



The Scottish Parliament
Pàrlamaid na h-Alba

Published 15 November 2022
SP Paper 261
58th Report, 2022 (Session 6)

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

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Northern Ireland Troubles (Legacy and Reconciliation) Bill

Published in Scotland by the Scottish Parliamentary Corporate Body.

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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.



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Introduction

1. At its meetings on 8 and 15 November 2022, the Delegated Powers and Law Reform Committee considered the delegated powers that are exercisable within devolved competence in the [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#) (“the Bill”).
2. The Scottish Government lodged a [Legislative Consent Memorandum](#) (“LCM”) in relation to the Bill on 20 October 2022.
3. The Bill is a UK Government Bill, introduced in the House of Commons on 17 May 2022. The Bill, as amended, was brought to the House of Lords on 5 July 2022. Its second reading there is scheduled for 23 November 2022.
4. This report, and the references to clause numbers, relate to the version of the Bill as brought from the House of Commons to the House of Lords on 5 July 2022.
5. Under paragraph 6 of Rule 9B.3 and Rule 6.11.1(b) and (c) of Standing Orders, the Committee submits this report to the lead Committee for the LCM, the Criminal Justice Committee.

Overview of the Bill

6. The Bill contains 57 clauses and 12 schedules.
7. The long title of the Bill is: “A Bill to address the legacy of the Northern Ireland Troubles and promote reconciliation by establishing an Independent Commission for Reconciliation and Information Recovery, limiting criminal investigations, legal proceedings, inquests and police complaints, extending the prisoner release scheme in the Northern Ireland (Sentences) Act 1998, and providing for experiences to be recorded and preserved and for events to be studied and memorialised.”
8. The UK Government's [Explanatory Notes](#)ⁱ to the Bill give the full background to the Bill and a summary of each clause. The overview of the Bill, on page 4 of the Explanatory Notes, notes (in summary) that the Bill will:
 - Establish a new independent body, the Independent Commission for Reconciliation and Information Recovery (the “Commission”) which will, when requested to do so, conduct investigations into deaths and very serious injuries which resulted from conduct forming part of the Troubles. The Commission will report its findings in each case. It may investigate any death or very serious injury if an individual comes forward seeking immunity from prosecution. State bodies and agencies will be under a duty to give full disclosure to the Commission of all relevant material that the Commission reasonably needs to fulfil its functions. The Commission will also produce a historic record of all other deaths that occurred during the Troubles (being those for which a request for immunity is not made).
 - Require designated persons to carry out a programme of work to memorialise the Troubles, including an oral history initiative.
 - Introduce a conditional immunity scheme, allowing those who cooperate with the Commission to receive immunity from prosecution for offences resulting in or connected with Troubles-related deaths and serious injuries.
 - Bar investigations into Troubles-related incidents by any organisation other than the Commission, and bar prosecutions for Troubles-related offences not involving/connected to offences involving death or serious injury.
 - Bar civil claims arising from conduct forming part of the Troubles and events between 1 January 1966 and 10 April 1998, where a claim has yet to be filed by the date of the Bill’s introduction. Claims made before the Bill’s introduction can continue.
 - Stop inquestsⁱⁱ which have not yet reached the stage of a substantive hearing by 1 May 2023 or the date on which the Commission becomes operational (whichever comes first), but these matters can be referred by families or coroners to the Commission for investigation.

ⁱ [Explanatory Notes for the Bill as brought to the Lords on 5 July 2022](#)

ⁱⁱ This includes inquiries in Scotland

9. The UK Government has published a [Delegated Powers Memorandum](#) to accompany the Bill (“DPM”).ⁱⁱⁱ As is normal for UK bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government’s view on the relevant clauses is set out in the LCM.

Legislative Consent Memorandum

10. The whole of the Bill extends to Scotland (and the whole of the UK), except for the Part which provides for ‘memorialising’ the Troubles (Part 4), which extends only to Northern Ireland.^{iv}
11. The Explanatory Notes set out that the UK Government is seeking the Scottish Parliament’s legislative consent for all the clauses of the Bill except for clauses 31, 41, 42 and Part 4.^v However, the Scottish Government states in the LCM that, after discussions, the UK Government has agreed with it that clauses 31 and 42 do in fact require consent.
12. There are five clauses in the Bill for which the Explanatory Notes say the UK Government is seeking consent, but for which the Scottish Government considers consent is not required: clauses 18-22. The Scottish Government’s view is that these clauses could not be made within the Scottish Parliament’s legislative competence because they modify the position provided for in section 48(5) of the Scotland Act 1998. That provision states:
 - ” Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person.
13. The Scottish Government states in the LCM that it does not intend to lodge a legislative consent motion in respect of the Bill. Its reasons are set out in paragraphs 72-75 of the LCM.^{vi}

^{iv} And subject to one other minor exception set out in clause 55(4)

^v See page 8 of, and the table in Annex A of, the Explanatory Notes

^{vi} The Scottish Government’s reasons are set out more fully at paragraphs 11 and 36-42 of the LCM.

Delegated powers - overview

14. At its meetings on 8 and 15 November, the Committee considered the following clauses of the Bill which contain regulation-making powers that are exercisable within devolved competence:
- Powers conferred concurrently on the Scottish Ministers and UK Ministers: clauses 52(2) and clause 57(4), and
 - Powers conferred on UK Ministers alone: clauses 30(1), 31(1) and 33(1).
15. If the Bill's timetable had allowed for it, the Committee would have written to the UK Government to ask for further explanation in relation to the scrutiny of the delegated powers in the Bill that are exercisable by UK Ministers within devolved competence and then to reflect the responses from the UK Government in this report. This would have been in line with the approach the Committee has taken in light of the correspondence between the Committee and the UK Government over the summer concerning the scrutiny of such powers which are conferred on UK Ministers in UK Parliament bills, and the application or otherwise of [SI Protocol 2](#): the Committee [wrote](#) to the UK Government on 12 July 2022, and in the [response](#) of 14 August 2022 the Secretary of State for Levelling Up, Housing and Communities indicated that the:
- ” UK Government takes into account a variety of factors when seeking delegated powers in devolved areas”, and 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.
16. However, given the timetable for this Bill at Westminster and the timetable for the consideration of the LCM in the Scottish Parliament, there has been no time for the Committee to write to the UK Government and receive its response in time for this report.
17. Nonetheless, the Committee wrote to the [UK Government on 10 November](#) seeking its views on the powers in this Bill. Once received, the response will be published on the Committee's webpage and forwarded to the lead committee, the Criminal Justice Committee.

18. **Given there has been no time to obtain further information from the UK Government to inform the Committee's consideration of the powers in the Bill that are conferred on UK Ministers within devolved competence, the Committee makes the following observation, in general terms:**
- a. The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.**
 - b. 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.

c. Powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.^{vii}

d. 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's position, as set out above, does not take a view on whether any particular powers in this Bill should in fact be conferred on Scottish Ministers (instead of or in addition to UK Ministers) or whether any particular powers in this Bill that are conferred on UK Ministers should be subject to a requirement for the Scottish Ministers' consent, the Committee just draws to the attention of the lead committee that the Bill confers new powers in devolved areas which will be exercised by UK Ministers with no opportunity for scrutiny by the Scottish Parliament.
20. The Committee also draws to the lead committee's attention that the powers in this particular Bill will not be subject to SI Protocol 2 because (1) they are not in areas formerly governed by EU law, and (2) there is no requirement that the UK Government obtains the Scottish Ministers' consent before exercising them.

vii Oliver Mundell MSP and Jeremy Balfour MSP dissented from this paragraph

Committee consideration of individual delegated powers

21. The Committee’s consideration of the relevant delegated powers in the Bill is set out below. It deals first with the concurrent powers and then with the powers that are conferred only on UK Ministers.

Concurrent powers for Scottish Ministers and UK Ministers in devolved competence

Clause 52(2) – Consequential provision

Power conferred on: Secretary of State, the Department of Justice in Northern Ireland and Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure when amending primary legislation, otherwise negative

Provision

22. The power in clause 52(2) is to make provision that is consequential on the Bill.
23. This power is extended by Schedule 2, paragraph 14(1) of the Bill which provides that the power can be used to make such provision as the person making it considers appropriate in consequence of Commission officers being given the powers and privileges of a police constable.

Committee consideration

24. The Committee noted this is a “Henry VIII power”, meaning a power that permits secondary legislation to amend primary legislation. This particular power can be used to amend primary legislation “whenever passed or made”, therefore also future primary legislation. Given the significant level of detail that is contained on the face of the Bill, the Committee is content that this is a Henry VIII power in this instance.
25. The Committee also noted that in its justification for taking this power, the UK Government explains in the DPM that the Bill provides for the prohibition and cessation of legal proceedings across the UK, and that, for the Commission to function properly, a number of pieces of legislation across the UK, including court rules, will require to be amended. It also explains that the power to make provision in respect of Commission officers being given the powers and privileges of a police constable deals with matters of detail, which are more appropriately addressed in secondary legislation.

26. **While recognising that the power in clause 52(2) is limited to making consequential provision, the Committee draws to the attention of the lead committee that the power is conferred concurrently on the Scottish Ministers and the UK Minister, and the consequences of that for the**

Scottish Parliament's scrutiny role, in line with the approach as set out at paragraphs 18 to 20 above.

Clause 57(4) – Transitional etc. provision

Power conferred on: Secretary of State, the Department of Justice in Northern Ireland and Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: No procedure

Committee consideration

27. The Committee noted that this is a standard power to make transitory, transitional or saving provision.

28. **While recognising that the power in clause 57(4) is limited to making standard transitional etc. provision, the Committee draws to the attention of the lead committee that the power is conferred concurrently on the Scottish Ministers and the UK Minister, and the consequences of that for the Scottish Parliament's scrutiny role, in line with the approach as set out at paragraphs 18 to 20 above.**

Powers for UK Ministers (alone) in devolved areas

Clause 30(1) – Regulations about the holding and handling of information

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

29. This is a power to make regulations about the holding of information by the Commission, including information identified as sensitive (i.e. relating to national security), prejudicial information or protected international information.

Committee consideration

30. The Committee noted that the DPM states that these regulations are needed to provide confidence to partners who will be providing information to the Commission that the information will be handled correctly.

Clause 31(1) – Biometric material

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

31. This is a power to prevent any particular collection of biometric material (e.g. DNA) being destroyed, so that it can be kept for the purposes of Commission investigations.

Committee consideration

32. The Committee noted that DPM states that this power is essential for ensuring that the Commission is able to retain and access the biometric data it needs in order to conduct investigations into Troubles-related incidents that comply with article 2 ECHR.
33. The Committee also noted that paragraph 36 of the LCM explains that the devolved aspect in relation to Scotland is that the power can be used to require such material to be kept beyond the point at which section 18(3)-(5) of the Criminal Procedure (Scotland) Act 1995 (as applied by the International Criminal Court (Scotland) Act 2001, Schedule 4, paragraph 7) would require it to be destroyed.

Clause 33(1) – Conclusion of the work of the Commission

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Provision

34. This is a power to wind up the Commission.

Committee consideration

35. The Committee noted that when exercising this power, the Secretary of State must consult the Commission and any other person he considers appropriate. There is no requirement in the Bill that the Secretary of State consults the Scottish Ministers before exercising this power.

36. **In relation to clauses 30(1), 31(1) and 33(1) the Committee draws to the attention of the lead committee that these powers are conferred within devolved competence on the UK Minister alone, and the consequences of that for the Scottish Parliament’s scrutiny role, in line with the approach as set out at paragraphs 18 to 20 above.**

