



Delegated Powers and Law Reform Committee

The Rt Hon Simon Clarke MP
Secretary of State for Levelling Up,
Housing and Communities
By email

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28 September 2022

Levelling-up and Regeneration Bill

Dear Secretary of State,

I am writing in relation to the Scottish Parliament's Delegated Powers and Law Reform Committee consideration at its meeting yesterday of the [Legislative Consent Memorandum](#) ("the LCM") for the [Levelling-up and Regeneration Bill](#).

Rule 6.11.1(b) of the Scottish Parliament's Standing Orders provide that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation". The Committee and its predecessor Committee have therefore considered powers conferred on UK Ministers in devolved areas in various Bills over the course of sessions 5 and 6.

The Committee's scrutiny of this Bill has focused on three clauses which confer delegated powers on UK Ministers within devolved areas. The Committee agreed to write to you, as Secretary of State for Levelling Up, Housing and Communities, with questions on each of these clauses.

Relevant clauses in the Bill

Clause 75(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

Power conferred on: the Secretary of State

Power exercisable by: Regulations (clause 75(1)) and publication (clause 75(3))

Parliamentary procedure: Negative procedure in respect of the power in clause 75(1) and no procedure in relation to the power in clause 75(3)

The Committee notes that regulations made under this clause will be laid in the UK Parliament only, despite this being in an area of devolved competence. Should that happen there will be no opportunity for parliamentary scrutiny within the Scottish Parliament as there is no requirement for consent before exercising this power.

There is a requirement that the Secretary of State consults with Scottish Ministers before making such regulations within devolved competence. However, this does not give the Scottish Parliament an opportunity to scrutinise the exercise of that power.

There is also no legal requirement on the Secretary of State to obtain the consent of Scottish Ministers before exercising the power in clause 75 in devolved areas.

The Committee's previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas has been as follows:

- 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. Powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
- 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.

The [Committee wrote to the UK Government on 12 July 2022](#) regarding the scrutiny of delegated powers in UK Parliament bills conferred on UK Ministers in devolved areas and the application or otherwise of SI Protocol 2. Your predecessor as Secretary of State for Levelling Up, Housing and Communities [responded](#) on 14 August indicating that the "*UK Government takes into account a variety of factors when seeking delegated powers in devolved areas.*" The Secretary of State also indicated that "[w]hether or not to include statutory consent requirements is considered on a case-by-case basis as each policy area has a different legislative context."

In the particular policy context of the Bill, the Committee would be grateful for an explanation as to:

- 1. how the UK Government envisages that this power may be used in relation to devolved matters;**
- 2. why the UK Government considers it appropriate, in the particular policy context of the Bill, that the power has been conferred so that it is**

exercisable independently by the Secretary of State in relation to devolved matters;

- 3. Why the UK Government considers it appropriate, in the particular policy context of the Bill, that when the power is exercised by the Secretary of State in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers; and**
- 4. whether the UK Government intends to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to devolved matters, or to require the Secretary of State when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers.**

Clause 116 – Power to specify environmental outcomes

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Affirmative, if specifying environmental outcomes or requiring an environmental outcomes report to be prepared in relation to a proposed relevant consent or a proposed relevant plan, negative if containing provision about how to assess and monitor the impact of a relevant consent or relevant plan on a specified environmental outcome

The [Delegated Powers Memorandum](#) accompanying the Bill states that the proposal is to introduce a new system of Environmental Outcomes Reports (EORs) to replace the existing environmental regimes for consenting relevant plans and projects. Currently, the domestic environmental assessment framework is derived from the EU Environmental Impact Assessment Directive and Strategic Environmental Assessment Directive.

It is currently unclear as to how the power will be used to create a new system of Environmental Outcomes Reports which will differ from the current SEA and EIA regimes.

Environmental matters are devolved to the Scottish Parliament. The current SEA and EIA are EU regimes which were implemented across the UK whilst it was Member State of the EU.

The Committee notes that the UK Government could exercise this power to create a new UK wide regime in an area which is devolved to the Scottish Parliament. The Secretary of State is not required to obtain the consent of Scottish Ministers before exercising this power to make provision in devolved areas, and therefore the Scottish Parliament will not have any oversight of the exercise of this power. The Committee's concerns highlighted against the powers in clause 75 above are mirrored here.

In the particular policy context of the Bill, the Committee would again be grateful for an explanation as to:

5. **what provision the UK Government envisages being made under the power;**
6. **why there is no concurrent power, equivalent to that in section 2(2) of the European Communities Act 1972, for Scottish Ministers to make provision regarding Environmental Outcomes in Scotland;**
7. **why the UK Government considers it appropriate, in the particular policy context of the Bill, that the power has been conferred so that it is exercisable independently by the Secretary of State in relation to devolved matters;**
8. **why the UK Government considers it appropriate, in the particular policy context of the Bill, that when the power is exercised by the Secretary of State in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers; and**
9. **whether the UK Government intends to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to devolved matters, or to require UK Ministers when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers.**

Clause 191 – Power of Secretary of State to make consequential provision

Power conferred on: Secretary of State

Power exercisable by: Regulations

Parliamentary procedure: Negative, but affirmative if amending primary legislation

The Delegated Powers Memorandum states that this power may only be exercised in connection with a provision of the Bill or regulations made under it as it is not possible to establish in advance all consequential provision that may be required. The Committee notes that the UK Government consider a power is needed to avoid any legal uncertainty or legal lacunas after the Act comes into force. This clause could be exercised within the devolved competence of the Scottish Parliament if the power is exercised to amend, repeal or revoke an Act of the Scottish Parliament or any provision made under an Act of the Scottish Parliament.

While this provision is not addressed in the Legislative Consent Memorandum and legislative consent is not sought, the Committee nevertheless considers that the Scottish Parliament may expect to have a role in scrutinising any such regulations, should the power be exercised to make provision within devolved competence,

Finally, the Committee would also be grateful for an explanation as to:

10. **why the UK Government considers it appropriate, in the particular policy context of the Bill, that the power has been conferred so that it is**

exercisable independently by the Secretary of State in relation to devolved matters;

11. why the UK Government considers it appropriate, in the particular policy context of the Bill, that when the power is exercised by the Secretary of State in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers; and

12. whether the UK Government intends to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to devolved matters, or to require UK Ministers when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers.

I would be grateful if you were able to provide a response to these questions by **Monday 17 October 2022**. This will allow the Committee to report its findings on the LCM prior to any final consideration by the Scottish Parliament.

I look forward to hearing from you.

I am copying this letter to the Rt Hon Alister Jack MP, Secretary of State for Scotland; John Swinney MSP, Deputy First Minister and Cabinet Secretary for Covid Recovery; as well as the Conveners of the Net Zero, Energy and Transport Committee, the Local Government, Housing and Planning Committee as well as the Constitution, Europe, External Affairs and Culture Committee.

Yours sincerely

Bill Kidd MSP
Deputy Convener of the Delegated Powers and Law Reform Committee