectives on economic growth, levelling up, and transitioning to net zero. The Bill represents the final stage in the set-up of the Bank, which has been operating on a non-statutory basis since it was established in June 2021.
4. The Bill is short, standing at only 11 clauses. It places the Bank on a statutory footing and enshrines its objectives in legislation. The Bank's objectives are to help tackle climate change and to support regional and local economic growth, through investment in infrastructure.
5. In the [Explanatory Notes](#) to the Bill, HM Treasury identifies six clauses which it considers require legislative consent from the Scottish Parliament. Such consent was sought on 10 May 2022. The Scottish Government lodged a [Legislative Consent Memorandum](#) ("LCM") on 2 September 2022.
6. Although broadly supportive of the Bill, the Scottish Government states in its LCM that it does not intend to lodge a legislative consent motion in respect of the Bill until further assurances are provided by HM Treasury. Specifically, Scottish Government wrote to UK Government on 9 June, seeking:
 - a Memorandum of Understanding between the UK Infrastructure Investment Bank and the Scottish National Investment Bank, to ensure high level alignment with SG priorities;
 - the appointment of individuals who have Scottish expertise to the board of the Bank, or their inclusion in relevant investment panels;
 - assurances from HM Treasury that there will be no impact on Barnett consequential and the Scottish budget.
7. The lead committee for the LCM is the Economy and Fair Work Committee, which took evidence on the LCM from Ivan McKee, Minister for Business, Trade, Tourism and Enterprise at its meeting on [5 October 2022](#). The Minister explained that discussions with UK Government are ongoing, and he was hopeful that the assurances sought will be secured. However, in absence of a formal response to the Scottish Government's letter of 9 June, the Minister could not recommend consent to the Bill as it stands.

Committee consideration

8. There is one clause in the Bill which confers delegated powers on the UK Ministers, and it is exercisable within devolved areas.
9. As the Bill does not confer powers to make subordinate legislation on the Scottish Ministers, Rule 9B.3.6 of the Parliament's Standing Orders does not apply and the Committee is not obliged to consider or report to the lead committee on the Bill. However, the Bill does confer power on UK Ministers to make subordinate legislation in devolved areas.
10. The LCM is therefore being considered in terms of the Committee's wider remit contained in Rule 6.11.1(b) of Standing Orders which provides that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation". The Committee and its predecessor Committee have considered powers conferred on UK Ministers in devolved areas in various Bills over the course of sessions 5 and 6.

Relevant Power in the Bill

Clause 2 – Power to amend the Bank's activities and the meaning of "infrastructure"

Power conferred on: the Treasury (meaning the Lords Commissioners of the Treasury by virtue of the Interpretation Act 1978)

Power exercisable by: regulations made by statutory instrument

Parliamentary procedure: draft affirmative

11. Clause 2 of the Bill sets out the Bank's objectives and activities, as well as the definition of infrastructure which is central to the scope of those activities. This Clause contains the Bill's two delegated powers:
 1. a power to amend the Bank's activities; and
 2. a power to amend the definition of "infrastructure" in the Bill.
12. The powers are exercisable by statutory instrument, subject to the affirmative procedure.
13. The UK Government states in its [Delegated Powers Memorandum](#) that the purpose of the powers is to allow future governments "to change the emphasis of the Bank's activities for policy reasons" and to alter the definitions to support this change. They give the example of the emergence of new kinds of green or other technologies, or new kinds of "infrastructure" that did not exist or were not considered as such when the Bill became law. The powers are both "Henry VIII" powers which enable the Treasury to make textual amendments to the Act that will result from the Bill.
14. As regards the application of the Bill to devolved matters, the Explanatory Notes state that the Bank will operate across a range of sectors but "will prioritise in particular clean energy, transport, digital, water, and waste." As noted above, this would cover investment within devolved competence in areas including water,

sewerage, rail and road infrastructure, ports or bridges within Scotland.

15. The list of examples in the Bill (clause 2(5)) of what constitutes “infrastructure” is non-exclusive, and therefore providing financial support for any other type of infrastructure that relates to tackling climate change or supporting regional/local economic growth is also within the scope of the Bill. Aspects of this could also be within devolved competence.
16. The delegated powers are similarly capable of being exercised to include further devolved matters within the scope of the Bill, or to remove devolved matters from the scope of the Bill. However, the powers will be exercisable by UK Ministers only. There is no requirement on the face of the Bill for the UK Ministers to obtain the consent of the Scottish Ministers, or to consult them, before exercising these powers within devolved competence. There also does not appear to be any political commitment in the accompanying documents that the Treasury will seek the consent of Scottish Ministers when doing so.

UK Ministers' power in devolved areas

17. In absence of a requirement for Scottish Ministers’ consent, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified of when they are laid before the UK Parliament.
18. The Committee’s previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas has been as follows:
 1. The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
 2. Where such powers are exercised by the Secretary of State in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.
 3. Powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers’ consent when exercised within devolved competence.
 4. As a minimum, powers when exercised by the Secretary of State in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.
19. The Committee [wrote](#) to the UK Government on 12 July 2022 regarding the scrutiny of delegated powers in UK Parliament bills conferred on UK Ministers in devolved areas and the application or otherwise of SI Protocol 2. The then Secretary of State for Levelling Up, Housing and Communities [responded](#) on 14 August indicating that the “UK Government takes into account a variety of factors when seeking delegated powers in devolved areas.” The Secretary of State also indicated that “[w]hether or not to include statutory consent requirements is considered on a case-by-case basis as each policy area has a different legislative context.”
20. The Scottish Government has indicated in its LCM that it intends to recommend consent for these provisions of the Bill. Although it has sought various assurances regarding the Bill, none of these relates to the exercise of the delegated powers. The Scottish Government has not, for instance, requested an amendment to the Bill

to provide that the exercise of the delegated powers is subject to Scottish Ministers' consent, or a consultation requirement.

21. The Committee notes that there is no statutory requirement for HM Treasury to obtain the Scottish Ministers' consent when exercising these powers within devolved competence, therefore, there is no formal means by which the Scottish Parliament could scrutinise the regulations made by HM Treasury or be notified that they had been laid before the UK Parliament;
22. The Committee reiterates the views previously expressed in its reports on the LCMs for the [Police, Crime, Sentencing and Courts Bill](#), the [Health and Care Bill](#), the [Elections Bill](#) and the [Public Services Pensions and Judicial Offices Bill](#), namely:
 - the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence;
 - accordingly, powers conferred on UK Ministers should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
23. The Committee also notes that the process set out in the SI Protocol 2 will not apply to the exercise of this power by HM Treasury because it does not relate to an area formerly within EU competence.
24. Finally, the Committee notes that the Scottish Government has asked UK Government for certain assurances as a condition of granting consent to the Bill, but none of these relates to the exercise of the delegated powers. It agreed to write to Ivan McKee, Minister for Business, Trade, Tourism and Enterprise to ask whether this could be done. The Committee will ask for the response to also be sent to the Economy and Fair Work Committee.

