



Law Society
of Scotland

Levelling-up and Regeneration Bill

Briefing for the Second Reading in the House of
Lords

January 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to provide a briefing on the Levelling-up and Regeneration Bill¹ (the Bill) ahead of the Second Reading in the House of Lords scheduled for 17 January 2023. We previously issued written evidence to the Public Bill Committee in the House of Commons in June 2022.²

If you would like to discuss this paper, or if you would like more information on the points that we have raised, please do not hesitate to contact us. Contact details can be found at the end of the paper.

General remarks

The Bill is divided into thirteen parts and has eighteen schedules. Various parts of the Bill extend and apply to different parts of the UK – we only seek to comment on provisions which extend and apply to Scotland. These provisions are – Part 1, Part 3 chapter 1, Part 3 Chapter 6 clauses 118-120 and clause 123, Part 6, Part 12 clause 213, and Part 13.

We note that a Legislative Consent Memorandum (LCM) has been lodged with the Scottish Parliament by Scottish Ministers.³ The LCM, dated July 2022, states that “The Scottish Government cannot recommend that the Parliament consent to the Bill as introduced”. The Net Zero, Energy and Transport Committee of the Scottish Parliament has published a report on the legislative consent memorandum for the Bill,⁴ and the Delegated Powers and Law Reform Committee of the Scottish Parliament has published a report on the delegated powers relevant to Scotland in the Bill.⁵

By way of general comment, we note that air quality in the context of levelling-up could be usefully considered in the Bill – we consider that this is a key area where there is scope for greater equality and levelling-up across the UK at a macro level. Issues around air quality directly relate to issues around access to environmental justice. This is of particular importance given the UK's commitments under the UN Aarhus Convention on access to environmental justice, public participation and access to

¹ <https://bills.parliament.uk/bills/3155>

² [22-06-23-levelling-up-and-regeneration-bill-evidence-for-hoc-committee-stage.pdf \(lawscot.org.uk\)](https://www.parliament.scot/bills-and-laws/legislative-consent-memorandums/levelling-up-and-regeneration-bill)

³ <https://www.parliament.scot/bills-and-laws/legislative-consent-memorandums/levelling-up-and-regeneration-bill>

⁴ <https://digitalpublications.parliament.scot/Committees/Report/NZET/2022/12/22/39e167fd-d4c1-48b8-8c9a-86abe4f0ccd4-1#a57ddc02-04a5-448c-b732-a9330ade0a03.dita>

⁵ [Legislative Consent Memorandum: delegated powers relevant to Scotland in the Levelling Up and Regeneration Bill \(azureedge.net\)](https://www.azureedge.net/legislative-consent-memorandum-delegated-powers-relevant-to-scotland-in-the-levelling-up-and-regeneration-bill)

environmental information. This Bill could present an opportunity for these commitments to be further referenced and integrated into UK law.

Comments on the Bill

Part 1

Part 1 of the Bill gives statutory force to the requirement to report upon the Government's statement of levelling-up missions.

We have no particular comments on this part of the Bill.

Part 3 chapter 1

This chapter of the Bill relates to planning data.

Clause 83(1) provides that "The Secretary of State may only make planning data regulations which contain provision within Scottish devolved competence after consulting the Scottish Ministers". The clause does not detail what will happen if the Scottish Ministers do not agree with the regulations. The UK Government should state what steps they will take in such an eventuality.

Part 3 chapter 6

Clauses 118-120 and clause 123 apply to Scotland.

Clauses 118, 119 and 120 are Nationally Significant Infrastructure Project (NSIP) related clauses which apply to Scotland in some circumstances. We have no particular comments on these clauses.

Clause 123 relates to pre-consolidation of planning, development and compulsory purchase legislation. This clause enables the Secretary of State to make changes to the law relating to planning, development and compulsory purchase in connection with the consolidation of some, or all, of that law. We have no particular comments on this clause.

Part 6

Part 6 concerns Environmental Outcomes Reports (EOR). This part extends and applies to Scotland. We would draw attention to the comments on EOR in the report of the Net Zero, Energy and Transport Committee of the Scottish Parliament on the legislative consent memorandum for the Bill.⁶

While we recognise the benefits being pursued, a move to EOR represents a very significant change from the current arrangements which are consistent across the UK and will impact on well understood and

⁶ <https://digitalpublications.parliament.scot/Committees/Report/NZET/2022/12/22/39e167fd-d4c1-48b8-8c9a-86abe4f0ccd4-1#a57ddc02-04a5-448c-b732-a9330ade0a03.dita>

established processes that protect our environment. At present the proposals lack detail as we set out below. It is essential that that further detail is carefully designed to achieve the benefits while also considering the detailed process of transition to EOR from the existing processes. We are also concerned that the Bill provides UK Government Ministers with powers to override existing environmental protections in Scotland and we set out further comments on the legislative consent aspects elsewhere in this document.

Clause 138 is an enabling provision giving the Secretary of State power to make regulations to set 'specified environmental outcomes' (EOR regulations) against which relevant consents and relevant plans will be assessed. This power to make regulations is very wide and we do not consider that the intentions around the planned use of the provisions to revise/replace existing Strategic Environmental Assessment, Environmental Impact Assessment and Habitats Assessment regimes are clear. As the provisions are of a skeletal nature with detail to be set out in subsequent regulations, it is not possible to fully appreciate the impacts of what is proposed by the Bill.

We note that the provisions appear to focus largely on cultural and natural heritage rather than on impacts on people – we consider that this may be a missed opportunity to capture the full range of environmental impacts (following consultation with Scottish Ministers and appropriate consent- see our comments below).

Clause 139 provides that the EOR regulations may make provision requiring an EOR to be prepared in relation to a 'proposed relevant consent' or a 'proposed relevant plan'. The power to define these terms is contained in clause 140.

Clause 141 concerns assessing and monitoring the impact of a relevant consent or relevant plan. We have no particular comments to make.

Clause 142(1) (formerly clause 120) contains 'non-regression' provisions, providing that the "Secretary of State may make EOR regulations only if satisfied that making the regulations will not result in environmental law providing an overall level of environmental protection that is less than that provided by environmental law at the time this Act is passed". Clause 142(2) provides a safeguard that EOR regulations may not contain provision that is inconsistent with the implementation of the international obligations of the UK relating to the assessment of the environmental impact of relevant plans and relevant consents. We welcome the principle behind this clause..

Clause 143(1) provides that the "Secretary of State may only make EOR regulations which contain provision within Scottish devolved competence after consulting the Scottish Ministers". We note the importance of respecting the devolution settlement, whereby devolved matters under Schedule 5 of the Scotland Act 1998 sit within the competence of the Scottish Parliament. There is a potential for these provisions to impact significantly on devolved competences and we are concerned that there are not accompanying requirements in the Bill for consent. We refer to our comments on clauses 138, 149 and 152 – at this stage, it is not clear how far it is envisaged that the generally drafted powers under this part

of the Bill can and will be used to recast aspects of the basic Strategic Environmental Assessment, Environmental Impact Assessment and Habitats Assessment rules in Scotland.

Under section 28(7) of the Scotland Act 1998, the UK Parliament has the power to make laws for Scotland. The exercise of this power is subject to “the Legislative Consent” or “Sewel” convention, being that the UK Parliament will not normally legislate on a devolved matter without the consent of the Scottish Parliament as set out in section 28(8) of the Scotland Act 1998. The creation of the regulation making powers in Part 6 of the Bill are subject to that convention as the power enables Ministers to make regulations which would affect devolved matters. We refer to the Legislative Consent Memorandum which as noted above has been lodged with the Scottish Parliament.⁷ and to the report of the Net Zero, Energy and Transport Committee of the Scottish Parliament on that Legislative Consent Memorandum which was published on 22 December 2022.

Clause 144 contains powers to allow the Secretary of State to direct when an EOR is not required – particularly for a proposed relevant consent which is solely for the purposes of national defence or preventing or responding to civil emergency, or as otherwise specified in EOR regulations (clause 144(2)). We have no particular comments to make.

Clause 145 provides that EOR regulations may make provision about enforcement of regulations and clause 146 provides that EOR regulations may make provision requiring a public authority to report on, or provide information in relation to, the delivery of specified environmental outcomes. We have no particular comments to make.

Clause 147(1) requires the Secretary of State to undertake public consultation before making regulations which contain provision under clause 138(1) or which amend, repeal or revoke existing environmental assessment legislation. Clause 147(2) also sets other further consultation requirements on the Secretary of State to “consult such persons as the Secretary of State considers appropriate” before making EOR regulations under a number of other clauses. We welcome these requirements for consultation. Given the wide scope of the powers in this part of the Bill and the potential impacts of any changes, we consider broad consultation to be necessary before the laying of any regulations. We also consider it appropriate that such regulations will be subject to the affirmative parliamentary procedure (under clause 219).

Clause 148 requires a public authority carrying out a function under this Part, or existing environmental assessment legislation, to have regard to any guidance issued by the Secretary of State. We consider that any such guidance should be subject to consultation.

Clause 149 concerns the interaction of EOR regulations with existing environmental assessment legislation (defined in clause 152) and the Habitats Regulations. We consider that the intended use of this provision as well as its connection to the powers under clause 138 and this part of the Bill more generally are unclear. For example, this clause could be read as having a limiting effect since adjustments to the existing environmental assessment provisions are envisaged only for the listed provisions under clause

⁷ <https://www.parliament.scot/bills-and-laws/legislative-consent-memorandums/levelling-up-and-regeneration-bill>

152 within which “existing environmental assessment legislation” is defined as a number of specific provisions covering England and Wales only. We would welcome clarity as to the intended use of the provisions under this part of the Bill.

Clause 150 repeals certain references of the Town and Country Planning Act 1990. We have no particular comments.

Clause 151 provides additional regulation-making powers. We have no particular comments.

Clause 152 is an interpretation provision. We have no comments beyond those made above around the connection with clause 149.

Part 12

Clause 213 applies to Scotland. This clause allows the Secretary of State to commission periodic reviews of the Royal Institution of Chartered Surveyors (RICS)- a professional body for surveyors. We have no comments on this clause. We do, however, note the view of RICS.⁸

Part 13

This Part sets out general provisions including those relating to consequential provisions, regulations, extent and commencement and transitional provisions. We have no comments on Part 13.

For further information, please contact:

Jennifer Paton
Policy Team
Law Society of Scotland
DD: 0131 476 8316
JenniferPaton@lawscot.org.uk

⁸ <https://www.rics.org/uk/news-insight/latest-news/news-opinion/rics-response-to-its-reference-in-the-draft-of-the-levelling-up-and-regeneration-bill/#:~:text=The%20Levelling%20Up%20and%20Regeneration%20Bill%20has%20continued,at%20this%20pivotal%20time%20for%20the%20UK%20economy>