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Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to the Building Safety Bill



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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

1. At its meeting on 22 February 2022, the Committee considered the Legislative Consent Memorandum (“LCM”) for the [Building Safety Bill](#) .
2. The Committee submits this report to the lead Committee for the LCM under Rule 9B.3.6 of Standing Orders.
3. The Building Safety ("the Bill") is a UK Government Bill, introduced in the House of Commons on 5 July 2021. The Committee stage for the Bill in the House of Lords began on 21 February 2022.
4. The Scottish Government lodged an [LCM](#) on 27 January 2022. Housing is generally devolved in Scotland and the majority of the provisions in the Bill apply to England and Wales only. There are, however, a number of provisions that apply to Scotland.
5. The lead committee for the LCM is the Local Government, Housing and Planning Committee.

Overview of the Bill

6. The core theme of the Bill is to make provision about the safety of people in or about buildings and the standard of buildings, to amend the Architects Act 1997, and to amend provision about complaints made to a housing ombudsman.
7. Part five of the Bill includes provisions for a 'New Homes Ombudsman Scheme' which aims to drive up standards in housebuilding and to independently resolve disputes between developers and purchasers where there is an issue concerning the quality of a new-build home. Initially the Bill was only to extend to England and Wales but following amendments as the Bill progressed, parts of it, in particular the provisions relating to the New Homes Ombudsman Scheme, have been extended to Scotland.

Review of powers conferred on Scottish Ministers

8. The UK Government has lodged a [Delegated Powers Memorandum](#) to accompany the Bill (the “DPM”).
9. There is one clause in the Bill which confers a delegated power on the Scottish Minister.

Clause 122 – 'Relevant owner', 'new build home' and 'developer'

Power conferred on: Scottish Ministers – New Power

Power exercisable by: Regulations made by SSI

Parliamentary procedure: Affirmative

Provision

10. Clause 122 of the Bill defines the key concepts of the New Homes Ombudsman Scheme including who is a ‘relevant owner’ what is a ‘new build home’ and what is a ‘relevant interest in land’ in Scotland, England and Wales. This clause confers a regulation making power on the Scottish Ministers as the ‘relevant national authority’ for Scotland to be able to add an additional descriptor of developer. Regulations made under this clause may make different provision for different purposes or may contain consequential, supplementary, incidental, transitional or saving provision in relation to regulations regarding an additional description of a developer.
11. Instruments made by the Scottish Ministers under clause 122 of the Bill would be subject to the affirmative procedure. In advance of such regulations being made by the Scottish Ministers consultation must take place with the other relevant national authorities in England and Wales. The same consultation requirements exist for the other relevant national authorities when making regulations regarding an additional descriptor of a developer in England and Wales.

Committee consideration

12. The Committee noted that the UK Government states in its DPM that the power is required in order to enable the ‘relevant national authority’ to add to the definition of who is a developer for the purposes of the New Homes Ombudsman Scheme; for Scotland this is the Scottish Ministers. The Committee also noted that this power is conferred on each relevant national authority as they may have specific policy priorities or identify specific issues in relation to their respective territories. The addition of an additional descriptor of developer would have the effect of changing the legislative regime and therefore additional categories of those who will be required to join and remain a member of the scheme and so the Committee considered a high level of scrutiny is considered appropriate.
13. As stated in the LCM, the Committee noted that the Scottish Government considers the purpose of this provision is to provide flexibility in the future to ensure that all of

the intended members of the scheme are captured by the definition of developer.

14. Further, the Committee noted that this clause confers a new regulation making power on the Scottish Ministers, as the relevant national authority for Scotland, where they consider it appropriate to add additional descriptors of developers to be part of the scheme. The regulations are subject to prior consultation with the other relevant national authorities and must be laid in the Scottish Parliament subject to the affirmative procedure.

15. **The Committee is content with the power conferred on Scottish Ministers in clause 122 of the Bill.**

Review of powers conferred on UK Ministers in devolved areas not formerly within EU competence

16. The Bill confers further powers on the Secretary of State which are exercisable in devolved areas. None of the delegated powers provisions in devolved areas appear to relate to areas formerly within EU competence before the UK fully withdrew from the EU.

Clause 120 - Establishment of the new homes ombudsman scheme

Power conferred on: Secretary of State – New Power

Power exercisable by: Competitive selection or direct appointment

Parliamentary procedure: None - by making arrangements

Provision

17. Clause 120 of the Bill requires the Secretary of State to arrange for there to be a redress scheme, to be known as the New Homes Ombudsman scheme which must meet the conditions set out in clause 121(1), and which includes the provisions outlined in schedule 9. The Secretary of State may also give financial assistance to a person for the establishment or maintenance of the New Homes Ombudsman Scheme and make payments to such a person in accordance with arrangements made.
18. The UK Government have given a non-exhaustive list of examples of how the arrangements could be made, which includes the Secretary of State selecting a third party to establish the scheme and maintain it, or the scheme being established and maintained 'in-house'. Additionally, the scheme could also be transferred to another person to maintain it once it has been established, or arrangements could be set up through other means.
19. Clause 121 provides that membership of the scheme must be open to all developers, it must enable qualifying complainants to have complaints against members of the scheme investigated and be determined by an independent individual, and it must meet the requirements of schedule 9.
20. Schedule 9 contains a number of mandatory requirements which the scheme arranged by the Secretary of State must comply with. The scheme must include provision about the procedure for becoming and remaining a member. The scheme may provide for different categories of member and the requirements may differ between categories of member. Provision is made for the payment of fees, a complaints procedure, how complaints are to be investigated, enforcement of determinations, recommendations made under the scheme and complaints about the scheme.
21. Before making arrangements for the New Homes Ombudsman Scheme under this clause, the Secretary of State must consult the Welsh Ministers and the Scottish

Ministers.

Committee consideration

22. The Committee noted the explanation in the LCM that housing is generally devolved in Scotland, and that this Bill will make arrangements for a scheme that will extend to England, Wales and Scotland, which is in an area of devolved competence for Scotland. However, the LCM states that there are interactions with the consumer protection reservation which may make it difficult for a Scottish Bill to exactly replicate the functions of the UK scheme. This clause therefore makes provision for arrangements to be made by the Secretary of State for a New Homes Ombudsman Scheme to be set up and maintained, aimed at driving up standards in housebuilding and providing a means to independently resolve disputes between developers and purchasers regarding the quality of new build homes.
23. The UK Government states in its DPM that from paragraph 789 onwards that there are various options for arranging the setup of such a scheme. The New Homes Ombudsman Scheme could be set up through the Secretary of State making arrangements for the establishment and maintenance by an external provider, within Government, or other means. The DPM further states that the house building industry may itself implement a scheme, which the Secretary of State could decide is an appropriate scheme for the purposes of the Bill. Failing that, the Secretary of State intends to go through a competitive selection process to appoint an entity to establish and maintain the scheme. The Secretary of State can also transfer the scheme to another provider after it is arranged. The Committee noted that there is a high level of flexibility offered by the Bill in how the scheme can be arranged and maintained by the Secretary of State, without there being a further legislative mechanism in which to make such arrangements. The arrangements for the establishment of the scheme will be made entirely administratively by the Secretary of State.
24. The Committee noted that the LCM states that this clause provides flexibility as to how the scheme will be established and delivered and the Scottish Government is supportive of the principles behind the scheme. Paragraph 6 onwards of the LCM outlines the alternatives to being part of this UK wide scheme. The Scottish Government considered that a separate Scottish scheme in the Scottish Parliament could be progressed, however, this is not recommended for the following reasons:
 - interactions with the consumer protection reservation may make it difficult to replicate all the functions of the UK scheme;
 - challenges in ensuring the UK scheme connects properly with any Scottish scheme and avoids any gaps in purchaser protections;
 - the house building industry preference is to have a UK-wide scheme;
 - the UK Bill is already well progressed;
 - potential impact on existing voluntary codes of conduct; and
 - a separate Scottish scheme could be progressed in the future and learning taken from the implementation of the UK scheme.
25. The Committee also noted that the powers of the Secretary of State to make

arrangements for the scheme are wide and it is an administrative delegation of the power. There are some limitations and protections on the exercise of this power through the requirements of clause 121 and schedule 9, and through the consultation requirements with Welsh and Scottish Ministers before any arrangements for the scheme are made. The option of opt out at a later date is also an option should Scotland wish to implement its own scheme. However, the Committee noted that this power is being exercised administratively by the Secretary of State, the effect of which is that there is no legislative mechanism for consideration or scrutiny of the arrangements being made for the scheme in any Parliament, including the Scottish Parliament. Further, whilst there is a consultation requirement, there is no requirement for consent of the Scottish Ministers to the arrangements of the scheme.

26. Given that the scheme is a UK-wide one, the Committee considered it would appear to be appropriate that the power to set up the scheme should be exercisable by the Secretary of State.
27. The Committee considered that the power to make such arrangements is a significant one, even being subject to the requirements within clause 121 and schedule 9 of the Bill. The requirements may limit the extent of the exercise of the administrative power, however, there remains a wide margin of discretion on exactly how the scheme will operate.
28. The DPM explains that making arrangements for the scheme administratively is to provide broad flexibility to either appoint an existing voluntary scheme, competitively select an entity to set up and run the scheme or set up a scheme to run it “in-house” and to have the flexibility to give financial assistance to such scheme to enable it to complete its tasks, or to otherwise make payments to it. This is considered by the UK Government to allow the Secretary of State to select the best implementation method to deliver the policy. The Committee considered the making of arrangements in this manner does offer a broad level of flexibility, but also a broad level of discretion in what arrangements will be made unilaterally, without any opportunity for scrutiny by the UK or Scottish Parliaments.
29. **The Committee considers that this power should be a power to make subordinate legislation as opposed to an administrative power to make arrangements. The Committee notes that this power is conferred on the Secretary of State on an administrative basis in devolved areas, and is not subject to any further legislative requirement or Parliamentary scrutiny. The Committee therefore suggests consideration be given to what opportunities could be created for scrutiny of the Scottish Ministers’ position in respect of arrangements for the establishment of the scheme.**
30. **The Committee expresses its concern regarding the tight timescale afforded to the Committee for considering the LCM. Where time had permitted, it would have been helpful to seek the Secretary of State's view on how this power is to be used.**

Clause 124 - Power to require persons to join scheme and to provide information

Power conferred on: Secretary of State – New Power

Power exercisable by: Regulations made by SI

Parliamentary procedure: Affirmative

Provision

31. Clause 124 of the Bill provides that the Secretary of State may make regulations requiring certain developers to become and remain members of the New Homes Ombudsman Scheme for specified periods. The clause makes provision for members of the scheme to be required to publicise their membership of the scheme; civil sanctions to be imposed for failure to comply with the requirements; and investigation of suspected breaches of the requirements. Exceptions to the requirement to become a member of the scheme can also be applied in certain circumstances.
32. Regulations made under this power are to be laid before and approved by a resolution of each House of the UK Parliament (equivalent to the affirmative procedure). Before exercising this power, the Secretary of State must consult the Welsh and Scottish Ministers.

Committee consideration

33. The Committee noted the DPM explains that the purpose of requiring developers to publicise their membership is to raise awareness amongst consumers that, if something goes wrong with their purchase, they are aware of the route to seek redress through the New Homes Ombudsman Scheme. Exceptions are provided to be able to exclude certain developers, should that be necessary.
34. The Committee noted that the LCM states that this clause creates a power for the Secretary of State to make regulations which will require developers of new build homes, who are within scope, to join the scheme and remain members of the scheme for a specified period.
35. The Committee also noted that regulations made under this clause will be laid in the UK Parliament only and there will be no opportunity for Parliamentary scrutiny within the Scottish Parliament. Whilst there is a consultation requirement, there is no requirement for consent despite being in an area of devolved competence.

36. **In keeping with the approach taken in relation to 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](#), the Committee considers that:**
 1. **the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence;**
 2. **the power is conferred on the Secretary of State, and not on the Scottish Ministers;**
 3. **there is no formal means by which the Scottish Parliament could scrutinise the regulations made by the Secretary of State or be notified**

that they had been laid before the UK Parliament; and

4. the power conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
37. The Committee notes that the process set out in the SI Protocol 2 would not apply to the exercise of this power by the Secretary of State on the basis that it does not appear to relate to an area formerly within EU competence before the UK fully withdrew from the EU.
38. The Committee highlights the correspondence between the Committee and the Minister for Parliamentary Business dated 6 October 2021 and 21 October 2021 in relation to options for Parliamentary scrutiny of the exercise of such powers.

Clause 126 – Developers' code of practice

Power conferred on: Secretary of State – New Power

Power exercisable by: Code of practice

Parliamentary procedure: None

Provisions

39. Clause 126 is a discretionary power on the Secretary of State to issue a code of practice, or approve an existing code of practice, on standards of conduct and standards of quality of work expected of members of the New Homes Ombudsman Scheme. Such a code, if issued, must be published and can be replaced or revised from time to time. Further, the New Homes Ombudsman Scheme must take such a code of practice into account in investigating any complaints under the scheme once it is published.
40. Before a code of practice under this provision can be issued, or approved, the Secretary of State must consult the Welsh and Scottish Ministers.

Committee consideration

41. The Committee noted that the code of practice will have significant standing as it must be taken into account in investigating complaints under the New Homes Ombudsman Scheme. However, the UK Government does not consider it appropriate for the code of practice to be subject to Parliamentary procedure, as outlined in the DPM. This is because, if published, it will cover detailed and technical issues such as workmanship and quality and will not include legislative obligations.
42. The Committee also noted that a code of practice to provide assistance in considering complaints under the new scheme appears appropriate in itself. However, there will be no opportunity for Parliamentary scrutiny within the Scottish Parliament, or indeed the UK Parliament, despite consideration of such a code by the New Homes Ombudsman Scheme being a legislative requirement, if one is

issued.

43. The Committee considers that whilst there is a consultation requirement with the Scottish Ministers, there is no requirement for consent despite being in an area of devolved competence. The delegated power to make arrangements for the scheme in clause 120 is exercised administratively without further legislative scrutiny. The same applies to the issue of the code of practice. The result is that there is no opportunity for further Parliamentary scrutiny in relation to setting standards of conduct and quality under the New Homes Ombudsman Scheme.

44. **The Committee therefore considers that this power should be subject to some form of Parliamentary procedure, such as a requirement that the code of practice be laid before the UK Parliament before it is issued.**

45. **The Committee notes that this power is conferred on the Secretary of State on an administrative basis in devolved areas, and is not subject to any further legislative requirement or Parliamentary scrutiny. The Committee suggests consideration be given to what opportunities could be created for scrutiny of the Scottish Ministers' position in respect of the code of practice.**

Clause 138 – Power of Secretary of State to make consequential provision

Power conferred on: Secretary of State – New Power

Power exercisable by: Regulations made by SI

Parliamentary procedure: Negative, but affirmative if amending primary legislation

Provision

46. Clause 138 provides the Secretary of State with the power to make regulations for consequential amendments which arise from the Bill or regulations made under it other than consequential amendments that could be made by the Welsh Ministers under clause 139. Regulations that make consequential provision may amend, repeal or revoke an enactment.
47. 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

48. The Committee noted that this provision is not addressed in the LCM and legislative consent is not sought.
49. The Committee noted that according to the DPM, this power may only be exercised in connection with a provision of the Bill or regulations made under it as it is not possible to establish in advance all consequential provision that may be required. The UK Government consider a power is needed to avoid any legal uncertainty or legal lacunas after the Act comes into force. The Committee considers that this clause could be exercised within the devolved competence of the Scottish

Parliament if the power is exercised to make consequential provision in relation to the New Homes Ombudsman Scheme.

50. Furthermore, the Committee considers that should the power be exercised to make provision within devolved competence, the Parliament may expect to have a role in scrutinising any such regulations. Powers which are conferred on UK Ministers alone and are exercisable within devolved competence should, in principle, be subject to a requirement for the Scottish Ministers' consent.
51. The Committee noted that regulations made under this power would be subject to the affirmative procedure, which allows a high level of scrutiny, if amending primary legislation. Regulations made under this power amending subordinate legislation would be subject to negative procedure. There are no corresponding powers conferred on Scottish Ministers, but there is a corresponding power conferred on the Welsh Ministers at clause 139 to make consequential provision. The Secretary of State is not required to obtain the consent of Scottish Ministers before exercising these powers, nor are they required to consult the Scottish Ministers.
52. **To the extent that the delegated power in clause 138 is within devolved competence, and in keeping with the approach taken in relation to 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](#), the Committee considers that:**
1. **the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence;**
 2. **the power is conferred on the Secretary of State, and not on the Scottish Ministers;**
 3. **there is no formal means by which the Scottish Parliament could scrutinise the regulations made by the Secretary of State or be notified that they had been laid before the UK Parliament; and**
 4. **the power conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.**
53. **The Committee notes that the process set out in the SI Protocol 2 would not apply to the exercise of this power by the Secretary of State on the basis that it does not appear to relate to an area formerly within EU competence before the UK fully withdrew from the EU.**
54. **The Committee highlights the correspondence between the Committee and the Minister for Parliamentary Business dated [6 October 2021](#) and [21 October 2021](#) in relation to options for Parliamentary scrutiny of the exercise of such powers.**

