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Delegated Powers and Law Reform Committee

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Dear Stuart,

Thank you for your letter of 07 May 2025, which extends questions raised by the Delegated Powers and Law Reform Committee.

The Committee has first asked the following questions, relating to Clauses 14, 15 and 20, of the Planning and Infrastructure Bill:

1. How decisions will be made regarding which authority will exercise these powers? And
2. How the Scottish Government intends to facilitate scrutiny by the Scottish Parliament of the policy approach to making these regulations, where the power within devolved executive competence is exercised by the Secretary of State?

The Planning and Infrastructure Bill confers concurrent powers on both UK and Scottish Ministers regarding electricity infrastructure consenting in Scotland, with a mandatory consultation requirement between both governments.

The consultation requirement ensures that either government must engage with the other before exercising these powers, respecting the complex devolution settlement in this area, where electricity is reserved, but consenting is executively devolved.

Whilst no formal decision-making mechanism as to which authority will exercise the powers is specified in the legislation, the general expectation shared by both governments is that the Scottish Government will bring forward these regulations and that they will be laid in the Scottish Parliament, reflecting the position that the planning system is a devolved matter and recognising the executively devolved role of the Scottish Ministers in administering applications for consent under the Electricity Act 1989.

Such regulations will set out further technical processes for consulting, considering and determining applications in Scotland, and therefore the Scottish Ministers will be best placed to decide what procedures are appropriate.

It is also worth noting that there has also been no appetite from the UK Government in recent years to update the Electricity Act 1989, as it applies in Scotland. These changes are the first changes to be proposed to the system of applications to construct or install electricity infrastructure in Scotland in decades, while the wider planning systems in Scotland, and in England and Wales for national infrastructure projects, have been updated many times. These proposals were actively pursued over many years by the Scottish Government, due to the need to improve consultation, modernise the process and make necessary process efficiencies.

Should any executive competence look to be exercised by the Secretary of State, we would first look to follow the established patterns of collaboration that produced the current Bill's provisions, which were only agreed after many months of detailed work between officials, ensuring they were sufficient to garner the support of both governments.

The Scottish Government would then implement a notification period to facilitate the necessary parliamentary scrutiny. This would be proportionate to any changes being made and could include providing written notice to the relevant Scottish Parliament committee(s), making statements to the Scottish Parliament and appearing before any relevant committee(s) of the Scottish Parliament. Any notification would outline the substance of the proposed regulations, summarise the Scottish Government's position and include the expected timeline for implementation.

This approach would ensure the Scottish Parliament has appropriate opportunities for scrutiny, whilst respecting the legal framework of concurrent powers that have been established by the Planning and Infrastructure Bill.

Any further change to the executive competence of the Scottish Ministers exercised by the Secretary of State by the making of such regulations would require a legislative consent motion.

The Committee has also asked the following questions, specifically relating to Clause 20 of the Planning and Infrastructure Bill, in relation to the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017:

1. Why it has been decided that this power should be exercisable concurrently, rather than being conferred solely on the Scottish Ministers? And
2. Why it is subject to a requirement to consult the Scottish Ministers when exercised by the Secretary of State, rather than a requirement to obtain the Scottish Ministers' consent?

Prior to Brexit, Scottish Ministers had executively devolved power to amend these regulations through section 2(2) of the European Communities Act 1972. However, this power was lost when the UK left the European Union. The 2017 regulations remain in operation for applications under the 1989 Act in Scotland, but without any power for Scottish Ministers to amend them.

Powers being conferred solely to Scottish Ministers, and a requirement to obtain the Scottish Ministers' consent if the powers are exercised by the Secretary of State, were not available options. The UK Government has highlighted that the generation and transmission of electricity is a reserved matter. The 2017 Regulations relate to the manner in which decisions are to be made in respect of applications under sections 36 and 37 of the 1989 Act for consent in relation to such reserved matters.

Therefore, whilst restoration of the previous position would have been preferred, Clause 20 is supported, as it allows for modifications, efficiencies and alignments in process, that will have benefits in the processing of Electricity Act 1989 applications.

This is a pragmatic position acknowledging that the clause does provide some needed procedural flexibility to ensure the continued effective operation of the 2017 Regulations alongside other updates to the electricity infrastructure consenting process in Scotland.

I trust this response has been helpful and I thank the Delegated Powers and Law Reform Committee for its role in providing the necessary scrutiny of the Planning and Infrastructure Bill legislative consent memorandum.

GILLIAN MARTIN