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Economy and Fair Work Committee

Report on the Legislative Consent Memorandum for the UK Infrastructure Bank Bill



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Economy and Fair Work Committee

To consider and report on matters relating to the economy falling within the responsibility of the Cabinet Secretary for Finance and the Economy.



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Introduction

1. The [UK Infrastructure Bank Bill](#) is a UK Government Bill introduced in the House of Lords on 11 May 2022. Standing Orders provide that a Legislative Consent Memorandum (LCM) should normally be lodged with the Scottish Parliament two working weeks after the introduction of a relevant Bill in Westminster. In the case of this Bill, the deadline would have been 25 May 2022. On 25 May, the Minister for Parliamentary Business [wrote to the Presiding Officer](#) stating that the Scottish Government was analysing the Bill and its implications and, if they concluded that an LCM was required, intended to lodge the LCM prior to summer recess or as soon as possible.
2. John Swinney, Deputy First Minister and Cabinet Secretary for Covid Recovery, lodged the [LCM](#) on 2 September. On [21 September](#), under Rule 9B.3.5, the Parliamentary Bureau referred the LCM to the Economy and Fair Work Committee.
3. The Bill is currently in the House of Commons at the second reading. The date for the second reading has still to be announced. It is therefore still possible for the Bill to be amended.

The provisions in the UK Infrastructure Bank Bill

4. The purpose of the Bill is to place the UK Infrastructure Bank (UKIB) on a statutory footing and to—
 - place UKIB objectives into legislation;
 - create statutory forms of transparency, accountability and governance;
 - remove legal obstacles to UKIB’s capacity for lending to local authorities and the Northern Ireland Executive for infrastructure purposes;
 - grant specific powers to the Treasury to provide financial assistance to UKIB; and
 - ensure UKIB is a long-lasting institution.¹

5. The UK Infrastructure Bill is relatively short, comprising eleven clauses. HM Treasury believe that six of these require legislative consent as they could fall within the legislative competence of the Scottish Parliament. These are—
 - Clause 2 (Objectives and functions);
 - Clause 3 (Strategic priorities and plans);
 - Clause 4 (Directions);
 - Clause 5 (Financial assistance);
 - Clause 8 (Duties of the bank); and
 - Clause 11 (Extent, commencement and short life).

These clauses relate to infrastructure investment and may involve investment in areas such as rail, ports or bridges located solely within Scotland and therefore fall within devolved competence.¹

6. In a letter to the Economic Secretary to the Treasury on 9 June 2022, the Cabinet Secretary for Finance and the Economy gave in-principle support for the Legislative Consent Motion, but sought the following assurances from UK Ministers before recommending consent to the Scottish Parliament—
 - The development of a Memorandum of Understanding (MOU) between UKIB and the Scottish National Investment Bank (SNIB) with the intention that this should maintain high level alignment with Scottish Government priorities through SNIB’s missions;
 - Placing individuals who have relevant knowledge of the policy/project landscape in Scotland at boardroom level or ensuring such individuals are included on relevant investment panels; and

- That there will be no impact on Barnett consequentials should the Scottish Parliament provide legislative consent. ¹

Devolved competence

7. As set out above, HM Treasury has provided its analysis of the Bill and believes that six of the eleven clauses require legislative consent from the Scottish Parliament. It is the UK Government's view that only these clauses engage the legislative consent process. Accordingly on 10 May 2022 the Economic Secretary to the Treasury asked for legislative consent for the clauses identified.
8. In the [LCM](#), the Scottish Government states that 'since the statutory objectives of the Bank have the potential to encroach on devolved areas of competence, the Scottish Government agrees that the Sewel Convention is engaged'.¹
9. The Sewel Convention is the convention that the UK Parliament will not normally legislate on matters devolved to the Scottish Parliament without its consent. [Chapter 9B of the Parliament's Standing Orders](#) sets out the rules and procedures for seeking legislative consent under the convention.

Legislative Consent Memorandum

10. The requirement for an Legislative Consent Memorandum (LCM) is triggered where a UK Bill makes provision applying to Scotland for any purpose within the legislative competence of the Parliament, or alters that legislative or executive competence of the Scottish Ministers.
11. The LCM prepared by the Scottish Government explains how the Bill will affect Scotland and why. For example, the Bill may—
 - change the law on a “devolved matter” (an area of policy which the UK Parliament has devolved to the Scottish Parliament); or
 - alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).
12. If the Scottish Government recommends in its LCM that consent be given, it will normally be decided by a motion taken in the Chamber known as a Legislative Consent Motion. This motion is usually drafted by the Scottish Government. If, however, the Scottish Government does not recommend consent be given, a debate on the LCM may be scheduled in the Chamber.
13. In this case, the Scottish Government has noted the following in its LCM—
 - ” Despite the merits of the Bill, the Scottish Ministers cannot recommend legislative consent at this time. Our final position on whether to recommend consent will be subject to the outcome of ongoing discussions with the UK Government and the provision of assurances that Scotland’s interests will be properly reflected in the design and delivery of UKIB activity. Should such assurances be received, we will provide a supplementary Legislative Consent Memorandum. ¹

Committee Consideration

Economy and Fair Work Committee

14. The Committee took evidence on the LCM from Ivan McKee, Minister for Business, Trade, Tourism and Enterprise and Scottish Government officials at its meeting on [5 October](#).
15. At this meeting, the Minister reiterated that the UK Infrastructure Bank Bill has merit, but some of the clauses continue to cause constitutional concern. He confirmed the Scottish Government remains in discussions with the UK Government about the development of an MOU between the UKIB and SNIB—
 - ” I understand that those are progressing in a positive direction and that there is an understanding or a recognition on the UK side that that would be a helpful move. We remain hopeful that that will reach a positive conclusion. ²
16. Additionally, the Scottish Government has requested the placement of an individual with an understanding of Scottish Government policy at board room level or that such individuals are included on relevant investment panels. Whilst the Minister believes that this would be a clear mechanism to ensure Scotland's interests are represented, it is unclear whether the UK Government will agree to this request. ²
17. In the LCM, the Scottish Government states—
 - ” The impact that UKIB activity may already be having or will have on Barnett consequential and the Scottish budget are not clear. We have asked for assurances from HM Treasury that there will be no impact on financial implications for the Scottish Government in relation to an adjustment of Barnett consequential. ¹
18. The Minister told the Committee that discussions are continuing at official level on the Barnett consequential. He stated—
 - ” There is recognition that that issue needs to be addressed. We hope that it will be resolved, but nothing has been clarified definitively yet. ²
19. The Committee was told there is no formal timetable for the outcome of these discussions, but the Scottish Government hopes ongoing issues highlighted will be resolved soon. The Minister clarified—
 - ” If we get the issues resolved to our satisfaction, we will return with another recommendation at some point. That could be later this year or early next year. ²

Delegated Powers and Law Reform Committee

20. The Delegated Powers and Law Reform Committee (DPLRC) considered the

delegated powers relevant to Scotland in the Bill at its meeting on [25 October 2022](#). The DPLRC [report](#) highlighted a number of issues.

21. In its report, the DPLRC noted that the UK Infrastructure Bank will operate across a range of sectors but "will prioritise in particular clean energy, transport, digital, water, and waste." This would cover investment within devolved competence in areas including water, sewerage, rail and road infrastructure, ports or bridges within Scotland.
22. The DPLRC also highlighted that the delegated powers are similarly capable of being exercised to include further devolved matters within the scope of the Bill, or to remove devolved matters from the scope of the Bill. The DPLRC said—

” The powers will be exercisable by UK Ministers only. There is no requirement on the face of the Bill for the UK Ministers to obtain the consent of the Scottish Ministers, or to consult them, before exercising these powers within devolved competence. There also does not appear to be any political commitment in the accompanying documents that the Treasury will seek the consent of Scottish Ministers when doing so. ³
23. The DPLRC set out these points in its report at paragraph 18—
 - The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
 - 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.
 - Powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers’ consent when exercised within devolved competence.
 - 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. ³
24. In its report, the DPLRC noted that, although various assurances have been sought regarding the Bill, none of these relates to the exercise of the delegated powers. The Scottish Government has not requested any amendment to the Bill to provide that the exercise of the delegated powers is subject to Scottish Ministers’ consent, or a consultation requirement. The [DPLRC wrote to Ivan McKee](#), Minister for Business, Trade, Tourism and Enterprise asking whether he would be seeking an amendment during the remaining stages of the Bill's consideration.

Conclusion

25. The Committee notes the views of the Delegated Powers and Law Reform Committee (DPLRC) expressed in its report on the LCM that—
 - the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence;
 - accordingly, powers conferred on UK Ministers should be subject to a requirement for the Scottish Ministers' consent, when exercised within devolved competence.
26. In its previous report on the [Legislative Consent Memorandum - Professional Qualifications Bill](#), the Committee shared the concerns of the Delegated Powers and Legislative Consent Committee that where UK legislation provides for regulations to be made in devolved areas, the legislation should require the UK Government to obtain consent. We note that the Delegated Powers and Legislative Reform Committee has written to the Scottish Government on this and that it awaits a response.
27. The Committee notes the following matters are still under discussion—
 - the development of a Memorandum of Understanding between UKIB and SNIB;
 - the placement of individuals with an understanding of Scottish Government policy at board room level or that such individuals are included on relevant investment panels; and
 - the impact on Barnett consequentials.
28. The Committee notes the LCM and requests that it is kept updated on the progress of these discussions. The Committee is keen for these issues to be resolved as soon as possible.

- [1] Scottish Government. (2022, September 2). Memorandum from the Scottish Government. Retrieved from <https://www.parliament.scot/-/media/files/legislation/bills/lcms/uk-infrastructure-bank-bill/uk-infrastructure-bank-bill-legislative-consent-memorandum.pdf>
- [2] Scottish Parliament. (2022, October 5). Official Report of the Economy and Fair Work Committee. Retrieved from <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13936>
- [3] Scottish Parliament, Delegated Powers and Law Reform Committee. (2022, October 27). Legislative Consent Memorandum: delegated powers relevant to Scotland in the UK Infrastructure Bank Bill. Retrieved from <https://digitalpublications.parliament.scot/Committees/Report/DPLR/2022/10/27/7523f5c6-00c9-4906-b351-51862e4ada6c#Introduction>

