

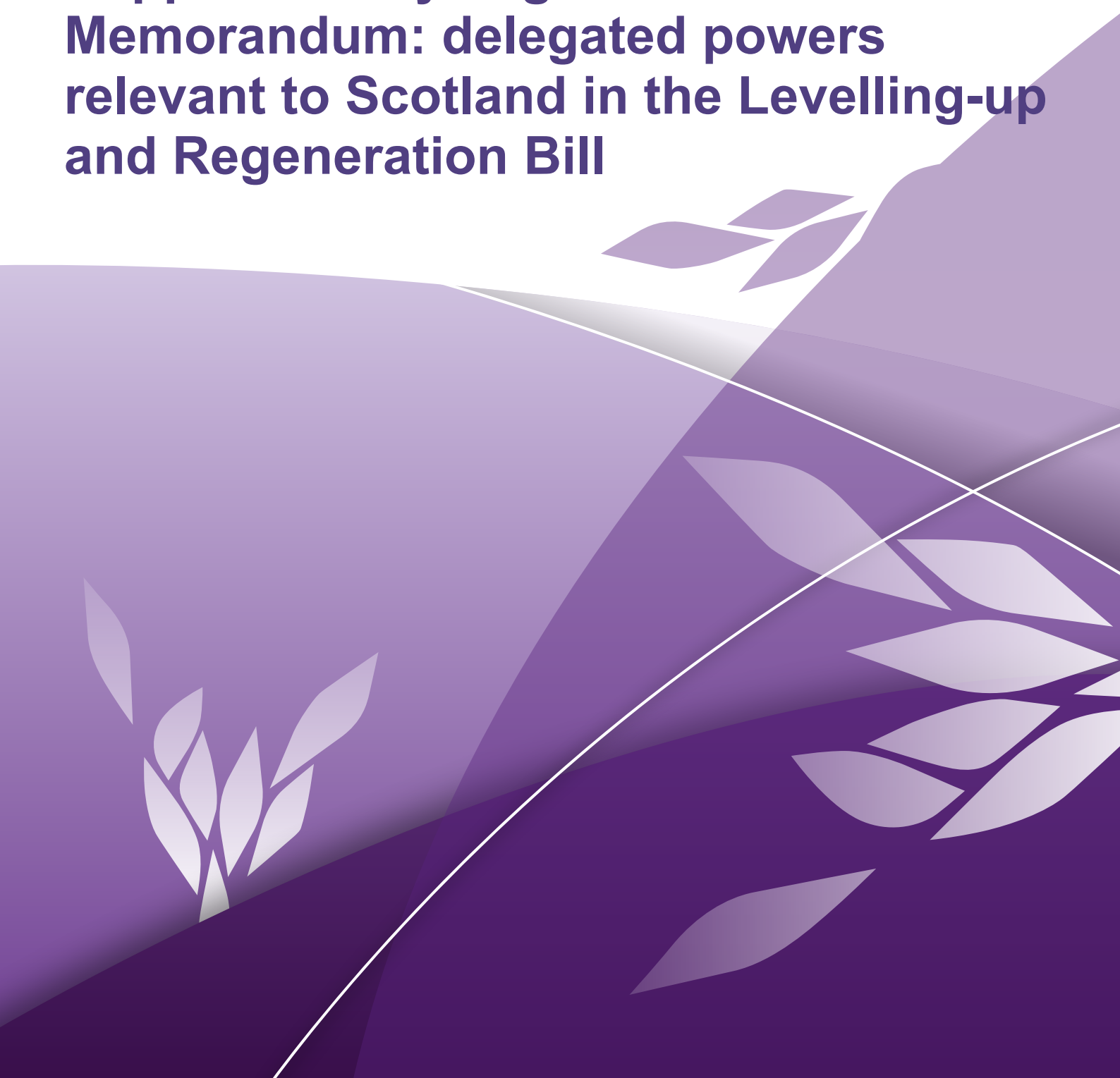


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Pàrlamaid na h-Alba

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## **Delegated Powers and Law Reform Committee**

# **Supplementary 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

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



**Convener**  
**Stuart McMillan**  
Scottish National Party



**Deputy Convener**  
**Bill Kidd**  
Scottish National Party



**Jeremy Balfour**  
Scottish Conservative  
and Unionist Party



**Oliver Mundell**  
Scottish Conservative  
and Unionist Party



**Mercedes Villalba**  
Scottish Labour

# Introduction

1. At its meetings on 27 September, 8 November and 15 November 2022, the Committee considered and [reported](#) on the delegated powers conferred on the UK Ministers which are exercisable within devolved areas in the [Levelling Up and Regeneration Bill](#) (“the Bill”) following the Scottish Government’s [original Legislative Consent Memorandum](#) (“LCM”), lodged on 27 July 2022.
2. A [Supplementary LCM](#) was lodged by the Scottish Government on 11 October 2023. This was considered at the Committee meeting on 24 October<sup>i</sup>.
3. The Committee considers the delegated powers in the Bill under its wider remit, in Rule 6.11.1(b) and (c) of Standing Orders, which includes considering and reporting on proposed powers to make subordinate legislation in particular bills or other proposed legislation; and general questions relating to powers to make subordinate legislation.
4. The lead Committee for consideration of the LCM is the Net Zero, Energy and Transport Committee. It is understood that the lead Committee will not be considering this Supplementary LCM due to time constraints, with the Parliament expected to consider the LCM today (Tuesday 24 October). As such, this Committee’s report is directed to the lead committee, and also to the Parliament.
5. The Bill is a UK Government Bill, introduced in the House of Commons on 11 May 2022. The Bill is currently in the final stages, known as ‘ping pong’ at Westminster. The Scottish Government has provided a supplementary LCM on account of the amendments that have been made to the Bill as it progressed through the UK Parliament in the time that has passed since this Committee last looked it.

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<sup>i</sup> Mercedes Villalba MSP submitted apologies for this meeting.

# Background to the Bill

6. This is a substantial Bill, now containing 264 clauses and 25 schedules. 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 13 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 6 of the Bill: Environmental outcomes reports
  - Part 12: Miscellaneous

## Legislative consent memorandums

7. The Scottish Government lodged a LCM for the Bill on 27 July 2022. That LCM indicated that the Scottish Government did not intend to lodge a legislative consent motion in relation to the Bill and that it recommended that the Parliament should not give its consent.
8. A Supplementary LCM was lodged by the Scottish Government on 11 October 2023. Following negotiations with the UK Government, the Scottish Government is now recommending that the Parliament gives its consent to the relevant provisions in Chapter 1 of Part 3 (Planning data), Part 6 (Environmental outcomes reports) and Part 12 (Miscellaneous) but withholds its consent to the relevant provisions in Part 1 of the Bill (Levelling-up missions). There are no delegated powers in Part 1 of the Bill.

# Review of relevant powers

## *Revised powers*

### **Chapter 1 of Part 3 of the Bill: Planning data**

#### **Clause 85(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**

#### Previous Committee Consideration

9. The Committee drew this 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 that therefore there would be no formal means by which the Scottish Parliament could scrutinise such regulations or be notified that they had been laid before the UK Parliament.
10. The Committee highlighted the UK Government’s response to the lead committee, noting that discussions were ongoing between the UK and Scottish Governments about the power. It noted that if the Bill were to be amended and the power conferred concurrently, it 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.
11. The Committee suggested that the lead committee explores further the consequences for the Parliament’s scrutiny role if concurrent powers were agreed to, and the appropriateness of a consent requirement.

#### Amendment to the Bill

12. Following discussions between the UK and Scottish Governments, the Bill has been amended to include a concurrent power for an “appropriate authority”, which includes the Scottish Ministers, to make such planning data regulations. Clause 91 provides that Scottish Ministers can only make such regulations where the provisions are within devolved competence. An amendment has also been made in order that the Secretary of State must obtain the consent of the Scottish Ministers prior to making planning data regulations which contain provision within Scottish devolved competence.

13. **The Committee welcomes this amendment to the Bill which will provide the Parliament with an opportunity to scrutinise the exercise of this power when such regulations are made by the Scottish Ministers.**

14. **In respect of the Secretary of State’s powers in devolved areas, the Committee reiterates its general position as agreed at its meeting on 22 November 2022 in relation to powers in UK bills conferred on UK Ministers in devolved areas, namely:**

**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 UK Ministers 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) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.**

**The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.**

**d) As a minimum, powers when exercised by UK Ministers 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.**

15. **The Committee asks the Scottish Government how it will facilitate scrutiny of any decision it makes to consent to the making of regulations within devolved competence by the Secretary of State, as the power appears to fall outwith the scope of SI Protocol 2.**

## **Part 6 – Environmental outcome reports**

**Clause 157 – power to specify environmental outcomes**

**Clause 158 - power to make EOR regulations making provision requiring an environmental outcomes reports to be prepared in relation to a proposed relevant consent or proposed relevant plan**

**Clause 159 – power to define “relevant consent” and “relevant plan” etc**

**Clause 160 – power to make provision about the monitoring and assessment of the extent to which a relevant consent or relevant plan affects the delivery of a specified environmental outcome**

**Clause 165 – power to make provision about, or in connection with, the enforcement of requirements imposed by or under Part 6**

**Clause 166 – power to make provision requiring a public authority to report on, or provide information in relation to, the delivery of specified environmental outcomes**

**Clause 169 – power to make provision about, or in connection with, the interaction of Part 6 with existing environmental assessment legislation or the Habitats Regulations**

**Clause 171 – power to make further provision**

### Previous Committee Consideration

16. The Committee made similar observations as outlined in paragraphs 9-11 in relation to the power to make Environmental outcome reports (“EOR”) regulations under the above clauses, noting that as drafted they are broad powers 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. Therefore, there would be no formal means by which the Scottish Parliament could scrutinise such regulations or be notified that they had been laid before the UK Parliament.
17. The Committee highlighted the UK Government’s response to the lead committee, noting that discussions were ongoing between the UK and Scottish Governments about the powers. It noted that were the Bill to be amended and the powers conferred concurrently, this would mean that either the Secretary of State or the Scottish Ministers could exercise the powers. Where the powers are exercised by the Secretary of State, the consequences mentioned above would similarly apply. The Committee suggested that the lead committee explores further the implications for the Parliament if concurrent powers are agreed to.

### Amendment to the Bill

18. Following discussions between the UK and Scottish Governments, the Bill has been amended to include concurrent powers for an “appropriate authority”, which includes the Scottish Ministers, to make such EOR reports regulations. The Secretary of State retains the powers to make regulations which contain provision within devolved competence, but similarly is required to obtain the consent of Scottish Ministers before doing so, unless a provision is incidental to or consequential on, provision that would be outside devolved competence.

19. **The Committee welcomes the amendments to the Bill which will provide the Parliament with an opportunity to scrutinise the exercise of these powers when such regulations are made by the Scottish Ministers.**
20. **In respect of the Secretary of State’s powers in devolved areas, the Committee reiterates its general position as agreed in November 2022, as outlined at paragraph 14 above.**
21. **The Committee asks the Scottish Government to confirm that its decision to consent to regulations made by the Secretary of State within devolved competence will fall within the scope of [SI Protocol 2](#), therefore providing this Parliament with an opportunity to scrutinise that decision.**

### *New Delegated Power*

**Clause 238 – powers to charge for post licence monitoring, variation, and transfer of marine licenses granted for licensable marine activity in the Scottish offshore region (beyond 12nm)**

**Powers conferred on: Scottish Ministers**

**Exercised by: Regulations made by statutory instrument / Orders made by statutory**

## instrument in respect of the power in section 98

### **Parliamentary Procedure: negative procedure (amendments to ss72A, 98, 107A and 107B of Marine and Coastal Access Act 2009); affirmative procedure (amendments to s108 of the Marine and Coastal Access Act 2009)**

#### *Provision*

22. The amendments give the Scottish Ministers powers, for the Scottish marine licensing area unless relating to an activity which is excluded by section 113(3) of that Act, to set fees payable for post-consent marine licence monitoring and variations to licences, to charge a deposit on account of fees payable, to establish an appeals process against certain notices, and to revoke an earlier fees order.
23. Regulations and orders would be subject to the negative procedure, except those that would establish an appeals process against certain notices, which would be subject to the affirmative procedure.

#### *Committee consideration*

24. The Supplementary LCM states that this clause has been updated to provide the same powers to Scottish Ministers as already existed for the Welsh Ministers and were proposed to be conferred on the Secretary of State. It states that the powers allow for an expansion of the range of chargeable fees and aligns with the Scottish Government's broad policy goals of full cost recovery for marine licensing.
25. The parliamentary procedures attached to the new regulation and order making powers for the Scottish Minister are consistent with those set out in the 2009 Act.
26. **The Committee is content with the powers in principle, and that exercise of the powers in s72A, 98, 107A and 107B of the 2009 Act would be subject to the negative procedure, whereas exercise of the power in section 108 would be subject to the affirmative procedure.**

