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

# **Supplementary Legislative Consent Memorandum: delegated powers relevant to Scotland in the Energy Bill (UK Parliament legislation)**



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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**  
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**Jeremy Balfour**  
Scottish Conservative  
and Unionist Party



**Oliver Mundell**  
Scottish Conservative  
and Unionist Party



**Mercedes Villalba**  
Scottish Labour

# Introduction

1. At its meetings on 15 November 2022 and 7 February 2023, the Delegated Powers and Law Reform Committee considered the delegated powers that are exercisable within devolved competence in the [Energy Bill](#) (“the Bill”). The Committee published its [report](#) on 10 February 2023.
2. The Bill was introduced in the House of Lords on 6 July 2022. The Scottish Government lodged an [LCM](#) on 28 September 2022 and a [Supplementary LCM](#) on 25 January 2023. The Bill has subsequently been amended, with final amendments being lodged on 31 August and 4 September 2023. To take account of those amendments, the Scottish Government lodged a [second Supplementary LCM](#) on 21 September 2023 in which it recommends that the Scottish Parliament gives legislative consent to the Bill.
3. The lead committee is Net Zero, Energy and Transport Committee. It will also consider the second Supplementary LCM at its meeting today (Tuesday 26 September). Given the time constraints, this Committee’s report is directed to the lead committee, and also to the Parliament, which is expected to consider the LCM next week.

# Overview of the Bill

4. The Bill in its current form contains 330 clauses and 22 schedules, divided into 15 parts, each of which regulates disparate areas of the law connected to energy provision. It seeks to implement a range of policy objectives, following various consultation exercises and reports in recent years. According to the Explanatory Notes, the aim of the Bill is to “help increase the resilience and reliability of energy systems across the UK, support the delivery of the UK’s climate change commitments and reform the UK’s energy system while minimising costs to consumers and protecting them from unfair pricing”.

# Legislative consent

5. Most of the provisions of the Bill extend to England, Scotland, and Wales, with some also extending to Northern Ireland. Energy is, for the most part, a reserved matter under the Scotland Act 1998, schedule 5, Part II, Head D. However, aspects of the Bill fall within the legislative competence of the Scottish Parliament. The UK Government acknowledges this and has undertaken to seek the consent of the Scottish Parliament for the provisions that engage the Legislative Consent Motion process.



## Delegated powers in devolved areas

6. The Bill creates several delegated powers in devolved areas. The Sewel convention does not apply to delegated legislation, which means that UK Ministers are not required by convention to seek the consent of the Scottish Parliament in respect of delegated legislation that affects devolved matters.
7. The previous version of the Bill, which this Committee considered, required UK Ministers to give notice to, or to consult, the Scottish Ministers in relation to certain powers exercisable by the UK Government. However, none of those powers was subject to a requirement for the Secretary of State to obtain the Scottish Ministers' consent before exercising them.
8. In its LCM the Scottish Government explained that it had sought amendments to the effect that the requirement to consult with Scottish Ministers over any secondary regulations to deliver the mechanisms should, in view of the devolved competences and interest in play, be amended to a requirement to secure Scottish Ministers' consent. Pending the outcome of those negotiations, the Scottish Government recommended that consent be withheld for clauses which delegate powers to UK Ministers to legislate in devolved areas but granted in relation to other parts of the Bill.

# Committee Report of 10 February 2023

9. In its report on the Bill, this Committee reiterated the position that it had 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 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) 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 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.

## What has changed?

10. Since that report, one clause (clause 2) has been amended to require that the UK Government obtains the consent of the Scottish Ministers for proposed regulations (on the licensing of carbon dioxide transport and storage) where these would amend Scottish legislation. However, this is the only clause which has been amended to provide for a consent requirement. Other clauses have been amended to require UK Ministers to give notice to, or to consult, the Scottish Ministers before exercising a power to make regulations. However, unless there is a requirement for Scottish Ministers' consent, there is no Ministerial decision which the Scottish Parliament can scrutinise. In any event, a consent process would not trigger an automatic notification to the Scottish Parliament under current SI protocol arrangements, which only extend to areas of former EU competence.
11. In its second Supplementary LCM (paragraph 5) the Scottish Government draws the Parliament's attention to the fact that "the UK Government has not agreed to include a requirement for statutory consent from Scottish Ministers in all areas where it is taking powers, contrary to the strongly expressed views of the Scottish Government and the Parliament." However, despite being disappointed by the UK Government's approach, the Scottish Government "on balance, believes that the advantages of the Bill allow it to recommend consent in this case".
12. In absence of a statutory consent requirement, the Scottish Government explains that two non-legislative elements are being offered to support the delivery of various clauses. A Memorandum of Understanding ("MoU") will "provide an agreement setting out how the Scottish Government and the UK Government will work together" regarding the use of certain powers. Further, a ministerial forum will be established "to discuss ongoing concerns" relating to the powers in various clauses.

## Committee consideration

13. The use of an MoU between the Governments, and an inter-ministerial forum to assist decision-making in relation to the use of the powers relates directly to the Committee's recommendations on consent and consultation in its previous report. In the absence of amendments requiring Scottish Ministers' consent, the two governments have agreed non-legislative intergovernmental arrangements about the exercise of the powers. This has implications for parliamentary scrutiny because neither of these new devices gives the Parliament a scrutiny role.
14. The amendment to clause 2 changes the Committee's conclusions at paragraph 49 of its original report on the LCM regarding that particular clause. However, the use of non-legislative mechanisms in relation to the other clauses means that the Committee's conclusions in relation to the other powers in the Bill which are conferred on UK Ministers and are capable of being exercised within devolved areas remain the same.

15. The Committee therefore:
  - welcomes that clause 2 has been amended to require the UK Government to obtain the consent of the Scottish Ministers before exercising the power in a way which amends an Act of the Scottish Parliament, or an instrument made under such an Act;
  - notes that no such consent requirement has been agreed in relation to any of the other delegated powers which the Committee previously reported on;
  - notes that some clauses have been amended to require UK Ministers to give notice to, or to consult, the Scottish Ministers before exercising a power to make regulations, and Scottish and UK Governments have also agreed two non-legislative means of co-operating regarding the use of several delegated powers in the Bill. However, none of these developments provide a means by which the Scottish Parliament can hold Scottish Ministers to account for their position in any agreement with the UK Government. In order to have oversight of how these powers are exercised by the UK Government, or of the Scottish Ministers' position when consulted, or during inter-ministerial discussions, the Scottish Parliament will be reliant on information provided by the governments; and
  - in relation to all regulation-making powers in the Bill which are conferred on UK Ministers and are capable of being exercised within devolved areas, reiterates the position it agreed at its meeting on 22 November 2022 (as set out at paragraph 9 above).

