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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 Retained EU Law (Revocation and Reform) 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 meetings on 23 and 30 May 2023, the Delegated Powers and Law Reform Committee considered the amendments made in the House of Lords to the delegated powers that are exercisable within devolved competence in the [Retained EU Law \(Revocation and Reform\) Bill](#) (“the Bill”).
2. The amendments were made to the Bill at Report stage and Third Reading in the House of Lords on 15 and 22 May 2023.
3. The Committee considered the amendments 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 UK Government lodged a [supplementary Delegated Powers Memorandum](#) (“sDPM”) in relation to the government amendments on 11 May 2023.
5. The lead Committee for consideration of the LCM is the Constitution, Europe, External Affairs and Culture Committee (“CEEAC Committee”), to which this Committee directs its report.
6. The Bill is a UK Government Bill, introduced in the House of Commons on 22 September 2022. As at 25 May 2023 it is at “ping pong”: the House of Lords’ amendments mentioned above were considered by the House of Commons on 24 May 2023 and some were reversed. The Bill is accordingly still subject to amendment. This report reflects the Committee’s consideration of the amendments as they stand at 25 May 2023, and the Committee’s recommendations are set out below.
7. This report should be read in conjunction with the Committee’s earlier [report on the delegated powers in the Bill at introduction](#), published on 16 January 2023.
8. The clause numbering in this report refers to the numbering in the [Bill as amended on Lords Report](#) (published on 17 May 2023), and the numbering of the [Lords amendments to the Bill is as published on 22 May 2023](#).

Legislative consent

9. The Scottish Government lodged a [supplementary Legislative Consent Memorandum](#) in relation the House of Lords' amendments on 24 May 2023.
10. The supplementary LCM recommends that the Parliament withholds its consent to the amendments, as it did when it considered the Bill on 23 February 2023.

Delegated Powers - overview

11. Following the amendments, all the delegated powers in the Bill are now exercisable within Scottish devolved competence in the same way: by both UK Ministers and Scottish Ministers and concurrently (each acting separately) or jointly (acting together).
12. There is no requirement in the Bill that UK Ministers obtain or seek the consent of the Scottish Parliament or Scottish Government before exercising the powers in devolved areas. In relation to the powers to amend retained EU law in the European Union (Withdrawal) Act 2018, the then UK Government gave a commitment that it would not normally use those powers in areas of devolved competence without the agreement of the relevant devolved administration.ⁱ As at 24 May 2023 no equivalent commitment has been given in relation to this Bill.

Committee consideration of the amendments made by the House of Lords to delegated powers

Clause 1 - Sunset of EU-derived subordinate legislation and retained direct EU legislation - power to preserve

Power conferred on: Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with one or more devolved authorities

Power exercisable by: Regulations

Parliamentary procedure: Affirmative procedure

Provision

13. The key amendment made in the House of Lords reverses the “sunset” of retained EU law (“REUL”) in clause 1. This amendment was agreed by the House of Commons on 24 May 2023.
14. As introduced, the Bill would have revoked all REUL at the end of 2023 except any pieces of legislation that were “preserved” before then. The power to preserve was to be exercised by regulations made (in relation to matters within devolved competence for Scotland) by the UK Ministers and/or Scottish Ministers.
15. As amended, the default position has changed so that the legislation that will be revoked is now listed in a schedule to the Bill, which contains around 600 pieces of legislation.
16. The power to make preservation regulations has similarly changed: the power now enables Ministers to remove items of legislation from the revocation schedule. The SDPM explains that this power is intended as a safeguard against potential errors subsequently discovered in the schedule.

Committee consideration

ⁱ Explanatory Notes to the 2018 Act, paragraph 31

17. Like the previous power to preserve, and as noted above, the amended power can be exercised within Scottish devolved competence by both Scottish Ministers and UK Ministers, concurrently or jointly, and is not subject to a consent or consultation requirement when exercised by UK Ministers.

18. **The Committee:**

- Notes that the revocation provision now applies only to identified legislation.
- Considers that the power to preserve is a useful safeguard given the short period of time available for scrutiny of the schedule of revocations.
- Takes the position agreed at its meeting on 22 November 2022 in relation to powers in UK bills conferred on UK Ministers in devolved areas, namely that, in general:
 - (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.
- Considers that the affirmative procedure is appropriate.

Clauses 19 and 21 - Consequential and transitional etc. provision

Power conferred on: Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with one or more devolved authorities

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure except where amending primary legislation in which case the draft affirmative procedure will apply

Provision

19. Clauses 19 and 21 enable Ministers to make consequential provision and

transitional, transitory and savings provision, as they consider appropriate, in relation to the Bill. This includes the power to modify any enactment, including Acts of the Scottish Parliament and Scottish subordinate legislation.

Committee consideration

20. At introduction, this power was conferred only on UK Ministers, including within devolved competence. The amendment extends this power to the devolved authorities.
21. The UK Government explains in its sDPM:
 - ” This removes the need for the UK government to make such provisions on behalf of the devolved authorities. The devolved authorities have requested the extension of these powers to them, and given the amount of consequential and transitional provisions that are likely to be required in consequence of the Bill, these powers have been exceptionally extended to them so that the necessary changes to the statute book can be made as efficiently and quickly as possible.

22. The Committee welcomes the extension of this power to the Scottish Ministers.

Committee consideration of other amendments made by the House of Lords which have implications for parliamentary scrutiny

Reporting requirements (Lords amendment 16 as amended by the Commons amendments (a) and (b))

Provision

23. This amendment in the name of Baroness Noakes was agreed by the House of Lords at third reading on 22 May, with the support of the UK Government. It was then further amended when the House of Commons considered the Lords’ amendments on 24 May. The amendment can therefore be expected to remain in the Bill, although its final form is not yet determined.
24. This new clause requires UK Ministers to update the [retained EU law “dashboard”](#) and lay a report every 6 months on the progress that is being made in revoking and reforming retained EU law.ⁱⁱ The obligation to report continues until the powers expire in June 2026.
25. These reports must also cover the UK Government’s forward-looking plans to revoke and reform REUL in the subsequent 6 month periods. This includes providing a list of such legislation as the UK Government intends to revoke or reform.

Committee consideration

26. The Committee understands that the dashboard at present does not contain any

ii The Lords amendment required annual reports, but a Government amendment in the House of Commons, agreed on 24 May, changed this to every 6 months.

legislation that is wholly devolved, but that it does contain legislation dealing with matters of mixed reserved/devolved competence.

27. Of particular interest to the Committee are the implications for parliamentary scrutiny of devolved REUL and the Scottish Government's intentions in this regard.

28. **The Committee draws this amendment to the attention of the lead committee, which may wish to explore the implications for the Scottish Parliament's scrutiny, for example:**

- **whether this obligation covers devolved REUL (as currently drafted the amendment could cover both);**
- **whether there should be an equivalent obligation on Scottish Ministers to report on their use of powers, and, in particular, their future plans for the use of the powers (as currently drafted the obligation is only on UK Ministers); and**
- **how the Scottish Government and Scottish Parliament would engage with this process in relation to devolved legislation.**

Non-government amendments

29. The following four non-government amendments were reversed by the Commons on 24 May, so many not reappear in the Bill. They are mentioned here because they would have scrutiny implications for the Scottish Parliament if passed, and there may not be another opportunity for the Committee to consider these amendments. The amendments are as follows.

Additional scrutiny processes for the schedule of revocations in the UK Parliament (Lords amendment 1 to clause 1)

30. Under this amendment, before anything on the schedule was revoked, a Joint Committee of both Houses of the UK Parliament would consider each item, leading to the possibility of a debate on the floor of each House on any entry which represented a substantial change from the current law.

31. The amendment makes no distinction between reserved and devolved law. It provides no equivalent scrutiny process in the devolved legislatures. The UK Parliament could potentially disapply the revocation of an item on the schedule up to the end of December 2023, whereas the ability for the devolved authorities to do so expires at the end of October.

Additional scrutiny for the UK Parliament of the revocation of retained EU rights, powers and liabilities (Lords amendment 6 to clause 3)

32. Along with the revocation of the legislation listed in the schedule (e.g. retained EU Regulations and domestic subordinate legislation which implemented EU law), the Bill also revokes other rights which were retained in the UK by the section 4 of the EU (Withdrawal) Act 2018. Examples of these (as given in the Explanatory Notes for that Act) are some Treaty rights, for example the right to freedom of establishment and free movement of capital in the Treaty of the Functioning of the

EU. Clause 3 of the Bill revokes these rights at the end of December 2023.

33. Under the amendment, by the end of October 2023, the Scottish Government would have to produce a list which of these rights they intend to revoke, and the Scottish Parliament would have the power to remove an item from that list, similar to new process for taking items off schedule 1. This would involve parliamentary procedure in the Scottish Parliament in October and potentially scrutiny of preservation or restatement SSIs if the Scottish Government wanted to preserve any of these rights, which would need done before the end of the year.

Additional scrutiny in the UK Parliament of the use of the “reform” powers (Lords amendment 42 to Schedule, regarding the procedure for regulations)

34. This amendment introduces additional scrutiny procedures in the UK Parliament of the UK Government’s use of the “reform” powers, being the powers to restate, revoke or replace REUL and assimilated law which expire on 23 June 2026.
35. This would require the UK Parliament to be given at least 40 days’ notice of such “reform” Statutory Instruments, and would give it the opportunity to prompt debate if it is considered either that the SI represents substantial change or that there had been insufficient public consultation. Unusually, this amendment would give UK Parliament the power to require amendments to be made to the proposed SI.
36. Such an amendment would raise the question of how the Scottish Parliament could engage in this process if the SI covered devolved matters; and whether the Scottish Parliament should have a similar role in relation to “reform” SSIs.

Additional conditions for the exercise of the “reform” powers in relation to environmental etc. matters (Lords amendment 15, inserting a new clause)

37. This amendment would place additional conditions on Ministers’ use of the “reform” powers, in this case the powers to restate, revoke, replace and update. Such powers could not be used to reduce the level of environmental protection or consumer protection or if this would conflict with international environmental agreements to which the UK is a party. The amendment would also require Ministers to seek independent advice, for example from Environmental Standards Scotland, and publish a report on how Ministers have taken that advice into account, before exercising the power.

- 38. The Committee draws to the attention of the lead committee the non-government amendments which, if they are reinstated by the Lords, the Committee considers would have implications for the Scottish Parliament’s scrutiny of matters within its competence. The lead committee may wish to explore:**
- **How the Scottish Parliament and/or the Scottish Government could engage with the additional scrutiny processes in so far as they apply to the UK Parliament’s consideration of devolved legislation.**
 - **In relation to the “reform” powers, whether the additional scrutiny procedures available in the UK Parliament, including the power to require amendments to be made to UK Government regulations, should**

also be available in the Scottish Parliament in relation to Scottish Government regulations.

- **Implications of the additional time period available to the UK Parliament to disapply items in the revocation schedule beyond the time available to the Scottish Parliament; the uncertainty during this period as to the final content of the schedule; and the need for cooperation between the Scottish Government and UK Government in this regard.**
- **What scrutiny processes would be appropriate in the Scottish Parliament for the scrutiny of the revocation of retained EU rights, powers and liabilities.**

