

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



Scottish Government
Riaghaltas na h-Alba
gov.scot

T: 0300 244 4000
E: DFMCSCR@gov.scot

Edward Mountain MSP
Convener, Net Zero, Energy and Transport
Committee
The Scottish Parliament
Edinburgh
EH99 1SP
Netzero.committee@parliament.scot

09 February 2023

Dear Edward,

I welcome the publication of the Net Zero, Energy and Transport Committee's (the Committee) report on the Legislative Consent Memorandum (LCM) for the Levelling-up and Regeneration Bill (the LURB), and note that the report includes two recommendations requesting further information from the Scottish Government as set out below:

- The Committee seeks detail on consideration given by the Scottish Government to improvements to the current process of environmental assessment in Scotland (paragraph 69).
- The Committee recommends the Scottish Government provide more detail of ongoing discussions between the Scottish and UK Governments on the use of delegated powers by the latter in areas of devolved competence (paragraph 72).

The purpose of this letter is to provide the further information that has been requested by the Committee, together with an update on the progress of the Scottish Government's engagement with the UK Government in relation to Part 6 (Environmental Outcomes Reports) of the LURB.

Update on engagement

When I first wrote to you on 8 November 2022, I emphasised my concerns that Part 6 of the LURB as introduced could significantly impact the devolution settlement, effectively giving UK Ministers powers to override existing and well-established processes that are designed to protect our environment in Scotland.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot



INVESTORS
IN PEOPLE

Accredited
Until 2020



Furthermore, I noted that the UK Government has continued to provide very little clarity on the intended operation of Part 6, particularly in relation to the scope and deployment of “environmental outcomes”. I also advised that although the current clauses within the LURB are described as ‘placeholder clauses’, these provisions nevertheless afford 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. The drafting implications of the ‘placeholder clauses’ remain unchanged since the date of my last letter.

I regret to inform you that, despite our efforts to proactively engage with the UK Government on Part 6, these concerns remain.

On 13 December 2022, I wrote to the Minister for Levelling Up emphasising our concerns with Part 6 as introduced, and noting that I would welcome an opportunity to discuss them. Separately, the Cabinet Secretary for Net Zero, Energy and Transport wrote to the Secretary of State for Levelling Up, Housing and Communities on 14 October 2022 and 21 December 2022 raising concerns that the UK Government has not fully engaged with the Scottish Government on the policy positions we have shared in relation to Part 6 to date. The Cabinet Secretary also noted the importance of ensuring there is adequate time to resolve our differences relating to Part 6 before the LURB progresses further in the House of Lords.

I received a response from the Minister for Levelling Up on 5 January 2023. This letter noted that discussions were continuing between officials. I responded to this letter on 24 January 2023, noting that engagement between officials is not occurring at the pace necessary to achieve meaningful outcomes. In particular, Scottish Government officials are still waiting for formal responses to the policy positions that have been put forward to the UK Government to date, and have not yet been given an opportunity to review updated clauses. This is despite the original clauses being introduced in the House of Lords in May 2022.

We continue to urge the UK Government to ensure there is timely and substantive engagement that allows for the concerns we have repeatedly raised regarding the drafting and operationality of the provisions within Part 6 to be meaningfully addressed before the LURB progresses further in the House of Lords. In particular, I have urged the UK Government to make updated draft clauses available for our consideration as soon as possible so that meaningful consideration and discussion can proceed.

Improvements to current processes for environmental assessment (paragraph 69)

The Scottish Government is responsible for environmental assessment across a broad range of consenting regimes, including but not limited to marine works, electricity works, town and country planning, forestry, agriculture and transport. Environmental assessments processes across these regimes are well-established and understood.

We are committed to ensuring qualifying plans, programmes and projects are fully and efficiently assessed across these regimes in order to better understand their likely environmental impacts and, where possible, help to avoid or reduce adverse effects. Good practice in environmental assessment is the responsibility of all parties concerned, including developers, plan-making and consenting authorities, as well as statutory consultees, and the current system provides a well-established and understood set of processes which is both systematic and transparent.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew’s House, Regent Road, Edinburgh EH1 3DG
www.gov.scot



INVESTORS
IN PEOPLE

Accredited
Until 2020



The Scottish Government is taking steps to promote improved practice in environmental assessment, including through an Environmental Impact Assessment annual conference in collaboration with key delivery partners, bringing together practitioners from industry, professional bodies, consultation authorities and decision makers. More widely, we are also working with the High Level Group on Planning Performance to drive forward a programme to enhance resources and skills across the planning system.

We are also continuing to engage with the UK Government where necessary to ensure we can secure improvements to current environmental assessment processes. As an illustrative example, we are seeking regulation making powers from the UK Government in relation to secondary legislation that currently applies to offshore wind projects. As a consequence of the UK's withdrawal from the EU and the subsequent repeal of the European Communities Act 1972, the enabling powers previously held by the Scottish Ministers to amend secondary legislation relevant to offshore wind projects, including the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations ('the 2017 Regulations'), no longer exist. In the absence of the UK Government providing regulation making powers or reinstating equivalent enabling powers to amend existing secondary legislation, the Scottish Ministers will be unable to make changes to the existing environmental assessment process relating to electricity works established under the 2017 Regulations.

As the Committee noted in paragraph 42 of its report, stakeholders have also raised concerns about the potential impact of embedding environmental outcomes reports into an already extensive network of consenting frameworks in Scotland, and concerns remain that there is little information available regarding the planned changes and how this may impact on well-established and understood processes that are designed to protect our environment.

The use of delegated powers in areas of devolved competence (paragraph 72)

Each UK bill that proposes powers for UK Ministers for the purposes of legislating in devolved areas is considered on a case-by-case basis. The Scottish Government regularly seeks amendments to such powers; for example, amendments to include a requirement to seek the consent of Scottish Ministers before legislating in devolved areas.

In relation to Part 6 of the LURB, Scottish Government officials are continuing to emphasise our significant concerns that Part 6, as introduced, includes 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. As set out in my letter dated 8 November 2022, at a minimum, we are emphasising that any regulation making provision for UK Ministers that extends to areas of devolved or executive devolved competence in Scotland should require the consent of the Scottish Ministers. Furthermore, as set out in the engagement update above, we are continuing to urge the UK Government to ensure there is timely and substantive engagement that allows our concerns to be meaningfully addressed.

Another illustrative example is engagement between the Scottish Government and the UK Government on the UK Energy Bill. The Energy Bill was introduced in the House of Lords on 6 July 2022 and is intended to deliver on UK Government commitments in its Energy Security Strategy and Ten Point Plan for a Green Industrial Revolution.

The Scottish Government lodged a Legislative Consent Memorandum (LCM) with the Scottish Parliament on 28 September 2022 in relation to clauses of the Energy Bill introduced on 6 July 2022. A supplementary LCM was lodged with the Scottish Parliament on 25 January 2023,

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

which relates primarily to the UK Government's proposed reforms to current processes for habitats regulations assessment (HRA) for offshore wind projects. These reforms are being progressed as part of the Offshore Wind Environmental Improvement Package (commonly known as OWEIP). Both LCMs are available here: [Energy Bill | Scottish Parliament Website](#)

The scope of the Energy Bill is significant, and the Scottish Government's approach to engagement on clauses which propose granting powers to the Secretary of State has been developed on a case-by-case basis.

For example, the UK Government's proposed amendments to HRA of offshore wind projects would give the Secretary of State powers to establish one or more marine recovery funds in Scottish waters (section 242). As set out in paragraph 19 of the supplementary LCM, this clause applies in Scotland for a purpose within the legislative competence of the Scottish Parliament, as it applies to the devolved purpose of marine licensing and marine planning in the Scottish inshore region (as well as onshore deemed planning). In response, and as set out in paragraph 35 of the supplementary LCM, we have requested amendments that would require, at a minimum, the consent of Scottish Ministers to both the operation of a marine recovery fund in Scottish waters and any delegation of functions by the Secretary of State.

I hope this additional information is helpful to the Committee's consideration of Part 6 of the LURB, and I look forward to the outcomes of the Committee's further deliberation.

I have copied this letter to the First Minister, the Cabinet Secretary for Net Zero, Energy and Transport, the Minister for Environment and Land Reform, and the Minister for Green Skills, Circular Economy and Biodiversity.

JOHN SWINNEY

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot



INVESTORS
IN PEOPLE

Accredited
Until 2020

