

Net Zero, Energy and Transport Committee
Tuesday 12 November 2024
33rd Meeting, 2024 (Session 6)

Note by the Clerk on the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 (draft)

Overview

1. At this meeting, the Committee will take evidence from the Deputy First Minister and Cabinet Secretary for Economy and Gaelic and officials on the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 (draft) before debating a motion in the name of the Deputy First Minister inviting the Committee to recommend approval of the instrument.
2. This is a draft Statutory Instrument (SI), which requires approval by resolution of the Parliament before it can become law. More information about the instrument is summarised below:

Title of instrument: Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 (draft) (see annexe)

Laid under: sections 30(3), 63(1)(b) and (3), and 113(4) and (5) of the [Scotland Act 1998](#)

Laid on: 28 October 2024

Procedure: Affirmative

Lead committee to report by: 6 December 2024

Commencement: See article 1

Procedure

3. Under the affirmative procedure, an instrument must be laid in draft and cannot be made (or come into force) unless it is approved by resolution of the Parliament. In this case, the instrument also requires approval by resolution of both Houses of the UK Parliament.
4. Once laid, the instrument is referred to:
 - the Delegated Powers and Law Reform (DPLR) Committee, for scrutiny on various technical grounds, and
 - a lead committee, whose remit includes the subject-matter of the instrument, for scrutiny on policy grounds.

5. The lead committee, taking account of any recommendations made by the DPLR Committee (or any other committee), must report within 40 days of the instrument being laid.
6. In line with standard practice for affirmative instrument, there will be two agenda items for this item:
 - an evidence session with the relevant Minister and officials, followed by
 - a formal debate on a motion, lodged by the Minister, inviting the lead committee to recommend approval of the instrument.
7. Only MSPs may participate in the debate, which may not last for more than 90 minutes. If there is a division on the motion, only committee members may vote. If the motion is agreed to, it is for the Chamber to later decide whether to approve the instrument.

Delegated Powers and Law Reform Committee consideration

8. The DPLR Committee considered the instrument on 5 November and reported on it in its [64th Report, 2024](#). It made no recommendations about the instrument.

Purpose of the instrument

9. This Order transfers to the Scottish Ministers' the power to make Environmental Outcome Report (EOR) regulations. EORs are the environmental assessments that are carried out in connection with applications for:
 - a. consent, approval or variation of consent under the [Electricity Act 1989](#) for the construction, extension or operation of generating stations whether in Scotland or in the Scottish Renewable Energy Zone area;
 - b. consent under section 37 of the 1989 Act for the installation, or the keeping installed, of overhead electric lines above ground.
10. The policy note explains that the UK has operated a system of environmental impact assessment ("EIA") in reliance on the power conferred by section 2(2) the [European Communities Act 1972](#). The function of making EIA regulations under the 1972 Act, in relation to electricity act consents, was executively devolved to the Scottish Ministers by virtue of the [Scotland Act 1998 \(Transfer of Functions to the Scottish Ministers etc.\) Order 1999](#), the [Scotland Act 1998 \(Transfer of Functions to the Scottish Ministers etc.\) \(No. 2\) Order 2006](#) and confirmed through the [Scotland Act 1998 \(Transfer of Functions to the Scottish Ministers etc.\) Order 2019](#). In Scotland, the relevant EIA regulations are the [Electricity Works \(Environmental Impact Assessment\) \(Scotland\) Regulations 2017](#).
11. The policy note states that as a consequence of the repeal of the 1972 Act, the power to make EIA regulations under section 2(2) of that Act was lost. This has resulted in the Scottish Ministers no longer having an operative

enabling power to amend environmental assessment processes and provisions within the 2017 Regulations, nor do the Scottish Ministers have powers to make new regulations.

12. The policy note further explains that the UK Government took powers in the [Levelling-up and Regeneration Act 2023](#) to introduce a new system of Environmental Outcome Report (“EOR”) regulations, to replace Environmental Impact Assessments (“EIAs”) and Strategic Environmental Assessments (“SEA”). This instrument is transferring these powers to the Scottish Ministers.
13. The Policy Note accompanying the instrument is included in the annexe. It includes a summary of consultation undertaken on the instrument, impact assessments carried out, and the anticipated financial effects.

Report

14. The Convener will invite the Committee to delegate to him authority for considering and approving a draft report prepared by the clerks after the meeting. In relation to any report finalised in this way, Committee Members may ask to see the draft and comment on it before the Convener authorises it for publication.

Clerks to the Committee
November 2024

Draft Order laid before Parliament under paragraphs 1 and 2 of Schedule 7 to the Scotland Act 1998, for approval by resolution of each House of Parliament and of the Scottish Parliament.

DRAFT STATUTORY INSTRUMENTS

2025 No.

CONSTITUTIONAL LAW
DEVOLUTION, SCOTLAND
ENVIRONMENTAL PROTECTION
ELECTRICITY

The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025

Made - - - - - ***

Coming into force in accordance with article 1(1)

At the Court at Buckingham Palace, the *** day of ***

Present,

The King's Most Excellent Majesty in Council

This Order is made by His Majesty in Council in exercise of the powers conferred upon Him by sections 30(3), 63(1)(b) and (3), and 113(4) and (5) of the Scotland Act 1998(a).

In accordance with paragraphs 1 and 2 of Schedule 7 to that Act, a draft of this Order has been—

- (a) laid before and approved by a resolution of each House of Parliament; and
- (b) laid before and approved by a resolution of the Scottish Parliament.

Accordingly, His Majesty, by and with the advice of His Privy Council, makes the following Order:

Citation, commencement, extent and interpretation

1.—(1) This Order may be cited as the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2025 and comes into force on the day after the day on which it is made.

(a) 1998 c. 46.

(2) This Order extends to England and Wales, Scotland and Northern Ireland.

(3) In this Order—

“the 1989 Act” means the Electricity Act 1989(a);

“the 2023 Act” means the Levelling-up and Regeneration Act 2023(b);

“the Scottish REZ area” means the area designated by the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005(c) as the area in relation to which the Scottish Ministers are to have functions.

Functions to be treated as being exercisable in or as regards Scotland

2.—(1) The functions to which paragraph (2) applies are, for the purposes of section 63 of the Scotland Act 1998 (power to transfer functions)(d), to be treated as being functions which are exercisable in or as regards Scotland.

(2) This paragraph applies to the functions of making regulations that are conferred on the Secretary of State by Part 6 of the 2023 Act (environmental outcomes reports), so far as they are exercisable by the Secretary of State in relation to the assessment of the effects on the environment in connection with—

- (a) applications for consent under section 36 of the 1989 Act(e) for the construction, extension or operation of a generating station in the Scottish REZ area (including any application for approval, consent or agreement required by virtue of a condition included in the grant of such a consent), or
- (b) applications for the variation, under section 36C of the 1989 Act(f), of a consent described in sub-paragraph (a).

(3) But paragraph (2) does not apply to the making of provision within section 159(2) of the 2023 Act (power to provide exemptions for national defence and civil emergency etc).

Functions to be exercisable concurrently by the Secretary of State and the Scottish Ministers

3.—(1) Subject to paragraph (2), the functions mentioned in paragraph (3) are, so far as they are exercisable by the Secretary of State in or as regards Scotland, to be exercisable by the Scottish Ministers concurrently with the Secretary of State.

(2) The Scottish Ministers may exercise a function by virtue of this article only after consulting the Secretary of State.

(3) The functions are—

- (a) the functions of making regulations that are conferred by—
 - (i) Chapter 1 of Part 3 of the 2023 Act (planning data); and
 - (ii) Part 6 of the 2023 Act, except so far as relating to the making of provision within section 159(2) of that Act;
- (b) the function conferred by section 84(3) of the 2023 Act (publication of approved data standards),

(a) 1989 c. 29.

(b) 2023 c. 55.

(c) S.I. 2005/3153.

(d) 1998 c. 46.

(e) Section 36 was amended by the Energy Act 2004 (c. 20) section 93(1) and (3), the Planning Act 2008 (c. 29) section 36 and Schedule 2, paragraphs 31 and 32, the Marine and Coastal Access Act 2009 (c. 23) section 12(7)(a) and (8), the Energy Act 2016 (c. 20) section 78, the Wales Act 2017 (c. 4) section 39 and Schedule 6, paragraph 47, and S.I. 2006/1054. The functions conferred by section 36 of the Electricity Act 1989 are exercisable in or as regards Scotland by the Scottish Ministers by virtue of S.I. 2006/1040.

(f) Section 36C was inserted by the Growth and Infrastructure Act 2013 (c. 27) section 20(1) and (2) and was amended by the Wales Act 2017 (c. 4) sections 39(12), 69(1) and Schedule 6, paragraph 48.

so far as the functions are exercisable by the Secretary of State in relation to the assessment of the effects on the environment in connection with applications to which paragraph (4) applies.

(4) This paragraph applies to—

- (a) applications for consent under section 36 of the 1989 Act for the construction, extension or operation of generating stations (whether in Scotland or in the Scottish REZ area) (including any application for approval, consent or agreement required by virtue of a condition included in the grant of such a consent);
- (b) applications for the variation, under section 36C of the 1989 Act, of a consent described in sub-paragraph (a);
- (c) applications for consent under section 37 of the 1989 Act (consent required for overhead lines)(a) for the installation, or the keeping installed, of an electric line in Scotland (including any application for approval, consent or agreement required by virtue of a condition included in the grant of such a consent).

(5) Paragraph 1 of Schedule 13 to the 2023 Act (restriction on making provision outside devolved competence) does not apply in relation to regulations made by the Scottish Ministers by virtue of this article under—

- (a) Chapter 1 of Part 3 of the 2023 Act; or
- (b) Part 6 of that Act.

Modifications of the 2023 Act

4.—(1) For the purposes of any function that is exercisable by the Scottish Ministers by virtue of article 3 of this Order—

- (a) any reference to an appropriate authority in Chapter 1 of Part 3 or Part 6 of the 2023 Act is to be read as if it were a reference to the Scottish Ministers;
- (b) any reference in Chapter 1 of Part 3 or Part 6 of, or Schedule 24 to, the 2023 Act to regulations made by the Scottish Ministers acting alone (including in their capacity as a devolved authority) is to be read as if it included a reference to regulations made by the Scottish Ministers by virtue of article 3;
- (c) section 166(2)(c) of the 2023 Act (EOR regulations: further provision) has effect as if for “any legislation” there were substituted “any provision made by or under an Act of the Scottish Parliament”.

(2) For the purposes of any function carried out by a public authority (within the meaning of section 167 of the 2023 Act (interpretation of Part 6)) under or by virtue of Part 6 of the 2023 Act, references in section 163(1) and (5) of the 2023 Act (guidance) to regulations made by a devolved authority acting alone are to be read as if they included references to regulations made by the Scottish Ministers by virtue of article 3.

Name
Clerk of the Privy Council

(a) Section 37 was amended by the Planning Act 2008 (c. 29) section 36 and Schedule 2, paragraphs 31 and 33, and the Wales Act 2017 (c. 4) section 42. The functions conferred by section 37 of the Electricity Act 1989 are exercisable in or as regards Scotland by the Scottish Ministers by virtue of S.I. 1999/1750.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order provides for certain functions of the Secretary of State conferred by the Levelling-up and Regeneration Act 2023 (c. 55) (“the 2023 Act”), so far as exercisable by the Secretary of State in or as regards Scotland, to be exercisable concurrently with the Scottish Ministers.

These are the Secretary of State’s functions of making regulations under Chapter 1 of Part 3 (planning data) or Part 6 (environmental outcomes reports) of the 2023 Act and the function conferred by section 84(3) (publication of approved data standards) of that Act, which are exercisable by Scottish Ministers only in relation to the assessment of the effects on the environment in connection with applications to the Scottish Ministers for consent under sections 36 or 37, or for variation of consent under section 36C, of the Electricity Act 1989 (c. 29) (“the 1989 Act”).

Article 2 specifies that certain functions of the Secretary of State are to be treated as exercisable in or as regards Scotland so that they are then capable of being transferred under section 63 of the Scotland Act 1998. These are the Secretary of State’s functions of making regulations under Part 6 of the 2023 Act (other than under section 159 (exemptions for national defence and civil emergency)) in respect of the assessment of the effects of certain public and private projects on the environment, as regards the construction, extension or operation of generating stations for which consent or variation of consent is applied for under section 36 and 36C of the 1989 Act in respect of the Scottish Renewable Energy Zone (“REZ”) area. Applications for consent include applications for any approval, consent or agreement required by virtue of a condition included in the grant of consent under section 36 of the 1989 Act. The “Scottish REZ area” was designated by the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005 (S.I. 2005/3153).

Article 3 provides that certain functions under Chapter 1 of Part 3 and Part 6 (other than under section 159 (exemptions for national defence and civil emergency)) of the 2023 Act are to be exercisable by the Scottish Ministers concurrently with the Secretary of State. These functions are: the assessment of the effects of certain projects on the environment as regards applications for consent under section 36 of the 1989 Act for construction, extension or operation of generating stations whether in Scotland or the Scottish REZ area; the variation of such a consent under section 36C of that Act; and applications for consent under section 37 of that Act for installing, or keeping installed, overhead lines in Scotland. For the purposes of article 3(3), applications for consent include applications for any approval, consent or agreement required by virtue of a condition included in the grant of consent under sections 36 or 37 of the 1989 Act.

Article 3(2) provides that Scottish Ministers may exercise a function by virtue of that article only after consulting the Secretary of State. Article 3(5) provides that restrictions in paragraph 1 of Schedule 13 to the 2023 Act, in respect of regulations made under Chapter 1 of Part 3 and Part 6 of that Act on Scottish Ministers acting alone, do not prevent the Scottish Ministers exercising functions by virtue of that article.

Article 4 modifies the 2023 Act in consequence of this Order so that relevant provisions of the 2023 Act, which would otherwise apply to Scottish Ministers when acting as a devolved authority under that Act, similarly apply to the exercise of functions by the Scottish Ministers by virtue of article 3.

An impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.

POLICY NOTE

**THE SCOTLAND ACT 1998 (TRANSFER OF FUNCTIONS TO THE SCOTTISH
MINISTERS ETC.) ORDER 2025**

2025 No. [XXXX]

This Order is made by His Majesty in Council in exercise of the powers conferred upon Him by sections 30(3), 63(1)(b) and (3), 113(4) and (5) of the Scotland Act 1998(a).

This instrument is, by virtue of Schedule 7 to the Scotland Act, subject to Type A procedure and is subject to the affirmative resolution procedure in both Houses of the UK Parliament and in the Scottish Parliament.

This Order transfers to the Scottish Ministers' regulation making functions for environmental assessment in connection with applications for consent, approval or variation of consent under section 36 and 36C of the Electricity Act 1989 ("1989 Act") for the construction, extension or operation of generating stations whether in Scotland or in the Scottish Renewable Energy Zone ("REZ"¹) area (including any application for approval, consent or agreement required by virtue of a condition included in the grant of such a consent); as well as applications for consent under section 37 of the 1989 Act for the installation, or the keeping installed, of overhead electric lines above ground (including any application for approval, consent or agreement required by virtue of a condition included in the grant of such a consent).

Policy Objectives

The UK operated a system of environmental impact assessment ("EIA") in reliance on the power conferred by section 2(2) the European Communities Act 1972 ("the 1972 Act"). The function of making EIA regulations under the 1972 Act, in relation to electricity act consents, was executively devolved to the Scottish Ministers by virtue of the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (SI 1999/1750), the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2006 (SI 2006/1040) and confirmed through the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 (SI 2019/964). In Scotland, the relevant EIA regulations are the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SI 2017/101).

As a consequence of the repeal of the 1972 Act, the power to make EIA regulations under section 2(2) of that Act was lost. This has resulted in the Scottish Ministers no longer having an operative enabling power to amend environmental assessment processes and provisions within the 2017 Regulations, nor do the Scottish Ministers have powers to make new regulations.

¹ The Scottish part of the REZ is designated by the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005 (SI 2005/3153).

The UK Government took powers in the Levelling-up and Regeneration Act 2023 (“the 2023 Act”) to introduce a new system of Environmental Outcome Report (“EOR”) regulations, to replace Environmental Impact Assessments (“EIAs”) and Strategic Environmental Assessments (“SEA”). EORs are intended to set the scope of assessments in a targeted way, to focus predominantly on those outcomes that are relevant to a given project, plan or programme.

This Order transfers EOR regulation making functions under Chapter 1 of Part 3 (planning data) and Part 6 (environmental outcome reports) of the 2023 Act (and related ancillary functions), in relation to the assessment of the effects on the environment in connection with applications for consent, approval or variation of consent to construct, operate or extend electricity generating stations (under sections 36 and 36C of the 1989 Act) in Scotland and the Scottish part of the REZ and applications to install and keep installed overhead electric lines (under section 37 of the 1989 Act) in Scotland, to the Scottish Ministers, to replace the lost function of making EIA-regulations in the same respect. These functions will be exercisable concurrently with the Secretary of State. Scottish Ministers will require to consult with the Secretary of State before exercising any functions by virtue of this Order.

This regulation making power sits within the broad legal framework of our consenting regime for offshore and onshore electricity generating stations, and for installation of electric lines above ground, and will contribute to the Scottish Government’s capacity to effectively assess and regulate the construction and installation of electricity infrastructure.

Consultation

For the purpose of this instrument, neither a public consultation is required nor do specific organisations or stakeholder groups need to be consulted.

Impact Assessments

The UK Government has considered impact assessments as required. A full Impact Assessment has not been prepared for this instrument because the Order relates to maintenance of existing regulatory standards.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

Orders under the Scotland Act are subordinate legislation made under UK primary legislation, and are UK SIs rather than Scottish SIs. Therefore a statement of compatibility with the UNCRC and a Children’s Rights and Wellbeing Impact Assessment is not required.

Financial Effects

This instrument is not considered to have any, or any significant, financial effects on the Scottish Government, local government or on business.

NZET/S6/24/33/1

**Scottish Government
Offshore Wind Directorate**

24 October 2024