



Delegated Powers and Law Reform Committee

The Rt Hon James Cleverly MP
Secretary of State for Foreign,
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By email

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12 October 2022

Northern Ireland Protocol Bill

Dear Secretary of State,

I am writing in relation to the Scottish Parliament Delegated Powers and Law Reform Committee's consideration at its meeting on 4 October of the [Legislative Consent Memorandum](#) ("the LCM") for the [Northern Ireland Protocol Bill](#).

Rule [6.11.1\(b\) and \(c\)](#) 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 as well as general questions relating to powers to make subordinate legislation. The Committee and its predecessor Committee have considered powers exercisable within devolved competence that are conferred on UK Ministers in various Bills over the course of sessions 5 and 6.

As you will know, all 26 clauses of the Bill extend to and apply in Scotland, and throughout the UK. The UK Government is seeking the Scottish Parliament's legislative consent for 13 of the clauses.¹ The Scottish Government considers that a further 7 of the clauses require legislative consent.²

Although the Scottish Parliament passed a motion³ on 29 June 2022 calling on the UK Government to withdraw the Bill, this Committee is required to consider the relevant

¹ Paragraphs 152 and 153 and the table in Annex A of the second version of the UK Government's Explanatory Notes: [Explanatory Notes](#) as brought to the House of Lords on 21 July 2022

² Specified in the LCM, paragraph 33

³ [motion S6M-05235](#)

powers in the Bill and may report on these to the lead committee, which in this case is the Constitution, Europe, External Affairs and Culture Committee.

Overview of the delegated powers in the Bill

The Committee noted that the Bill does not confer any powers on the Scottish Ministers. It does, however:

- confer regulation-making powers on UK Ministers that are exercisable within the legislative competence of the Scottish Parliament; and
- confer power on UK Ministers to sub-delegate these powers to (among others) the Scottish Ministers (clause 22(6)).

There is no requirement in the Bill that UK Ministers obtain or seek the consent of the Scottish Parliament or Scottish Government before exercising the powers within devolved competence.

The Committee noted that the House of Lords Delegated Powers and Regulatory Reform Committee (“DPRRC”) produced a report on the Bill on 7 July 2022, stating it was reporting while the Bill was still in the House of Commons because the Bill is “of exceptional constitutional significance”. As you will be aware, the DPRRC report is highly critical of the delegated powers in the Bill, summarising its conclusions as follows:

“The Northern Ireland Protocol Bill is a skeleton bill that confers on Ministers a licence to legislate in the widest possible terms. The Bill unilaterally departs from the Northern Ireland Protocol and enables Ministers to depart from the Protocol even further. The Bill represents as stark a transfer of power from Parliament to the Executive as we have seen throughout the Brexit process. The Bill is unprecedented in its cavalier treatment of Parliament...”

The Scottish Government states in the LCM that “the Bill is also concerning for the breadth of powers that it confers on the UK Government”.

The delegated powers in this Bill have attracted an unusual level of attention from academic and other external commentators. We are aware that the extent of the delegated powers was also raised by MPs from various parties when the Bill was debated in the House of Commons.

Delegated Powers and Law Reform Committee consideration

While the Committee considered each relevant power individually, it agreed to write to you, as the Minister responsible for the Bill, with questions on the following points which are applicable to all (or many) of the relevant powers. These are:

- sub-delegation to the Scottish Ministers;
- powers for UK Ministers within devolved competence; and
- parliamentary procedure.

I will cover each in turn.

Sub-delegation to the Scottish Ministers

All of the regulation-making powers in the Bill can be sub-delegated by UK Ministers to a devolved authority, meaning the Scottish Ministers, Welsh Ministers or a Northern Ireland department. This can be done by regulations made by UK Ministers under clause 22(6).

The Committee noted that a blanket sub-delegation provision is a novel approach to how powers are to be allocated between the UK and devolved governments. It has not seen this before in other post-EU bills.

The Bill imposes no conditions or requirements on whether or how the UK Ministers can sub-delegate, they have a free choice. It is open to them to choose not to sub-delegate any of the powers.

The powers can be sub-delegated “to any extent”. UK Ministers could therefore sub-delegate a power only for certain purposes, or under conditions.

One result of choosing not to confer powers on the Scottish Ministers on the face of the Bill is that the Scottish Parliament has no opportunity to scrutinise whether or how the powers will in fact be sub-delegated, despite this being a delegation of power that is within the Scottish Parliament’s competence. The Committee has considered the justification given in paragraph 154 of the DPM.

The Committee would be grateful for an explanation as to:

- 1. why the sub-delegation model was chosen rather than the conventional approach of the Bill directly conferring the delegated powers upon the Scottish Ministers (or concurrently upon UK and Scottish Ministers) to the extent that they are exercisable within devolved competence;**
- 2. why is it not considered appropriate to set out on the face of the Bill the scrutiny procedure that will apply to sub-delegated regulations made by the Scottish Ministers, given that the chosen approach means that the Scottish Parliament has no say in how these powers, which are within its competence, are to be scrutinised; and**
- 3. why does the approach to the delegation of powers to Scottish Ministers depart from that taken in, for example, the EU (Withdrawal) Act 2018 and the Trade (Australia and New Zealand) Bill, each of which makes clear that the powers they confer do not include power to make provision outwith devolved competence? Is the intention that any regulations making the sub-delegation would contain this restriction?**

Powers for UK Ministers within devolved competence

As highlighted above, there is no requirement in the Bill on UK Ministers to obtain the consent of the Scottish Parliament or Scottish Ministers before exercising the powers in the Bill within devolved competence. There also does not appear to be any political

commitment in the accompanying documents that UK Ministers will seek such consent. In the absence of a consent requirement, the Scottish Parliament has no ability to scrutinise the decision to legislate on matters that are within its competence.

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. The 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."*

The Committee would therefore be grateful for a specific explanation in relation to each relevant power in the Bill as to:

4. **why the UK Government considers it appropriate, in the particular policy context of this Bill, that the power has been conferred so that it is exercisable independently by a Minister of the Crown in relation to devolved matters;**
5. **Why the UK Government considers it appropriate, in the particular policy context of this Bill, that when the power is exercised independently by a Minister of the Crown in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers; and**
6. **whether the UK Government intends to amend the Bill either to ensure the power is conferred solely on the Scottish Ministers in relation to devolved matters, or to require the Minister of the Crown, when exercising the power in relation to devolved matters, to obtain the consent of the Scottish Ministers?**

Parliamentary procedure

The Committee noted that the parliamentary procedure⁴ chosen for each of the relevant powers in the bill is uniform:

- draft affirmative procedure where amending an Act of the UK Parliament;
- draft affirmative procedure where making retrospective provision;
- otherwise subject to the negative procedure; and
- made affirmative procedure is available where in the Minister's opinion it is necessary by reason of urgency.

The requirement for the affirmative procedure for regulations that amend or repeal primary legislation applies only to Acts of the UK Parliament. Accordingly, Acts of the Scottish Parliament can be amended or repealed by regulations which are subject only to the negative procedure at Westminster. These instruments will not be laid nor subject to any procedure at Holyrood.

The Committee would be grateful for an explanation as to:

- 7. why it is considered appropriate that provision amending or repealing an Act of the UK Parliament necessitates the affirmative procedure, but provision amending or repealing an Act of the Scottish Parliament does not?**

I would be grateful if you were able to provide a response to these questions by **Tuesday 25 October 2022**.

I look forward to hearing from you.

I am copying this letter to the Rt Hon Alister Jack MP, Secretary of State for Scotland; Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture; as well as the Convener of the Constitution, Europe, External Affairs and Culture Committee.

Yours sincerely

Stuart McMillan MSP
Convener of the Delegated Powers and Law Reform Committee

⁴ Clause 23 of the Bill