



The Scottish Parliament
Pàrlamaid na h-Alba

Published 10 June 2020
SP Paper 756
34th Report, 2020 (Session 5)

Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Legislative Consent Memorandum: Environment Bill



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
<http://www.parliament.scot/abouttheparliament/91279.aspx>

For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
Overview of Bill	2
Delegated Powers	3
Annex A	8
Annex B	10

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
Bill Bowman
Scottish Conservative
and Unionist Party



Deputy Convener
Stuart McMillan
Scottish National Party



Mary Fee
Scottish Labour



Gordon Lindhurst
Scottish Conservative
and Unionist Party



Gil Paterson
Scottish National Party

Introduction

1. At its meetings on 2 June 2020 and 9 June 2020, the Committee considered the provisions in the UK Government's Environment Bill ("the Bill") that confer power on the Scottish Ministers to make subordinate legislation.
2. The Bill was introduced in the House of Commons by the UK Government on 30 January 2020. It replaces an earlier bill of the same name which was introduced in October 2019. The earlier bill fell when the UK Parliament was dissolved for the December 2019 general election.
3. The Bill relates to environmental regulation after the UK's withdrawal from the EU. As EU law continues to apply, in general, until the end of the implementation period (31 December 2020), the expectation is that this Bill would take effect at the end of the implementation period. Environmental matters are largely devolved, and much of the Bill does not apply in Scotland.
4. The Scottish Government lodged a Legislative Consent Memorandum ("LCM") on 27 May 2020. The LCM states that the Scottish Government intends to lodge a legislative consent motion for all the relevant provisions in the Bill. The lead committee is the Environment, Climate Change and Land Reform Committee.
5. Paragraph 6 of Rule 9B.3 of the Standing Orders provides that where a Bill that is the subject of a legislative consent memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions. The delegated powers provisions in the Bill are therefore considered below.

Overview of Bill

6. The Explanatory Notes describe the Bill as being in two thematic halves: the first being a legal framework for environmental governance after EU exit; the second making provision “for specific improvement of the environment”.
7. The outline of the Bill is as follows. The parts of the Bill which confer regulation-making powers on Scottish Ministers and are therefore of most interest to the Committee are in bold.

Part 1: Environmental governance

- Provision relating to environment targets, improvement plans, monitoring, policy statement on environment principles, an establishing the Office for Environmental Protection.

Part 2: Environmental governance, Northern Ireland

Part 3: **Waste and resource efficiency**

- Provision relating to **producer responsibility**, **resource efficiency**, managing waste, including **electronic waste tracking** and waste enforcement.

Part 4: Air quality and recall of motor vehicles etc.

Part 5: Water

- Provision relating to management plans, regulation of water and sewerage undertakers, abstraction, water quality, **cross-border river basin districts** and land drainage.

Part 6: Nature and biodiversity

Part 7: Conservation covenants

Part 8: Miscellaneous and general provisions

- Provision relating to the **regulation of chemicals** and general provisions.

Delegated Powers

8. The Bill confers powers on the Scottish Ministers and/or on UK Ministers in devolved areas in the following three ways:
 1. Power delegated to the Scottish Ministers alone (clause 55)
 2. Power delegated to both the Scottish Ministers and the Secretary of State, requiring Scottish Ministers' consent for exercise by the Secretary of State
 3. Power delegated to the Secretary of State, exercisable only with Scottish Ministers' consent
9. The following powers can all be exercised by either the Scottish Ministers or (if the Scottish Ministers consent) by the Secretary of State:
 - Clause 47 and Schedule 4 part 1 - producer responsibility obligations
 - Clause 47 and Schedule 4 part 2 - producer responsibility obligations - enforcement
 - Clause 48 and Schedule 5 part 1 - Producer responsibility for disposal costs
 - Clause 48 and Schedule 5 part 2 - Producer responsibility for disposal costs - enforcement
 - Clause 49 and Schedule 6 - Resource efficiency information
 - Clause 50 and Schedule 7 - Resource efficiency requirements
 - Clause 125 and Schedule 19 paragraph 2 - Power to amend the REACH Enforcement Regulations 2008
10. The following powers are delegated to the Secretary of State (alone), but can be exercised only if the Scottish Ministers consent:
 - Clause 81 - Water quality in cross-border river basins
 - Clause 84 - Solway Tweed river basin district
 - Clause 125 and Schedule 19 paragraph 1 - Power to amend the UK REACH Regulation
11. Where powers are conferred jointly on the Scottish Ministers and the Secretary of State, the lead committee may wish to consider how these will be exercised.
12. In the event that the powers above are exercised by the UK Ministers with the Scottish Ministers' consent, there would be no formal means by which the Scottish Parliament could scrutinise such regulations, nor be notified that they had been laid before the UK Parliament.

13. The Committee is of the view, as previously expressed in relation to other legislation arising from EU Withdrawal, that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
14. The Committee considers it appropriate, as a minimum, that all consent decisions of the Scottish Ministers in respect of powers under the Bill exercisable by UK Ministers in devolved areas are subject to the process set out in the proposed new SI Protocol covering powers exercised by UK Ministers in devolved areas arising from EU withdrawal.
15. The Committee has raised this issue with the Scottish Government previously and has received assurances from Michael Russell MSP, Cabinet Secretary for Government Business and Constitutional Relations, Fergus Ewing MSP, Cabinet Secretary for Rural Economy and Tourism and Humza Yousaf MSP, Cabinet Secretary for Justice, that it is the Scottish Government's intention that the protocol will apply to all instruments proposed to be made by UK Ministers arising from EU exit which relate to devolved matters.ⁱ

Issues Considered by the Committee that are Specific to the Environment Bill

16. At its meeting on 2 June, the Committee agreed to write to the Scottish Government with questions on some of the powers in the Bill (see Annex A). The Committee considered the response from the Scottish Government (see Annex B) at its meeting on 9 June. The issues considered, and conclusions reached, are set out below.

Part 2 Enforcement Regulations

17. The Scottish Government was asked for its view on whether in schedules 4, 5, 6 and 7 it is the intention in each case that the Part 2 enforcement regulations must be made by the person who made the relevant Part 1 regulations.
18. The response from the Cabinet Secretary explained that: "Scottish Ministers may decide, when it is agreed that the relevant Part 1 regulations should be made under Schedules 4, 5, 6 and 7 on a UK-wide basis by the Secretary of State, that similarly a UK-wide approach for the Part 2 enforcement regulations would make most sense. Alternatively, Scottish Ministers could proceed with Scotland only Part 2 enforcement regulations. Any future approach to Part 1 regulations and the corresponding Part 2 enforcement regulations under Schedules 4, 5, 6 and 7 will be individually judged in each case, and the most appropriate approach taken".

19. The Committee welcomes this clarification.

Provision within Legislative Competence

ⁱ Letter from the Cabinet Secretary for Government Business and Constitutional Relations dated 5 February; Letter from the Cabinet Secretary for Rural Economy and Tourism dated 21 May; Letter from the Cabinet Secretary for Justice dated 14 May

20. Clause 49(3)(b) of the Bill specifies that regulations under Schedule 6 made by Scottish Ministers may only contain provision that would be within the legislative competence of the Scottish Parliament. The same specification is made in clause 50 in relation to regulations under Schedule 7, and in relation to regulations made under Schedule 19. However, this is not specified in relation to regulations under Schedules 4 and 5 (on producer responsibility).
21. The Scottish Government was asked to explain why a legislative competence limitation is specified in relation to regulations under Schedules 6, 7 and 19 but not in relation to regulations under Schedules 4 and 5.
22. The response from the Scottish Government stated: "we do not believe that there is any significant reason for this difference in approach". Two potential explanations for the difference in approach are given in the Cabinet Secretary's letter: that the difference relates to a change of drafting approach between the previous Environment Bill that fell at dissolution and the current Bill; or that the limitation has been made explicit in relation to aspects of the Bill that cover a significant range of reserved and devolved matters.
23. The Committee welcomes this clarification.

Solway Tweed River Basin District

24. Clauses 81(1) and 84(1) of the Bill concern the Solway Tweed River Basin District ("RBD"). Clause 84(1) allows functions in a devolved area to be reallocated between the Scottish and UK Ministers by subordinate legislation which is subject to the negative procedure and laid in the UK Parliament alone. While the Scottish Ministers' consent is required, the Scottish Parliament's consent is not. There would therefore be no formal means for the proposals for the new division of functions to be scrutinised by the Scottish Parliament. Similarly, clause 81(1) allows the UK Secretary of State to make regulations amending specified legislation concerning groundwater in the Scottish part of the RBD.
25. The Scottish Government was asked why it is considered appropriate that these powers are conferred on the Secretary of State with Scottish Ministers' consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence.
26. The response from the Scottish Government explains that this reflects that there are existing UK regulations which put in place arrangements in relation to river basin management planning in respect of each cross-border river basin district as a whole.
27. Clause 81 enables the Secretary of State to make amendments to the existing UK regulations which apply to both the Scottish and English parts of the cross-border river basin districts. The response from the Scottish Government explains that the Scottish Ministers could not make regulations applying to the cross-border districts as a whole within devolved competence, therefore the power is exercisable by the Secretary of State with the Scottish Ministers' consent.
28. In relation to clause 84, the Scottish Government's response explains that the intention of the power is to allow for the joint functions under the existing regulations

to become functions which are exercisable by the Secretary of State alone in relation to the English part and by the Scottish Ministers alone in the Scottish part. Therefore, use of this power will likely involve making amendments which extend beyond Scotland and which change the Secretary of State's functions. That is why the power is exercisable by the Secretary of State with Scottish Ministers' consent.

29. The Committee considers this further information from the Scottish Government to be useful in relation to the issues raised. While the Committee is satisfied in principle with the explanation, it recognises that there are also policy considerations. The lead committee may therefore wish to consider this power further from a policy perspective.

30. The Committee also notes that the explanation from the Scottish Government suggests that the intended use of this power is actually far narrower than what is permitted under the Bill.

31. The Committee therefore highlights to the lead committee that this power appears to go much further than is necessary to meet the stated policy intention. The lead committee may therefore wish to consider whether this is appropriate from a policy perspective.

32. The Committee also asked the Scottish Government what the difficulty is with the current position that clause 84(1) is intended to address.

33. The response from the Scottish Government explained that post-EU Exit UK Ministers and Scottish Ministers may make different decisions on whether to keep pace with any new EU standards or to diverge from existing EU standards. The Scottish Government therefore requested these clauses "to protect Scottish Ministers' interests in the associated functions of setting standards and objectives in the Scottish part of the Solway Tweed RBD, so that these may be consistent with Scottish Ministers' approach in the rest of Scotland".

34. The Scottish Government's response further explains that the intention of this power is to allow for the joint functions under the existing regulations to become functions which are exercisable by the Secretary of State alone in relation to the English part and by the Scottish Ministers alone in the Scottish part, so that Scottish Ministers may choose to keep pace with new EU standards in the Scottish part of Solway Tweed RBD, even if UK Ministers choose not to do so in England. The Committee notes that the same point arises here that the power is wider than the stated policy intention.

35. The Committee welcomes this further information but again highlights to the lead committee that this power appears to go much further than is necessary to meet the stated policy intention. The lead committee may wish to consider whether this is appropriate from a policy perspective.

36. Clause 125 introduces Schedule 19 paragraph 1 which creates a power to amend the UK REACH Regulation. The Committee considered this to be a very wide-ranging power to amend the regime by secondary legislation.
 37. Again, in relation to this clause, the Committee asked the Scottish Government why it is considered appropriate for this power to be conferred on the Secretary of State with Scottish Ministers' consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence.
 38. In response the Cabinet Secretary refers to the REACH EU Exit SIs that the Scottish Ministers, with the consent of the Environment, Climate Change and Land Reform Committee, have already agreed to. The response explains that these SIs provide for a UK-wide system to replace the EU REACH system and that: "It is therefore considered appropriate that the power to amend the UK REACH Regulation is conferred on the Secretary of State as the intention is for UK REACH to operate on a UK-wide basis... given that UK REACH is intended to operate on UK-wide basis it is not considered necessary for the Scottish Ministers to have a corresponding power to make regulations within devolved competence".
 39. The letter also explained that paragraph 2 of Schedule 19 of the Bill ensures that the Scottish Ministers have a power to amend the enforcement provisions for REACH.
40. The Committee is satisfied in principle with this explanation but recognises that there are also policy considerations. The lead committee may therefore wish to consider this matter further from a policy perspective.

Annex A

Letter to the Scottish Government dated 2 June 2020

Dear Cabinet Secretary

At its meeting earlier today, the Delegated Powers and Law Reform Committee considered the Legislative Consent Memorandum for the UK Environment Bill (“the Bill”). Given the Committee’s remit, it focused on the powers in the Bill to make subordinate legislation.

We note that the Environment, Climate Change and Land Reform Committee has already written to you with questions on the Bill. We will not repeat these here but look forward to seeing your response. The Delegated Powers and Law Reform Committee would be grateful if you could answer the following additional questions to aid its consideration.

Firstly, in Schedules 4, 5, 6 and 7 is it the intention in each case that the Part 2 enforcement regulations must be made by the person who made the relevant Part 1 regulations? Or is the intention, for example, that a particular set of Part 1 regulations could be made by the Secretary of State and the related Part 2 enforcement regulations could be made by the Scottish Ministers?

1. Could you clarify what the Scottish Government understands the intention to be?

Clause 49(3)(b) of the Bill specifies that regulations under Schedule 6 made by Scottish Ministers may only contain provision that would be within the legislative competence of the Scottish Parliament. The same specification is made in clause 50 in relation to regulations under Schedule 7, and in relation to regulations made under Schedule 19. However, this is not specified in relation to regulations under Schedules 4 and 5 (on producer responsibility).

2. Could you explain why a legislative competence limitation is specified in relation to regulations under Schedules 6, 7 and 19 but not in relation to regulations under Schedules 4 and 5?

Clauses 81(1) and 84(1) of the Bill concern the Solway Tweed River Basin District (“RBD”). Clause 84(1) allows functions in a devolved area to be reallocated between the Scottish and UK Ministers by subordinate legislation which is subject to the negative procedure and laid in the UK Parliament alone. While the Scottish Ministers’ consent is required, the Scottish Parliament’s consent is not. There would therefore be no formal means for the proposals for the new division of functions to be scrutinised by the Scottish Parliament. Similarly, clause 81(1) allows the UK Secretary of State to make regulations amending specified legislation concerning groundwater in the Scottish part of the RBD.

3. Why is it considered appropriate that these powers are conferred on the Secretary of State with Scottish Ministers’ consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence?

4. What is the difficulty with the current position that clause 84(1) is intended to address?

Clause 125 introduces Schedule 19 paragraph 1 which creates a power to amend the UK REACH Regulation. This is a very wide-ranging power to amend the regime by secondary legislation.

5. Why is it considered appropriate for this power to be conferred on the Secretary of State with Scottish Ministers' consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence?

The Committee would welcome a response to these questions by **12 noon on Thursday 4 June**. I appreciate this is a tight turnaround time but this is necessitated by the tight timetable to which the LCM process is running.

Yours sincerely,

Bill Bowman

Convener of the Delegated Powers and Law Reform Committee

Annex B

Response from the Scottish Government dated 5 June 2020

Dear Bill

UK ENVIRONMENT BILL

Thank you for your letter of 2 June about the Delegated Powers and Law Reform Committee's consideration of the Legislative Consent Memorandum for the UK Environment Bill ("the Bill"). I note that it has focused on the powers in the Bill to make subordinate legislation. I address the questions the Committee's questions in the enclosed annex.

We are considering this Bill against the background of the Covid-19 crisis, and as you know the Scottish Government's priority at this time is to respond to that crisis. However, we understand that the UK Government will continue to progress this Bill through the Westminster Parliament in due course. We therefore have to progress our consideration, and I am grateful for the Committee's attention to this Bill and to the Legislative Consent Memorandum.

Yours

ROSEANNA CUNNINGHAM

Annex

Questions from the Delegated Powers and Law Reform Committee on the Legislative Consent Memorandum for the UK Environment Bill

Firstly, in Schedules 4, 5, 6 and 7 is it the intention in each case that the Part 2 enforcement regulations must be made by the person who made the relevant Part 1 regulations? Or is the intention, for example, that a particular set of Part 1 regulations could be made by the Secretary of State and the related Part 2 enforcement regulations could be made by the Scottish Ministers?

1. Could you clarify what the Scottish Government understands the intention to be?

The Scottish Government's response:

1. The Scottish Ministers may decide, when it is agreed that the relevant Part 1 regulations should be made under Schedules 4, 5, 6 and 7 on a UK-wide basis by the Secretary of State, that similarly a UK-wide approach for the Part 2 enforcement regulations would make most sense. Alternatively, Scottish Ministers could proceed with Scotland only Part 2 enforcement regulations. Any future approach to Part 1 regulations and the corresponding Part 2 enforcement regulations under Schedules 4, 5, 6 and 7 will be individually judged in each case, and the most appropriate approach taken.

Clause 49(3)(b) of the Bill specifies that regulations under Schedule 6 made by Scottish Ministers may only contain provision that would be within the legislative competence of the Scottish Parliament. The same specification is made in clause 50 in relation to regulations under Schedule 7, and in relation to regulations made under Schedule 19. However, this is

not specified in relation to regulations under Schedules 4 and 5 (on producer responsibility).

2. Could you explain why a legislative competence limitation is specified in relation to regulations under Schedules 6, 7 and 19 but not in relation to regulations under Schedules 4 and 5?

The Scottish Government's response:

2. We do not believe that there is any significant reason for this difference in approach. A previous version of the Environment Bill had been introduced on 15 October 2019 but it fell as a result of the dissolution of the UK Parliament for the General Election which was held on 12 December. The UK Environment Bill which was introduced in January 2020 adopted a different drafting approach to the provisions on producer responsibility by repealing and re-writing (rather than amending) sections 93 to 95 of the Environment Act 1995 and that may explain the different approach in the drafting of the various Schedules. For resource efficiency and, in particular, for chemicals measures, the Bill covers a significant range of reserved and devolved matters, and this may be another reason why the UK Government chose to make the limit to Scottish Ministers' regulation making powers explicit in these instances. Similar provisions on legislative competence of Scottish Ministers are also included in clause 126 of the Bill on consequential provisions and in clause 132 of the Bill on transitional and savings.

Clauses 81(1) and 84(1) of the Bill concern the Solway Tweed River Basin District ("RBD"). Clause 84(1) allows functions in a devolved area to be reallocated between the Scottish and UK Ministers by subordinate legislation which is subject to the negative procedure and laid in the UK Parliament alone. While the Scottish Ministers' consent is required, the Scottish Parliament's consent is not. There would therefore be no formal means for the proposals for the new division of functions to be scrutinised by the Scottish Parliament. Similarly, clause 81(1) allows the UK Secretary of State to make regulations amending specified legislation concerning groundwater in the Scottish part of the RBD.

3. Why is it considered appropriate that these powers are conferred on the Secretary of State with Scottish Ministers' consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence?

4. What is the difficulty with the current position that clause 84(1) is intended to address?

The Scottish Government's response:

3. This is appropriate as it reflects that there are existing UK regulations which put in place arrangements in relation to river basin management planning in respect of each cross-border river basin district as a whole.

In relation to clause 81, this enables the Secretary of State to make amendments to the existing UK regulations which apply to both the Scottish and English parts of the cross-border river basin districts. The Scottish Ministers could not make regulations applying to the cross-border districts as a whole within devolved competence, therefore the power is exercisable by the Secretary of State with the Scottish Ministers' consent.

In relation to clause 84, the intention of this power is to allow for the joint functions under the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004 (the ST Regulations) to become functions which are exercisable by the

Secretary of State alone in relation to the English part and by the Scottish Ministers alone in the Scottish part. Exercising this power will likely involve making amendments which extend beyond Scotland and which change the Secretary of State's functions, therefore the power is exercisable by the Secretary of State with Scottish Ministers' consent.

4. The purpose of the ST Regulations was to enable the extent of the cross-border river basin district to be defined geographically, and to provide that certain, predominantly administrative, functions should be jointly exercised for the district as a whole. In practice this has worked well to date, as both UK and Scottish Ministers have had a similar and shared interest in the protection and improvement of these cross-border rivers.

Post-EU Exit however, it seems possible that UK Ministers may opt a) not to keep pace with any new EU standards, or b) to diverge from existing EU standards. Therefore these clauses, which we requested, are intended to protect Scottish Ministers' interests in the associated functions of setting standards and objectives in the Scottish part of the Solway Tweed RBD, so that these may be consistent with Scottish Ministers' approach in the rest of Scotland.

The intention of this power is to allow for the joint functions under the existing ST Regulations to become functions which are exercisable by the Secretary of State alone in relation to the English part and by the Scottish Ministers alone in the Scottish part, so that Scottish Ministers may choose to keep pace with new EU standards in the Scottish part of Solway Tweed RBD, even if UK Ministers choose not to do so in England.

Clause 125 introduces Schedule 19 paragraph 1 which creates a power to amend the UK REACH Regulation. This is a very wide-ranging power to amend the regime by secondary legislation.

5. Why is it considered appropriate for this power to be conferred on the Secretary of State with Scottish Ministers' consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence?

The Scottish Government's response:

5. The Scottish Ministers have agreed, with the consent of the Environment, Climate Change and Land Reform Committee, to a number of REACH EU Exit SIs [1] which provide for a replacement UK-wide system that replicates the EU REACH system as far as is possible. It is therefore considered appropriate that the power to amend the UK REACH Regulation is conferred on the Secretary of State as the intention is for UK REACH to operate on a UK-wide basis. Paragraph 3 of Schedule 19 of the Bill requires the consent of Scottish Ministers where amendments are made to the REACH Regulation which are within devolved competence, but given that UK REACH is intended to operate on UK-wide basis it is not considered necessary for the Scottish Ministers to have a corresponding power to make regulations within devolved competence. In relation to the REACH Enforcement Regulation, paragraph 2 of Schedule 19 of the Bill ensures that the Scottish Ministers have a power to amend the enforcement provisions for REACH.

