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**Environment, Climate Change and Land Reform
Committee**
**Comataidh Atharrachadh Clìomaid is Ath-leasachaidh
Fearann**

**Legislative Consent Memorandum - UK
Environment Bill**



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Environment, Climate Change and Land Reform Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Environment, Climate Change and Land Reform.



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Introduction

1. The Environment Billⁱ was introduced by the UK Government into the House of Commons on 30 January 2020. The Bill provides for a wide range of powers across environmental policy which were previously within the competence of the EU. Further information about the Bill can be found in the SPICe bill briefingⁱⁱ.

ⁱ [Environment Bill](#)

ⁱⁱ [SPICe briefing on the UK Environment Bill](#)

The Environment Bill

2. The Environment Bill was being considered by a public bill committee in the House of Commons, but consideration was suspended due to the Coronavirus outbreak. The Committee is now scheduled to report by Thursday 25 June 2020.
3. Much of environmental policy is devolved to the Scottish Parliament. As a number of the Bill's provisions would apply to Scotland, the UK Government is seeking the Scottish Parliament's legislative consent for these provisions.
4. Legislative consent is being sought on the following clauses—
 - 47 and 48 (schedules 4 and 5), 61, *producer responsibility*
 - 49 and 50 (schedule 6), *resource efficiency*
 - 55 and 60, *electronic tracking of relevant waste*
 - 69 (schedule 11), *air quality*
 - 81, 84 and 85, *water quality*
 - 125 (and schedule 19), *chemicals/REACH*
 - 126, *consequential provisions*.

Legislative Consent Memorandum

5. The Scottish Government lodged an LCMⁱⁱⁱ on 27 May 2020. The LCM states that—

” The Scottish Government supports the approach set out in the Bill to those matters requiring consent, which respect the competence of the Scottish Parliament and Ministers. Some of these provisions are consequent on the UK’s withdrawal from the EU: while the Scottish Government regrets that EU exit is now taking place, it recognises that replacement legislation is required for those frameworks previously provided by EU law. The Scottish Government therefore recommends that the Scottish Parliament consents to those provisions of the Bill which relate to domestic environmental matters for the reasons set out above.

ⁱⁱⁱ Legislative Consent Memorandum on the UK Environment Bill

Committee Consideration

6. At the outset of its consideration^{iv}, the Committee wrote^v to the Cabinet Secretary for the Environment, Climate Change and Land Reform seeking further information on a number of aspects of the Bill. The Committee also wrote to stakeholders^{vi} seeking their views on the implications of the Bill on Scotland; the Committee thanks those organisations and individuals who responded. The Committee took evidence from the Cabinet Secretary at its meeting on 15 June 2020^{vii}.

iv [Environment Bill page](#)

v [Letter from the Convener of the Environment, Climate Change and Land Reform Committee to the Cabinet Secretary for Environment, Climate Change and Land Reform.](#)

vi [Letter from the Convener of the Environment, Climate Change and Land Reform Committee to stakeholders](#)

vii [Official Report, Environment, Climate Change and Land Reform Committee, 15 June 2020.](#)

Why Legislation is Necessary

7. The devolution settlement, as set out in the Scotland Act 1998, provides that both the Scottish Government and the UK Government have powers to make regulations in devolved competence, under s2(2) of the European Communities Act 1972, in order to implement EU law.
8. At the end of the transition period, on 31 December 2020, the European Communities Act 1972 will be repealed. The Environment Bill is an enabling Bill which would, post exit, provide both UK and Scottish Ministers with the power to bring forward secondary legislation that will have effect in Scotland in certain areas of environmental policy currently within EU competence.
9. It is proposed the Scottish Government would use this legislation to ask the UK Government to make regulations in certain areas of environmental policy currently within EU competence where legislating at a UK level is considered to be appropriate. The Bill also contains powers which would enable the Scottish Ministers to bring forward their own legislation in some, but not all, of the subject areas covered by the Bill.
10. Whilst the Environment Bill would replace the European Communities Act 1972 in providing a legislative basis for the UK Government (and in some areas the Scottish Government) to make regulations on environmental policy in Scotland, it is not clear what has been done to replicate other aspects of the current arrangements, such as the extensive involvement of stakeholders and engagement of parliamentarians in the development of EU law. The EU's decision-making process involves extensive stakeholder engagement by the European Commission, followed by approval by both the European Parliament and European Council.

The Committee recognises that primary legislation is required – as a result of EU exit and the repeal of the European Communities Act 1972 – to make provision, and where appropriate to delegate power to Ministers to make regulations, in those areas of law currently within the EU competence.

The Committee believes that powers which fall within devolved competence, including environment policy, should return to the Scottish Parliament on exit day. The Committee is, therefore, unclear why environmental powers in devolved competence need to be made via UK primary legislation, as opposed to Scottish primary legislation. Provision via Scottish primary legislation would enable full Scottish parliamentary scrutiny and accountability of the legislative proposals and, thus, respect the devolution settlement.

The Committee recommends the Scottish and UK Governments provide a full explanation of the rationale for sharing powers via legislation in the UK Parliament, as opposed to the Scottish Parliament, in advance of the debate on the motion.

Shared or Concurrent Powers

11. The Bill provides for a range of legislative powers to be ‘shared’, or held concurrently, by UK and Scottish Ministers. This means that the power can be exercised in relation to Scotland by either the Scottish Ministers or the appropriate UK Minister (known as the Secretary of State).
12. The Bill provides legislative powers to both Scottish Ministers and the Secretary of State (with the consent of Scottish Ministers) in relation to producer responsibility and resource efficiency. Legislative powers are given to Scottish Ministers (alone) in relation to electronic waste tracking and to UK Ministers in relation to the regulation of chemicals and to water quality in cross-border river basins. The provision on air quality is not a legislative power in relation to Scotland.
13. The Scottish Government, in the LCM, indicates it is content with these provisions because it may make sense to legislate on a single, UK basis and many policy areas already operate on this basis, albeit within the context of EU membership. The LCM states Scottish Ministers’ view that “the relevant provisions respect the competence of the Scottish Parliament and Scottish Ministers” and, in her letter to the Committee, the Cabinet Secretary stated her view that the Bill does not have consequences for the devolution settlement.
14. There is no information in the accompanying documents for the Bill, or the LCM, on the criteria which the Scottish Government – or any future Scottish government – would use when deciding whether to consent to powers being exercised by UK Ministers by UK statutory instrument (SI). In her letter to the Committee, the Cabinet Secretary responded that this would be considered “on a case by case basis”.

The Committee recognises there will be policy areas where it makes sense to legislate to establish a joint scheme with the rest of the UK. As previously stated, however, the Committee believes that decisions about environmental policy in Scotland should be made in the Scottish Parliament, by members of the Scottish Parliament, to whom Scottish Ministers are accountable.

The Committee considers the Scottish Government has not yet provided a sufficient level of detail about the circumstances in which Scottish Ministers would consent to the legislative powers of the Scottish Parliament being exercised by the UK Government.

The Committee has significant concerns that the Scottish Parliament is being asked to give its consent to legislative powers within its competence being delegated to UK Ministers on the basis of such limited information. The Committee urges the Scottish Government to provide further information in relation to this in advance of the debate on the motion.

Process for Parliamentary Scrutiny

15. In the event of agreeing to give its consent to this LCM, the Scottish Parliament's role in relation to regulations made by UK Ministers exercising these delegated powers would be extremely limited. There is no equivalent of the LCM process/ Sewel convention for subordinate legislation.
16. It is proposed that a protocol between the Scottish Parliament and Scottish Government would make provision for some level of Scottish parliamentary scrutiny in relation to proposals for these UK SIs. Under this protocol, it is anticipated the Scottish Parliament would be notified when the Scottish Government has taken the decision to consent to regulations being made under the Environment Bill, if enacted. The proposed protocol is expected to be broadly similar to the protocol already in place which applies to consent given to UK SIs made under certain provisions of the European Union (Withdrawal) Act 2018.
17. The Committee considered 34 notifications for UK SIs made under the 2018 Act. Parliamentary scrutiny of these decisions is limited due to the standard timescale of 28 days and the fact that notifications do not include sight of the SI. This means that the Scottish Parliament does not see the detail of what the SI would actually do. Crucially, Parliamentary scrutiny of these decisions does not enable the Scottish Parliament to approve or annul the terms of the SI itself.
18. The Scottish Parliament's scrutiny of UK SIs made under the 2018 Act was, at the time, very much focused around a concentrated exercise to fix "deficiencies" in EU law in advance of a possible 'no-deal' exit, to ensure that the statute book works in the UK when EU law is copied over into Scots law. Members made allowances for curtailed scrutiny deadlines and limited information on this basis.
19. In addition, the 'no-deal' SI exercise was based on retaining the status quo rather than making policy changes. However, regulations to be made under this Bill would be used to implement policy change. These same specific 'no deal' constraints should not exist in relation to future notifications.
20. During evidence, the Committee explored the possibility of regulations made by UK Ministers in devolved competence and with the consent of Scottish Ministers being made via the joint parliamentary procedure. This would ensure that both the UK Parliament and Scottish Parliament would scrutinise (and approve/reject) draft regulations.
21. The Cabinet Secretary stated that "there are discussions about doing that. That approach is not generally provided for in the bill, but that is not to say that it will not happen." The Cabinet Secretary went on to say that there is "no resistance to our doing that" although "thought has to be given as to when that approach would be appropriate and necessary, and to how, in practical terms, it can be done".^{viii}
22. It is not clear what role there would be for Scottish parliamentary scrutiny of how the regulations are implemented in Scotland given the UK Government is not

viii [Official Report, Environment, Climate Change and Land Reform Committee, 15 June 2020.](#)

accountable to the Scottish Parliament. Nor is it clear how far any UK authorities exercising powers under the Bill would be subject to the environmental oversight arrangements expected to be contained in the Continuity Bill.

The Committee is concerned that, if legislative consent is given and the Bill is passed, there would be a very limited role for the Scottish Parliament in relation to how the legislative powers in the Bill are exercised. The Scottish Parliament, as the Bill is currently drafted and if enacted, would have limited scope to influence decisions on devolved policy, scrutinise relevant legislation and its implementation and, therefore, effectively hold Scottish Ministers to account.

There is no equivalent of the LCM process/Sewel Convention for subordinate legislation. Thus, the Committee is of the view that this Bill, along with other EU exit bills which introduce shared powers and a significant number of the SIs the Committee has previously considered, change the nature and operation of the devolution settlement in relation to the environment in Scotland and devolved environmental policy.

Measures need to be put in place – as a matter of priority – to ensure the devolution settlement keeps pace with the constitutional reality of a post-EU UK. The Committee believes that, where significant legislative powers in devolved competence are delegated to the UK Government, the Scottish Government should explore whether a joint process for approval of SIs needs to be included on the face of the Bill. The Committee believes the joint process should be included on the face of all bills which provide that significant legislative powers in devolved competence are delegated to the UK Government.

The Committee considers that the use of the joint procedure for those legislative powers contained within the Bill and exercised by UK Ministers would enable the Scottish Parliament to properly to exercise its scrutiny role. The Committee is pleased to hear the Scottish Government has already given thought to the possible wider use of the joint parliamentary process. Use of this procedure will be particularly important in some instances that UK Ministers exercise a power – for example, an instrument which sets up a UK-wide scheme or in significant policy areas.

The Committee recommends the Scottish Government engage in active discussion with the UK Government on the possibility of amending clauses 47, 48, 49, 50 and 125 (and corresponding schedules) to require the joint procedure to be used when these powers are exercised by UK Ministers.

The Committee notes that the current protocol in operation relating to EU exit UK SIs is currently being revised to apply to all future UK SIs in devolved competence. For the revised protocol to be meaningful, it needs to address the issues around limited information and time for parliamentary scrutiny.

The Committee considers the specific ‘no deal’ constraints to parliamentary scrutiny of UK SIs made under the European Union (Withdrawal) Act 2018, and which make provision in devolved competence, should not exist in relation to SIs made post EU exit. To be meaningful, the Scottish Parliament would need the protocol to provide for an appropriate timescale and sight of the draft SI in order to effectively scrutinise UK SIs which change the law within the legislative competence of the Scottish Parliament. The Committee considers that this is vitally important as regulations to be made under this Bill could be used to implement very significant policy change.

Common Frameworks

23. The Committee is aware of a number of common frameworks being developed between the UK Government and devolved administrations. Common frameworks have been proposed in a range of policy areas where a common approach across the UK is considered necessary. These might be expected to underpin the exercise of the extended legislative powers being conferred to enable a UK SI to deal with matters within devolved competence.
24. Devolved administrations have agreed not to diverge from existing policy in these areas until a final decision has been taken about a common framework. It is expected that common frameworks would include information about governance and decision-making arrangements relating to each specific policy area, including dispute-resolution mechanisms. It is not expected that common frameworks would include much policy detail, although they may set out minimum standards. During evidence, the Cabinet Secretary said common frameworks would not “tie the hands” of the Scottish Government.^{ix}
25. The Committee expects common frameworks in a number of policy areas, including waste and chemicals, which this Bill provides for. At this stage, no further detail is available. It is thought these common frameworks have been postponed to 2021 due to the UK election and Covid-19.
26. Scottish Government officials were asked to include information relating to relevant common frameworks in the LCM. The LCM does not, however, include any reference to common frameworks apart from in reference to how the proposed UK Office for Environment Protection would work alongside the equivalent Scottish arrangements.
27. The Committee has already highlighted – in relation to the Agriculture Bill LCM – the significant challenges for parliamentary scrutiny of legislative proposals without any detail about the relevant common framework and governance arrangements^x. In addition, it is clear from the information provided to the Committee in relation to the proposed UK ETS common framework that, by the time a common framework document is sent to the Parliament, there is very limited scope for influence or amendment.
28. In her letter to the Committee^{xi}, the Cabinet Secretary stated that—

^{ix} Official Report, Environment, Climate Change and Land Reform Committee, 15 June 2020.

^x Letter from the Convener of the Environment, Climate Change and Land Reform Committee to the Cabinet Secretary for Environment, Climate Change and Land Reform.

^{xi} Letter from the Cabinet Secretary for Environment, Climate Change and Land Reform to the Convener of the Environment, Climate Change and Land Reform Committee.

- ” Agreement to the JMC(EN) principles on common frameworks was reached when all four UK administrations agreed that level-playing field commitments should be maintained should the UK leave the EU. Any move away from these level-playing field commitments has implications for the frameworks process because it widens the scope for policy divergence between administrations in different parts of the UK. This could have a detrimental impact on significant areas of devolved competence such as environmental protection, regulations around GM crops, marine policy and energy. (response to question 3)

The Cabinet Secretary, in her letter to the Committee, states that—

- ” We do not agree with the UK Government’s rejection of future alignment on environmental standards and strong level playing field measures with the EU.

The Committee considers that to undertake effective scrutiny it is vital that Parliament has full information on the governance arrangements covered by the relevant, proposed common frameworks alongside the legislative proposals. The Committee considers this to be a fundamental requirement and has already raised this issue in relation to the UK Agriculture Bill^{xii}.

The Committee highlights its concern that neither the UK nor Scottish Governments have been in a position to provide any update on the content, form or timetable for the relevant common frameworks alongside this LCM. The Committee notes that it has not been given any information regarding the proposed common frameworks in its remit since 26 June 2019 from either government.

The Committee considers that information about the relevant common frameworks – especially regarding the content, form and timetable – must be available to the Committee in advance of its consideration of any regulations made under this Bill.

^{xii} [Letter to the Convener of the Rural Economy and Connectivity Committee.](#)

Legislative Consent Memoranda

29. As set out earlier, EU exit represents a significant change in the UK governance landscape and has considerable implications for inter-government relations. A number of legislative powers in environmental policy currently within EU competence have been delegated to UK Ministers by UK Bills, as well as a significant number of the SIs the Committee considered as part of the no-deal preparations. These have significant implications for the Scottish Parliament and parliamentary scrutiny going forward.

The Committee recommends the Scottish Government reviews how it presents information in its LCMs relating to UK EU exit legislation. This would assist members' understanding of the constitutional consequences of EU exit and assist the transparency of the full implications of the UK legislation.

The LCMs must—

- **make it explicit where legislative powers in devolved competence are to be delegated to UK Ministers – and whether this is subject to consultation with, or the consent of, Scottish Ministers;**
- **provide a clear explanation why the Scottish Government believes the Scottish Government should share powers to make delegated legislation with the UK Government. The Committee believes the Scottish Government must ensure it provides sufficient information to inform the Scottish Parliament that this would be in Scottish interests; and**
- **In relation to this Bill - provide more information about the relevant common frameworks.**

Clauses 47 and 48 / Schedules 4 and 5 -Producer Responsibility Provisions

30. The Bill introduces delegated powers for Regulations for revised and extended UK-wide producer responsibility schemes. These are shared powers so could be used to enable UK-wide producer responsibility schemes to be taken forward either via parallel regulations by each of the UK and devolved administrations or by UK Regulations with the consent of Scottish Ministers and the other devolved administrations. The consent of the Scottish Ministers is required where the powers are exercised by UK Ministers.

As Stated earlier in the report the Committee recommends the Scottish Government engage in active discussion with the UK Government on the possibility of amending clauses 47, 48, (and corresponding schedules) to require the joint procedure to be used when these powers are exercised by UK Ministers.

The Committee has no further comments to make in relation to the provisions on producer responsibility which relate to the Scottish Parliament's legislative competence.

Clauses 49 and 50 / Schedules 6 and 7 - Resource Efficiency

31. The Bill introduces delegated powers for relevant authorities to make Regulations on the resource efficiency of products. These are also shared powers, with the consent of Scottish Ministers required.

As stated earlier in the report the Committee recommends the Scottish Government engage in active discussion with the UK Government on the possibility of amending clauses 49, 50 (and corresponding schedules) to require the joint procedure to be used when these powers are exercised by UK Ministers. The Committee has no further comments to make in relation to the provisions on resource efficiency which relate to the Scottish Parliament's legislative competence.

Clauses 55, 60 and 61 – Managing Waste; Waste Enforcement and Regulation

32. The Bill introduces delegated powers for Scottish Ministers to make Regulations to introduce electronic waste tracking i.e. the digital tracking of waste. The Bill also introduces powers for regulations to be made by the UK Secretary of State to regulate waste imports or exports - which is a reserved area.

33. In its letter^{xiii}, the Committee asked the Cabinet Secretary why waste was treated differently from producer responsibility obligations and resource efficiency, in that the Bill does not provide for UK Ministers to share this power. The Cabinet Secretary responded that—

” The statutory requirements in relation to waste collection and disposal which apply to waste operators are currently different across the different parts of the UK. While current legislation on waste as well as the new regulation-making powers on waste tracking are separate, all administrations are working closely together on how a waste tracking system will operate in practice.

The Committee notes that the legislative powers relating to waste policy in devolved competence are for Scottish Ministers only; this is not a proposed shared power. As stated earlier, and as a matter of principle, the Committee believes legislative powers in devolved competence should be provided for via Scottish legislation to allow full legislative scrutiny to take place in the Scottish Parliament.

^{xiii} Letter from the Convener of the Environment, Climate Change and Land Reform Committee to the Cabinet Secretary for Environment, Climate Change and Land Reform.

Clause 69 and Schedule 11 – Air quality

34. Most of this part of the Bill applies to England only but it includes a requirement for the UK national air quality strategy to be reviewed within one year of the new provision coming into force, and then at least every five years following the initial review (there was previously no requirement for review). This applies in Scotland although the Scottish Government also produces its own air quality strategy. However, the relationship between the UK and Scottish air quality strategies is not clear. The Cabinet Secretary addressed some detailed questions on this in her letter to the Committee.

The Committee has no comments to make in relation to the provisions on air quality which relate to the Scottish Parliament's legislative competence.

Clauses 81 – water quality, 84 and 85 – Solway Tweed River Basin District

35. The Bill covers water quality; water resources; drainage and the regulation of water and sewerage companies. Water quality is a devolved issue and most of this part of the Bill applies to England only, or England and Wales. A small number of provisions apply to Scotland because they relate to cross-border management of the Solway Tweed River Basin District (STRBD) which straddles Scotland and England. Again, the Cabinet Secretary addressed some detailed questions on this in her letter to the Committee.
36. In its report^{xiv}, the Delegated Powers and Law Reform Committee (DPLRC) highlights that the powers provided appear to go much further than is necessary to meet the stated policy intention.

The Committee notes there is a joint scheme with England in relation to the cross-border management of the STRBD. However, the Committee shares the concern of the DPLRC in relation to the extent of the proposed powers. It is not clear to the Committee why this could not be done in joint legislation. That is, legislation approved by both the UK Parliament and the Scottish Parliament.

As a matter of principle, the Committee believes legislative powers in devolved competence should be provided for via legislation that allows full legislative scrutiny to take place in the Scottish Parliament.

^{xiv} Report of the Delegated Powers and Law Reform Committee.

Clause 125 – REACH

37. Paragraph 1 of schedule 19 gives UK Ministers the power to amend the REACH regulation. There is no corresponding power for Scottish Ministers. Paragraph 2 gives both Scottish Ministers and UK Ministers with Scottish Ministers' consent the power to amend REACH Enforcement Regulations 2008.
38. When providing evidence to the Delegated Powers and Law Reform Committee^{xv}, the Scottish Government stated that -
- ” Given that UK REACH is intended to operate on UK-wide basis it is not considered necessary for the Scottish Ministers to have a corresponding power to make regulations within devolved competence.
- Scottish Ministers can request the UK Government amend the REACH regulation on their behalf.
39. The DPLRC drew this issue to the attention of the Committee in the context of the Committee's previous consideration of three UK statutory instruments relating to a UK REACH.
40. In her letter, the Cabinet Secretary stated that, in the event of the UK Government not taking forward a request by the Scottish Government to make regulations under clause 125, “Scottish Ministers would be able to fall back on the safeguarding provisions within UK REACH which would allow us to take provisional action for Scotland”. When asked about this during oral evidence, the Cabinet Secretary answered that “all that we are trying to signal is that the agreements in areas of devolved responsibility, whatever they may be, do not tie our hands or mean that we cannot make our own decisions within the devolved area of competence.”
41. In her letter, the Cabinet Secretary also referred to the Scottish Government's position that the UK should seek to retain continued membership and participation in EU REACH, the work of the European Chemicals Agency (ECHA) and alignment with other associated EU chemical regulations. When asked about this during oral evidence, the Cabinet Secretary stated that discussions were still ongoing and it was not possible to comment further at this time.

The Committee has had an ongoing interest in the proposals for a UK REACH, including seeking additional information from the Scottish Government, taking evidence from stakeholders and highlighting its concerns. The Committee recognises the importance of the chemical industry in Scotland and has previously expressed concerns about a lack of clarity in relation to the future framework and its operation and a lack of alignment of the UK REACH and EU REACH.

^{xv} Letter from the Cabinet Secretary for Environment, Climate Change and Land Reform to the Convener of the Delegated Powers and Law Reform Committee.

The Committee requests an urgent update from the Scottish and UK Governments on progress towards setting up the UK REACH.

As stated earlier in the report the Committee recommends the Scottish Government engage in active discussion with the UK Government on the possibility of amending clause 125 (and corresponding schedules) to require the joint procedure to be used when these powers are exercised by UK Ministers.

Part 1

42. This Bill establishes the environmental governance mechanism for England. In her letter to the Committee, the Cabinet Secretary stated the scope of the Office of Environmental Protection (OEP) excludes matters that are within the legislative competence of the Scottish Parliament.
43. There remains a lack of clarity about whether all matters that are within the legislative competence of the Scottish Parliament will be within the remit of the anticipated Scottish environmental governance arrangements. In its written submission, the Law Society of Scotland^{xvi}, raises the same concern when it suggests that “if any such body’s remit does not include these matters, it appears that a lacuna in environmental governance will exist for such matters”. The Law Society of Scotland also suggests there is a lack of clarity around which governance arrangements would apply in instances of executive devolution, given these are areas which are not within the legislative competence of the Scottish Parliament.

The Committee is unclear which environmental governance arrangements will apply when UK Ministers exercise powers within the legislative competence of the Scottish Parliament and apply to Scottish Ministers in instances of executive devolution.

The Committee requests the Scottish Government provide clarity on this in advance of the debate on the motion. The Committee will follow up this issue as part of its future scrutiny of the anticipated Scottish environmental governance arrangements.

^{xvi} Law Society of Scotland, written submission.

Conclusion

The Committee is unable to make a recommendation in relation to the LCM for the Environment Bill.

