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

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Levelling Up and Regeneration 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.



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Introduction

1. At its meetings on 27 September, 8 and 15 November 2022, the Committee considered the delegated powers conferred on the UK Ministers which are exercisable within devolved areas in the [Levelling Up and Regeneration Bill](#) (“the Bill”).
2. The Bill is a UK Government Bill, introduced in the House of Commons on 11 May 2022. The Bill is currently at Report Stage in the House of Commons. As the Bill is still progressing through the UK Parliament it is subject to amendment.
3. This report, and the references to clause numbers, relate to the version of the Bill dated 20 October 2022, as amended by the Public Bill Committee.
4. Under Rule 6.11.1(b) and (c) of Standing Orders, the Committee submits this report to the lead Committee for the LCM, the Net Zero, Energy and Transport Committee.

Overview of the Bill

5. The Bill contains 196 clauses and 17 schedules.
6. The [Explanatory Notes](#) to the Bill state that “the Levelling Up and Regeneration Bill supports the Government’s manifesto commitment to level up the United Kingdom. The Government’s objective is to reverse geographical disparities between different parts of the United Kingdom by spreading opportunities more equally”. The Bill is split into 11 parts. Much of the Bill applies to England and Wales only, however the following provisions also extend to Scotland:
 - Part 1 of the Bill: Levelling-up missions
 - Chapter 1 of Part 3 of the Bill: Planning data
 - Part 5 of the Bill: Environmental outcomes reports
 - Section 186 in Part 10 of the Bill: Review of governance etc of the Royal Institution of Chartered Surveyors

Legislative consent memorandum

7. The Explanatory Notes to the Bill set out that the UK Government is seeking the Scottish Parliament's legislative consent for those clauses relating to planning data, environmental outcomes reports, and the review of governance etc of the Royal Institution of Chartered Surveyors.
8. The Scottish Government lodged a [Legislative Consent Memorandum](#) ("LCM") for the Bill on 27 July 2022. The LCM indicates that the Scottish Government does not intend to lodge a legislative consent motion in relation to the Bill and recommends that the Parliament should not give its consent.

Delegated powers - overview

9. The Bill does not confer any powers on the Scottish Ministers. It does however confer regulation-making powers on UK Ministers that are exercisable within the legislative competence of the Scottish Parliament.
10. There is no requirement in the Bill that UK Ministers obtain or seek the consent of the Scottish Parliament or Scottish Government before exercising any of the powers in the Bill in devolved areas.
11. The UK Government has published a [Delegated Powers Memorandum](#) (“DPM”), which sets out its justification for taking each of the powers in the Bill.

12. **The Committee's position in relation to powers in UK Bills is, in general terms, that:**

- 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.ⁱ**
- 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.**

13. The Committee wrote to the Secretary of State responsible for the Bill at the time, Simon Clarke MP, formerly the Secretary of State for Levelling Up, Housing and Communities, on [28 September 2022](#) asking questions about three delegated powers in the Bill that are exercisable within devolved competence.
14. The Committee received a response from the Minister for Levelling Up, Dehenna Davison MP, on [25 October 2022](#). In her response, the Minister for Levelling Up stated that discussions are ongoing between the UK and Scottish Governments regarding the possibility of conferring concurrent powers on Scottish Ministers in respect of two of these powers. As noted above, if such amendments are made to the Bill, the Committee would consider them in a supplementary LCM. The recommendations in this report reflect that position.

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

Committee consideration of delegated powers in the Bill

Clause 75(1) and (3) – Power to make regulations to require a relevant planning authority in processing such planning data as is specified or described in the regulations, to comply with approved data standards

Power conferred on: the Secretary of State

Power exercisable by: Regulations (clause 75(1)) and publication (clause 75(3))

Parliamentary procedure: Negative procedure in respect of the power in clause 75(1) and no procedure in relation to the power in clause 75(3)

Provision

15. Clause 75 of the Bill provides that the Secretary of State may make regulations which make provision requiring a relevant planning authority, in processing its planning data which is specified or described in the regulations, to comply with any approved data standards. The Secretary of State may publish approved data standards from time to time. Approved data standards are written standards containing technical specifications or other requirements in relation to the data, or in relation to providing or processing the data.
16. Such planning data regulations may make provision requiring a relevant planning authority to make certain planning data available to the public under an approved open licence.
17. Regulations made by the Secretary of State requiring a planning authority to comply with data standards would be subject to the affirmative procedure, whereas a publication made by the Secretary of State setting approved data standards would not be subject to any procedure.
18. Such regulations will be laid in the UK Parliament only. The Secretary of State may exercise the power in respect of planning authorities in Scotland. Planning is a matter for which responsibility is devolved to the Scottish Parliament.
19. Before making regulations within devolved competence, the Secretary of State must consult with Scottish Ministers.

Committee consideration

20. In response to questions asked by the Committee, the UK Government explained that the power will be used to enable the UK Government to set national data standards to facilitate the creation of data that is consistently held and processed. It said that the clause is primarily concerned with governing the processing of planning data by English planning authorities, but that a limited power to legislate in devolved areas has been taken to complement the provisions regarding environmental assessments.
21. The UK Government said that discussions were currently ongoing with the Scottish

Government as to whether concurrent powers for devolved administrations would be appropriate in respect of this power. It said it would lay amendments to reflect any agreement reached.

22. However, the Committee noted that the UK Government's letter did not explain its position as to why it was appropriate that the Secretary of State has the power to legislate in this area of devolved competence. The letter also does not explain why it would be appropriate for the Secretary of State to retain that power should concurrent powers be agreed to.

23. **The Committee draws the power to the lead committee's attention, noting that it could be exercised by the Secretary of State within devolved competence without a requirement for the Scottish Ministers' consent and the consequences of that for the Parliament's scrutiny role in line with the approach as set out at paragraph 12 above.**

24. **The Committee highlights the UK Government's response to the lead committee, noting that discussions are currently ongoing between the UK and Scottish Governments about the power. It notes that if the Bill were to be amended and the power conferred concurrently, this would mean that either the Secretary of State or the Scottish Ministers could exercise the power. Likewise, where the power was exercised by the Secretary of State, the consequences mentioned above would similarly apply.**

25. **The Committee suggests that the lead committee explores further the consequences for the Parliament's scrutiny role if concurrent powers are agreed to, and the appropriateness of a consent requirement.**

Clause 118 – Power to specify environmental outcomes (formerly clause 116)

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative, if specifying environmental outcomes or requiring an environmental outcomes report to be prepared in relation to a proposed relevant consent or a proposed relevant plan, negative if containing provision about how to assess and monitor the impact of a relevant consent or relevant plan on a specified environmental outcome

Provision

26. Clause 116 is a power conferred on the Secretary of State to make regulations specifying outcomes relating to environmental protection in the United Kingdom or a related offshore area.
27. Regulations made under the power may make provision requiring an environmental outcomes report to be prepared in relation to a proposed relevant consent or a proposed relevant plan. Such regulations may also define “relevant consent” and “relevant plan”.
28. Regulations may also make provision about the monitoring or assessing of the

extent to which a relevant consent or relevant plan affects the delivery of a specified environmental outcome.

29. Regulations made under this power by the Secretary of State are subject to the affirmative procedure, unless they are making provision about the monitoring or assessing of the extent to which a relevant consent or plan affects the delivery of a specified environmental outcome in which case they are subject to the negative procedure.
30. The Secretary of State is required to consult with the Scottish Ministers before making regulations which make provision in devolved areas.

Committee consideration

31. The Committee noted that the UK DPM states that the proposal is to introduce a new system of Environmental Outcomes Reports (EORs) to replace the existing environmental regimes for consenting relevant plans and projects. Currently, the domestic environmental assessment framework is derived from the EU Environmental Impact Assessment Directive and Strategic Environmental Assessment Directive.
32. In its response to the Committee, the UK Government explained that the new regime will require environmental outcomes reports that consider the impact of proposed plans and projects on the delivery of specified outcomes. It does not provide any further detail as to the extent that this will differ from the current SEA and EIA regimes.
33. However, the Committee noted that the UK Government's response does state that it is intended that the power will be exercised in areas of devolved competence only to maintain the current position for those circumstances where the UK Government has historically legislated for matters within areas of devolved competence, such as between the inshore and offshore region for marine works. The power as drafted does not constrain the exercise of the power to such matters.

34. **The Committee draws the power to the attention of the lead committee, noting that as drafted it is a broad power which could be exercised by the Secretary of State within devolved competence to replace the current environmental assessment regime in Scotland with no requirement for the Scottish Ministers' consent, and the consequences of that for the Parliament's scrutiny role in line with the approach as set out at paragraph 12 above.**
35. **The Committee highlights the UK Government's response to the lead committee, noting that discussions are currently ongoing between the UK and Scottish Governments about the power. It notes that were the Bill to be amended and the power conferred concurrently, this would mean that either the Secretary of State or the Scottish Ministers could exercise the power. Where the power was exercised by the Secretary of State, the consequences mentioned above would similarly apply.**
36. **The Committee suggests that the lead committee explores further the implications for the Parliament if concurrent powers are agreed to, and the**

appropriateness of a consent requirement.

Clause 194 – Power of Secretary of State to make consequential provision (formerly Clause 191)

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative, but affirmative if amending primary legislation

Provision

37. Clause 194 provides the Secretary of State with the power to make regulations for consequential amendments which arise from the Bill or regulations made under it. Regulations that make consequential provision may amend, repeal or revoke any enactment passed before the passing of the Bill or in the same session of Parliament as this Bill. That includes Acts of the Scottish Parliament and subordinate legislation made under them.
38. Regulations that amend or repeal primary legislation are subject to the affirmative procedure. Any other regulations under this clause are subject to the negative procedure.

Committee consideration

39. In its response to the Committee's question about this power, the UK Government explained that the power can only be used to make provision which is consequential on matters in the Bill or on provision made under the Bill, and that it is anticipated that the implications for Scotland will be limited.
40. However, the Committee noted that the UK Government's response does not explain why the power has been conferred so that it is exercisable independently by the Secretary of State in relation to devolved matters. The UK Government also does not indicate whether it is considering amending the Bill to either ensure that the power is conferred solely on the Scottish Ministers in relation to devolved matters, or to require the Secretary of State when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers.

41. **The Committee draws the power to the attention of the lead committee, noting that it could be exercised by the Secretary of State within devolved competence without a requirement for the Scottish Ministers' consent and the consequences of that for the Parliament's scrutiny role in line with the approach as set out at paragraph 12 above.**
42. **The Committee highlights the UK Government's response to the lead committee, noting that there is no indication that the UK Government is considering amending this power to confer an equivalent power on the Scottish Ministers to act in relation to devolved matters. It also notes that the UK Government's response to the Committee does not suggest the**

power is the subject of discussions between the UK and Scottish Governments.

