

An Leas-phrìomh Mhinistear agus Ath-shlànachadh
Cobhid
Deputy First Minister and Cabinet Secretary for Covid
Recovery
John Swinney MSP



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08 November 2022

Dear Convener,

Re: UK Levelling-up and Regeneration Bill

I am writing in response to your letter of 11 October regarding the Legislative Consent Memorandum lodged by the Scottish Government on the UK Government's Levelling-up and Regeneration Bill (the Bill). Specifically, you ask for further clarity on the Scottish Government's interpretation of provisions contained in part 5 of the Bill relating to Environmental Outcomes Reports (EOR).

How the Scottish Government envisages the outcome-based system outlined in the Bill might impact on the devolved settlement

As currently drafted, Part 5 of the Bill could significantly impact the devolved settlement, effectively giving UK Ministers powers to override existing and well-established processes that are designed to protect our environment in Scotland.

My colleague, the Cabinet Secretary for Finance and Economy, wrote to the then UK Parliamentary Under Secretary of State for Levelling Up, the Union and Constitution, Mr Neil O'Brien MP in June 2022, in which she expressed her frustration that yet again we received little advance sight of the draft clauses of the Bill before its introduction. Such actions show continued disregard for devolution, undermining the role of Scottish Ministers, and in our view do not make for good law.

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The Cabinet Secretary further emphasised that clause 116 of the Bill would give the Secretary of State powers to set environmental outcomes for the whole of the UK in regulations. This is unacceptable and would cut across Scottish legislation and the powers of the Scottish Ministers.

Linked to this is a regulation making power that would allow provisions to be introduced requiring EORs to be prepared in relation to a proposed relevant consent or a proposed relevant plan, establishing a new approach to environmental assessment in planning and other consenting systems across the UK. Clause 121 of the Bill contains a very limited obligation on the Secretary of State to ‘consult’ devolved administrations before exercising the power to make EOR regulations which contain provisions within Scottish devolved competence. Therefore, as currently drafted, the consent of the Scottish Ministers would not be required for regulations that encroach on devolved competence and functions.

The UK Government has continued to provide very little clarity on the intended operation of Part 5. The scope and deployment of “environmental outcomes” that may be specified under Part 5 is unclear as the term remains undefined. It is also unclear to what extent UK Ministers might seek to include provisions in possible EOR regulations that would encroach upon Scottish devolved competence.

On 14 October 2022, the Cabinet Secretary for Net Zero, Energy and Transport wrote to the Secretary of State for Levelling Up, Housing and Communities reiterating our concerns regarding potential impacts on the devolved settlement, including:

- The Bill provisions, as introduced, include an apparent intention to encroach on devolved competence by legislating in areas of devolved and executive devolved competence without seeking the consent of Scottish Ministers.
- Officials were informed these provisions were intended as a ‘placeholder’, and that it was the UK Government’s intention to replace these provisional clauses with drafting to properly reflect devolved competence and to clarify the extent of application to devolved administrations. This was also made clear by Paul Scully, Minister of State, Department for Levelling Up, Housing and Communities in Committee on 8th September. Mr Scully stated that the intention of the current provisions was to cover the “*limited circumstances in which the UK Government have historically legislated in areas of devolved competence*”.
- The draft clauses continue to give unlimited scope to UK Ministers to regulate in areas of devolved and executive devolved competence for Scotland, with only a requirement for consultation with the Scottish Ministers. This does not match Mr Scully’s comments above.

The Scottish Government agrees that reform is required to streamline existing consenting processes, particularly to support the delivery of our ambitious agenda for offshore wind which is critical to delivering the UK’s 50GW target for offshore wind by 2030.¹ However, we have significant concerns that the draft clauses within the Bill, if implemented, would be counterproductive and slow down current processes.

¹ For the avoidance of doubt, ‘offshore wind’ includes renewable wind energy projects in both the inshore region (0-12nm) and the offshore region (beyond 12nm).

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We are proactively engaging with the UK Government on these issues. At a minimum, we are emphasising that any regulation making provision for UK Ministers that extends to areas of devolved or executively devolved competence in Scotland should require the consent of the Scottish Ministers.

Whether the Bill as drafted could affect responsibility for planning decisions on cross-border projects, for example on decision-making on compensation and mitigation for offshore wind or developments on river catchments that straddle England and Scotland

As mentioned above, the very limited clarity provided to date by the UK Government on the intended operation of Part 5 makes it difficult to fully assess how it would impact current licensing and consenting processes, including for cross-border projects.

Currently, cross-border projects are likely to represent a small minority of projects, with administrative arrangements and collaboration (practised over many decades) effectively addressing any issues that may arise. There is a risk the Bill will disrupt this well-established regime, slowing down planning and consenting.

Furthermore, it is unclear how UK Ministers might choose to exercise the broad powers allocated to them in the current draft clauses to set environmental outcomes and make EOR regulations within areas of devolved competence. This creates uncertainty, and provides scope for the UK Government to make potential changes to responsibility for planning and consenting decisions on cross-border projects without the consent of Scottish Ministers.

The more significant concern for the Scottish Government is how the Bill might impact offshore wind (and other renewable energy projects) entirely within Scottish waters.

A unique regulatory regime for EIA applies in Scottish waters, whereby Scotland has fully devolved powers in relation to marine licensing EIAs in the inshore zone (0-12nm), executively devolved powers in relation to marine licensing EIAs in the offshore zone (beyond 12nm) and separately, functions for EIA in respect of electricity generating stations consented under s.36 of the Electricity Act 1989 in the inshore and offshore zone (within 0-12nm and beyond 12nm). This lack of full devolution unfortunately deprives the Scottish Ministers of the full powers to develop an end-to-end regulatory regime responsive to Scottish needs. However, our well understood EIA regimes currently function well and there is little appetite from stakeholders to reinvent this process in a way which might further complicate our consenting regimes.

The existence of only executively devolved powers in relation to consents required under the Electricity Act 1989 (in the Scottish inshore and offshore zone, namely within 0-12nm and beyond 12nm) and for marine licensing beyond 12nm raises the prospect of a new environmental assessment regime being imposed by the UK Government as a result of this legislation. If implemented, this would give rise to a divergence between regimes operating in the onshore, inshore and offshore domains within Scotland.

This could lead to an over-complicated set of multiple regulatory regimes each with their own procedures that would be burdensome for business and counterproductive to increasing the efficiency and effectiveness of the system.

It is our view that full devolution of relevant powers to the Scottish Ministers is the most efficient and effective means to overcome this risk. This specifically comprises full legislative devolution

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of the Electricity Act 1989 regime (onshore and from 0-200nm) and the marine licensing regime for the Scottish offshore region (beyond 12nm).

UK Energy Bill

For completeness, it is important to acknowledge that proposed amendments to the EIA regime in the Bill are only one component of reforms being progressed by the UK Government that impact on licensing and consenting for marine renewables such as offshore wind.

In the UK Energy Bill, the UK Government is proposing reforms to current habitats regulations assessment (HRA) processes. EIA and HRA are two interlocking parts of the same overall consenting regime. Therefore, it is vital that these reforms are coordinated and provide a coherent process that reduces complexity.

On 10 October 2022, the Cabinet Secretary for Net Zero, Energy and Transport wrote to the Secretary of State for Business, Energy and Industrial Strategy regarding the proposed amendments to HRA processes. In this letter, the Cabinet Secretary highlighted significant concerns; in particular, the risk that the proposed Energy Bill will create a two-tier consenting system, and open the possibility of the UK Government taking compensatory measures in Scottish territorial waters, cutting across the devolved competency of environmental protection and marine licensing.

It is absolutely critical that proposed reforms to EIA and HRA are considered together in order to improve current consenting and licensing processes. Our requests on the UK Energy Bill and Part 5 of the Bill complement each other – together, they would give Scottish Ministers a comprehensive set of powers to deliver a streamlined planning system that supports delivery of both Scotland's and the UK Government's renewable energy and net zero ambitions.

This letter is copied to Michael Matheson MSP, Cabinet Secretary for Net Zero, Energy and Transport and Ariane Burgess MSP, Convener of the Local Government, Housing and Planning Committee.

JOHN SWINNEY

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