



The Scottish Parliament
Pàrlamaid na h-Alba

Published 4 May 2022
SP Paper 168
27th 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 High Speed Rail (Crewe – Manchester) 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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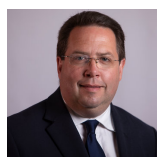
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Introduction

1. At its meetings on 29 March and 3 May 2022, the Delegated Powers and Law Reform Committee considered the Legislative Consent Memorandum (“the LCM”) for the [High Speed Rail \(Crewe – Manchester\) Bill](#) .
2. The High Speed Rail (Crewe – Manchester) Bill (“the Bill”) is a UK Government Bill, introduced in the House of Commons on 24 January 2022. It is currently awaiting its second reading in the House of Commons, on a date to be announced.
3. The Scottish Government lodged the [LCM](#) on 7 February 2022.
4. This is an unusual type of Bill; the LCM notes it is the first ever cross-border hybrid Bill. Its purpose is to provide the necessary powers for the Secretary of State for Transport as Promoter of a proposed new national high speed rail network (or “HS2”) scheme and the statutory undertaker to take forward works. In Scotland, these are limited to the authorisation and necessary powers for the construction of a train maintenance depot at Annandale in Dumfries and Galloway. The powers in the Bill arise in the context of a hybrid bill so they are very specific, localised, and can only be exercised for a single purpose (the specific works itemised in the schedule to the Bill).
5. 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

6. [The Explanatory Notes](#) to the Bill note that it confers the powers required to construct part of the second phase – Phase 2b (Crewe to Manchester) – of a proposed new national high speed rail network, (or “HS2”). Phase 2b will involve the construction of a new railway line from Crewe to Manchester, serving new stations at Manchester Airport and Manchester Piccadilly. A railway will also be constructed between Hoo Green in Cheshire and a junction with the West Coast Main Line at Bamfurlong, which will enable trains to transfer between the HS2 main line and the West Coast Main Line. A new train stabling facility for HS2 trains will also be constructed between Gretna Green and Kirkpatrick Fleming in Dumfries and Galloway.
7. The Bill comprises 66 clauses and 33 schedules and the main provisions of the Bill provide for the following:
 - the authorisation of work necessary for the construction and maintenance of Phase 2b (Crewe-Manchester) and all ancillary works;
 - powers to carry out these works, which are conferred on the nominated undertaker;
 - the acquisition of land (or airspace or subsoil) necessary for the authorised works to be carried out;
 - the acquisition of limited rights in land required for works necessary for the construction of Phase 2b (Crewe-Manchester) to be carried out; and
 - planning and the granting of planning permission for the authorised works; and
 - the deregulation of works on Phase 2b (the disapplication of certain provisions of other Acts to enable Phase 2b works to take place without further legal constraints after the enactment of the Bill).

Delegated Powers

8. The UK Government lodged a [Delegated Powers Memorandum](#) to accompany the Bill (the “UK DPM”). 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.
9. The UK DPM identifies each of the provisions in the Bill that confer powers to make delegated legislation. It explains in each case the purpose of the power, why a delegated power is appropriate, and the parliamentary procedure that has been selected.
10. There are no powers in the Bill conferred solely on Scottish Ministers. Instead, powers relating to works authorised under the Bill which take place in Scotland are conferred on UK Ministers in devolved areas. Some of the powers are conferred on UK Ministers in consultation with Scottish Ministers.
11. The UK DPM explains, at paragraph 6, that the provisions in this Bill and the framework which it is seeking to establish are similar to those of the High Speed Rail (London – West Midlands) Act 2017 (the Phase One Act) and the High Speed Rail (West Midlands – Crewe) Act 2021 (the Phase 2a Act). However, deviations from previous Bills have been included on the basis of changes to wider legislation, and to reflect the inclusion of land in Scotland in the Bill.
12. At its meeting on 29 March 2022, the Committee agreed to write to the UK Government and the Scottish Government to raise questions in relation to the following powers:
 - Schedule 5 Paragraph 15 (as modified by Schedule 33) – Designation of trunk or special roads;
 - clause 18 (deemed planning permission) and Schedule 17 Paragraph 17 and 24(6) (as modified by Schedule 33) - Power to make provision about fees relating to requests for approval and appeals in connection with the payment of fees by means of a cheque;
 - clause 18 (deemed planning permission) and Schedule 17 Paragraph 24 to 27 (as modified by Schedule 33) – Powers relating to modification of the appeals procedure;
 - clause 58 - Power to make rules about the provision of arbitration of the Bill; and
 - clause 22(1) and 22(2) and Schedules 18 and 19 (as modified by Schedule 33) - Power to disapply provisions related to listed buildings and ancient monuments.
13. On receipt of the responses, the Committee reconsidered these powers at its meeting on 3 May 2022.
14. The Committee agreed it was content with the explanations provided in relation to:

- clause 18 (deemed planning permission) and Schedule 17 Paragraph 17 and 24(6) (as modified by Schedule 33) - Power to make provision about fees relating to requests for approval and appeals in connection with the payment of fees by means of a cheque;
- clause 18 (deemed planning permission) and Schedule 17 Paragraph 24 to 27 (as modified by Schedule 33) – Powers relating to modification of the appeals procedure;
- clause 58 - Power to make rules about the provision of arbitration of the Bill; and
- clause 22(1) and 22(2) and Schedules 18 and 19 (as modified by Schedule 33) - Power to disapply provisions related to listed buildings and ancient monuments.

15. The Committee therefore finds the powers noted above, and the proposed procedures, to be acceptable in principle.

16. In relation to 'Schedule 5 Paragraph 15 (as modified by Schedule 33) – Designation of trunk or special roads', the Committee noted that the Scottish Government does not currently recommend consent for this provision.
17. The background to the provision, together with the Committee's consideration and recommendation, are set out below.

Schedule 5 Paragraph 15 (as modified by Schedule 33) – Designation of trunk or special roads

Power conferred on: Secretary of State in consultation with Scottish Ministers

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: None

Provision

18. Paragraph 15 of Schedule 5 concerns the designation of trunk and special roads. Paragraph 15(2) contains a regulation making power to enable the Secretary of State acting in consultation with Scottish Ministers to provide that a highway is to become a trunk road or special road (or both) from the date specified in regulations or else in an instrument after the making of the regulations. Paragraph 15(3) provides that the regulations must specify the special road authority for the highway.

Committee consideration

19. The Committee noted that the UK DPM explains at paragraph 10 that the purpose of this power is to enable suitable provision to be made if part of a trunk road network or a special road is extended or realigned as a result of Phase 2(b) (Crewe to Manchester). The level of detail will not be available before Royal Assent and so flexibility is required so that the integrity of the highway network is maintained. The Committee also noted that at paragraph 11 the UK DPM states that as the trunk

road network within England and Scotland is within the remit of National Highways and Transport Scotland respectively, it is not considered that parliamentary scrutiny is required for any decisions to alter aspects of their networks.

20. Paragraphs 44 and 45 of the LCM consider roads matters, however the Committee noted that this particular provision and power is not specifically mentioned in the LCM. In relation to other roads related provisions considered in the LCM, it also noted that, having reviewed the description of works and associated plans, the Scottish Government considers it unlikely that any works will be required on the trunk road network in connection with this Bill.
21. The Committee noted that Section 2 of the Roads (Scotland) Act 1984 imposes a duty upon the Scottish Ministers to manage and maintain trunk roads and special roads in Scotland. Section 5 of the 1984 Act confers power on Scottish Ministers, after consideration of specified requirements, to direct that any existing road, or any road proposed to be constructed by Scottish Ministers, should become a trunk road. Section 7 of the Act empowers a roads authority to obtain authorisation of a scheme to provide a special road by means either of construction or appropriating an existing road as a special road. Where the roads authority for the special road are the Scottish Ministers, they must, before making such a scheme, give due consideration to specified requirements. The Committee also noted that it appears that the powers under section 5 and 7 of the 1984 Act may be exercised generally by way of ministerial orders or schemes that are not subject to parliamentary scrutiny.
22. The Committee also noted that whilst the LCM refers to it being unlikely that works will be required on trunk roads in Scotland, this commentary was understood to be in relation to carrying on works on trunk roads in respect of roads maintenance and did not specifically relate to the potential extension or realignment of trunk roads or special roads.
23. In its response to the Committee, the Scottish Government thanked the committee for identifying an issue in relation to the appropriate level of involvement for the Scottish Ministers in any decision to designate works in Scotland as a trunk road or special road. The Scottish Government clarified that in respect of this provision, as is the case for the other provisions relating to roads, that though it is considered unlikely that any works will be required on the trunk road network in connection with this Bill, the Scottish Government does not consider that the disapplication of the sections which relate to road works to be necessary.
24. In his response, the Secretary of State stated that the designation of trunk roads in England is purely a matter within his jurisdiction, and when applied to Scotland, and that it was considered appropriate to provide the Scottish Government the opportunity for input into the decision via consultation, to avoid having the risk of a potentially unresolved joint decision.
25. A copy of all correspondence can be found in the **Annex**.
26. The Committee agreed to write again to the UK Government to seek clarification on why this power in the Bill is exercisable in relation to Scotland if it is anticipated that the trunk road network in Scotland will not be affected.

27. **The Committee therefore agrees to write to the UK Government to seek clarification on why this power in the Bill is exercisable in relation to Scotland if it is anticipated that the trunk road network in Scotland will not be affected.**
28. **The Committee recommends that the lead committee may wish to question the Minister for Transport during its evidence session on the LCM regarding whether further discussions with the UK Government are taking place on this provision.**

Annex

On 4 April 2022, the Committee asked the Scottish Government:

At the meeting of the Delegated Powers and Law Reform Committee on 29 March, the Committee considered the delegated powers relevant to Scotland in the [High Speed Rail \(Crewe Manchester\) Bill](#) as referred to in the [Legislative Consent Memorandum](#) (“the LCM”) lodged by the Scottish Government on 7 February 2022.

The Committee noted that the following powers to make regulations and rules by statutory instrument are exercised by the Secretary of State in consultation with the Scottish Ministers —

- schedule 5 Paragraph 15 (as modified by Schedule 33) – Designation of trunk or special roads;
- clause 18 (deemed planning permission) and Schedule 17 Paragraph 17 and 24(6) (as modified by Schedule 33) - Power to make provision about fees relating to requests for approval and appeals in connection with the payment of fees by means of a cheque;
- clause 18 (deemed planning permission) and Schedule 17 Paragraph 24 to 27 (as modified by Schedule 33) – Powers relating to modification of the appeals procedure;
 - clause 58 - Power to make rules about the provision of arbitration of the Bill; and
- clause 22(1) and 22(2) and Schedules 18 and 19 (as modified by Schedule 33) - Power to disapply provisions related to listed buildings and ancient monuments.

The Committee noted that these powers are exercisable in relation to matters within the legislative competence of the Scottish Parliament. The Committee has therefore written to the UK Government to ask for the reasons why it considers it appropriate that they are exercised in consultation with Scottish Ministers, but without a statutory requirement to obtain the Scottish Ministers’ consent. The Committee also asked what it considers ‘in consultation with Scottish Ministers’ will mean in practice.

The Committee acknowledged that the Scottish Government considers that legislative consent can be recommended at this time for many, but not all, of the provisions identified as requiring consent. **The Committee nevertheless seeks further explanation as to why the Scottish Government considers it appropriate that these powers listed above are to be exercised in consultation with Scottish Ministers but without a statutory requirement to obtain the Scottish Ministers’ consent.**

The Committee also noted the following powers to make regulations are exercised by the Secretary of State, but that there is no requirement to consult Scottish Ministers—

- Clause 18 (deemed planning permission) and Schedule 17 Paragraph 13 (as modified by Schedule 33) – Power to specify qualifying authority;
- Clause 19 (as modified by Schedule 33) - Power to extend the time limit of deemed planning permission; and
- Clause 22(1) and 22(2) and Schedules 18 and 19 (as modified by Schedule 33) -

Power to disapply provisions related to listed buildings and ancient monuments.

The Committee noted that these powers are exercisable in relation to matters within the legislative competence of the Scottish Parliament. The Committee has therefore also written to the UK Government to ask for the reasons why it considers it appropriate that these powers are exercised without a requirement for consultation with or consent from the Scottish Ministers.

It is noted from the LCM that the Scottish Government recommends that the Scottish Parliament gives its consent to a number of provisions related to planning matters, including the clauses noted above. **The Committee would nevertheless welcome further explanation on why you consider it appropriate that these powers may be exercised without a requirement to consult with or obtain consent from the Scottish Ministers?**

I would be grateful if you were able to provide a response to these questions by Wednesday, 20 April 2022. I am copying both this letter and the letter to the UK Government, as referred to above, to the Net Zero, Energy and Transport Committee

On 22 April 2022, the Minister for Transport, Jenny Gilruth MSP responded:

I refer to your letter of 4th April addressed to the Cabinet Secretary for Net Zero, Energy & Transport in respect of the above. I am responding on behalf of the Cabinet Secretary.

I am grateful for the scrutiny of the committee of the delegated powers relevant to Scotland in the High Speed Rail (Crewe-Manchester) Bill as referred to in the Legislative Consent Memorandum.

In regard to the matters raised within your letter, I can advise of the following in respect of the provisions:

- Schedule 5 Paragraph 15 (as modified by Schedule 33) – Designation of trunk or special roads

The Scottish Government is obliged to the committee for identifying an issue in relation to the appropriate level of involvement for the Scottish Ministers in any decision to designate works in Scotland as a trunk road or special road. We can advise that in respect of this provision, as is the case for the other provisions relating to roads, that though it is considered unlikely that any works will be required on the trunk road network in connection with this Bill the Scottish Government does not consider that the disapplication of the sections which relate to road works to be necessary.

Accordingly, the Scottish Government therefore does not recommend that the Parliament gives legislative consent to these provisions at this time and the draft motion with the Legislative Consent Memorandum (LCM) does not recommend consent for this provision.

- Clause 18 (deemed planning permission) and Schedule 17 Paragraph 13 (as modified by Schedule 33) – Power to specify qualifying authority;
- Clause 18 (deemed planning permission) and Schedule 17 Paragraph 17 and 24(6) (as modified by Schedule 33) - Power to make provision about fees relating to requests for approval and appeals in connection with the payment of fees by means of a cheque

- Clause 18 (deemed planning permission) and Schedule 17 Paragraph 24 to 27 (as modified by Schedule 33) – Powers relating to modification of the appeals procedure
- Clause 19 (as modified by Schedule 33) - Power to extend the time limit of deemed planning permission

With regard to the provisions mentioned above, it will be for the UK Government to explain their justification for the approach taken in the Bill. The Scottish Government's reasons for considering the planning provisions as acceptable do not extend beyond the reasons given in the LCM.

We recognise the desire to have a pragmatic and broadly consistent approach to procedures across the project as a whole.

The proposals to which the provisions relate are supported in principle as reflected in the current National Planning Framework (NPF) 3 and draft NPF4 (see paragraph 31 of the LCM), and the proposals and procedures involved relate to a single site in Scotland.

In this specific context and these particular circumstances, the UK Government's approach in respect of these provisions is considered acceptable.

- Clause 58 - Power to make rules about the provision of arbitration of the Bill

The Scottish Government is grateful to the Committee for drawing this provision to its attention. We accept the proposal in respect of arbitration as it sets out a consistent procedure across the project and a common set of rules relating to the HS2 project in both England and Scotland and are content for the provision to be subject to consultation in the knowledge that any such consultation will follow well-established Gunning principles.

- Clause 22(1) and 22(2) and Schedules 18 and 19 (as modified by Schedule 33) - Power to disapply provisions related to listed buildings and ancient monuments.

The Scottish Government is content that these powers relating to listed buildings and ancient monuments may be exercised without a requirement to consult with or obtain consent from the Scottish Ministers.

As stated in the LCM (para 37), the Scottish Government and Historic Environment Scotland confirmed that there is minimal, or very limited impact, at the location, and that Historic Environment Scotland has been fully engaged with HS2 Limited for a number of years through the consultation process and the environmental impact assessment process.

The Scottish Government therefore considers it appropriate to recommend that the Scottish Parliament consents to this provision given that it relates to this specific project which will have minimal impact on Listed buildings and ancient monuments in Scotland.

I trust that the explanations given address the issues you raise.

On 4 April 2022, the Committee asked the UK Government:

At the meeting of the Delegated Powers and Law Reform Committee on 29 March, the Committee considered the delegated powers relevant to Scotland in the [High Speed Rail \(Crewe Manchester\) Bill](#) as referred to in the [Legislative Consent Memorandum](#) ("the LCM") lodged by the Scottish Government on 7 February 2022.

The Committee noted that the following powers to make regulations and rules by statutory instrument are exercised by the Secretary of State in consultation with the Scottish Ministers —

- schedule 5 Paragraph 15 (as modified by Schedule 33) – Designation of trunk or special roads;
- clause 18 (deemed planning permission) and Schedule 17 Paragraph 17 and 24(6) (as modified by Schedule 33) - Power to make provision about fees relating to requests for approval and appeals in connection with the payment of fees by means of a cheque;
- clause 18 (deemed planning permission) and Schedule 17 Paragraph 24 to 27 (as modified by Schedule 33) – Powers relating to modification of the appeals procedure;
 - clause 58 - Power to make rules about the provision of arbitration of the Bill; and
- clause 22(1) and 22(2) and Schedules 18 and 19 (as modified by Schedule 33) - Power to disapply provisions related to listed buildings and ancient monuments.

These powers are exercisable in relation to matters within the legislative competence of the Scottish Parliament. **The Committee would therefore be grateful if you could explain the UK Government’s reasons why it is considered appropriate that they are exercised in consultation with Scottish Ministers, but without a statutory requirement to obtain the Scottish Ministers’ consent. As part of your response, the Committee would welcome specific details on what ‘in consultation with Scottish Ministers’ will mean in practice.**

The Committee also noted the following powers to make regulations are exercised by the Secretary of State, but that there is no requirement to consult Scottish Ministers—

- Clause 18 (deemed planning permission) and Schedule 17 Paragraph 13 (as modified by Schedule 33) – Power to specify qualifying authority;
- Clause 19 (as modified by Schedule 33) - Power to extend the time limit of deemed planning permission; and
- Clause 22(1) and 22(2) and Schedules 18 and 19 (as modified by Schedule 33) - Power to disapply provisions related to listed buildings and ancient monuments.

These powers are exercisable in relation to matters within the legislative competence of the Scottish Parliament.

The Committee would therefore be grateful if you could explain why it is considered appropriate that these powers are exercised without a requirement for consultation with or consent from the Scottish Ministers?

I would be grateful if you were able to provide a response to these question by **Wednesday, 20 April 2022.**

I am writing in similar terms to the Scottish Government and copying this letter to the Scottish Parliament’s Net Zero, Energy and Transport Committee.

On 26 April 2022, the Secretary of State for Transport, the Rt Hon Grant Shapps MP, responded:

Thank you for your letter of 4 April requesting an explanation of the powers being sought through the High Speed Rail (Crewe – Manchester) Bill.

As you will be aware, my officials have been working closely with colleagues in both Transport Scotland and more widely with Scottish drafters and Scottish Government to formulate this first ever cross-border hybrid Bill. I am grateful to the teams in Scotland for the support they have shown my officials over the last few years in this matter. The powers in the Bill were also discussed with the Scottish Transport Minister last year, before the Bill was introduced.

Turning to the detail of your letter, I note that Schedule 17 and Clause 58 reflect cases where in England, the decision is made jointly between the Secretary of State for Transport and another government department. It is recognised that input from another government department with responsibilities in these areas is helpful, but as applied to Scotland, this joint decision needed to be replaced by a consultation.

This is because, in such cases, a joint decision would involve two different governments. Getting a joint decision from two departments of the same government does not create the same risk of deadlock in the case of disagreement, since there are mechanisms within government to ensure that inter-departmental differences can be resolved.

When alternative resolutions were first considered, it was noted that the UK Government and the Scottish Government have no escalation mechanism between them, nor can they act as a single entity.

Requiring a joint decision out of two separate Governments therefore raises the risk of delay in a case where they cannot agree. This was considered to present too much of a risk of major delay in the delivery of the HS2 project. Nevertheless, requiring consultation means that there will be input from the relevant Scottish Government Department, whilst maintaining the seamless development and implementation of the project.

In the case of Schedule 5, paragraph 15, the designation of trunk roads and motorways in England is a matter purely within my jurisdiction. When applied to Scotland, it is considered appropriate to provide the Scottish Government opportunity for input into the decision, via consultation. Again, as explained above, this avoids having the risk of a potentially unresolved joint decision.

You note there are powers included in the Bill that are exercised by the Transport Secretary without a requirement for consultation with or consent from the Scottish Ministers. These are all decisions which in England are made by the Secretary of State for Transport alone, without reference to other government departments. The same regime has therefore been applied to Scotland in this Bill. This reflects the point that these are decisions which are made by me as Promoter of the project, rather than in the more general transport jurisdiction sense. Similarly, Paragraph 13 allows for the Secretary of State to designate qualifying authorities where they have given a satisfactory undertaking as to their handling of planning matters.

Schedules 18 and 19 are also not modified to require consultation with Scottish Ministers. Clause 19 is concerned with a decision to extend the time limit for the duration of planning permission if that is necessary for delivery of the project. Paragraph 5 of Schedule 18 allows for the Secretary of State to disapply the Bill listed building regime where it is no longer required in order to deliver the project and paragraph 3 of Schedule 19 allows the same decision to be made in relation to the disapplication of the ancient monuments

regime. Again, in all these cases, the functions are central to my role as Promoter of the legislation in Parliament and as the Minister who has sought the powers that allow it to be delivered.

Regarding what consultation will mean in practice, the form of consultation is not prescribed and there are no formal requirements.

However, any consultation would be in accordance with established Gunning principles for consultation, i.e.:

1. The proposals are still at a formative stage.
2. A final decision has not yet been made, or predetermined, by the decision makers.
3. There is sufficient information to give ‘intelligent consideration’. The information provided must relate to the consultation and must be available, accessible, and easily interpretable for consultees to provide an informed response.
4. There is adequate time for consideration and response. There must be sufficient opportunity for consultees to participate in the consultation.
5. ‘Conscientious consideration’ must be given to the consultation responses before a decision is made.

I trust this explanation satisfies the committee. I would like to reiterate again my thanks to Scottish officials for their ongoing support and assistance to my officials with this first ever cross-border hybrid Bill.

