Delegated Powers and Law Reform Committee

14th Report, 2014 (Session 4)

Legislative Consent Memorandum on the High Speed Rail (London-West Midlands) Bill

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Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (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; and
   (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.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
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Delegated Powers and Law Reform Committee

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The Committee reports to the Parliament as follows—

1. At its meetings on 21 January and 4 February 2014, the Committee considered the provisions in the High Speed Rail (London-West Midlands) Bill ("the Bill")\(^1\) that confers powers to make subordinate legislation on the Scottish Ministers.

2. The Bill was introduced to the House of Commons on 25 November 2013. It is a substantial UK Government Bill, sponsored by the Secretary of State for Transport, Patrick McLoughlin.

3. The draft legislative consent motion, which will be lodged by the Cabinet Secretary for Infrastructure, Investment and Cities is:

   "That the Parliament agrees that the relevant provisions of the High Speed Rail (London-West Midlands) Bill 2013, relating to works required in Scotland for HS2 Phase 1 and to the exercise of the related right of entry to property, in so far as these matters should fall within the executive competence of the Scottish Ministers, should be considered by the UK Parliament."

4. The Legislative Consent Memorandum\(^2\) was considered by the Committee under Rule 9B3.6. The Committee is required to consider, and may report to the lead committee on, any provision in a Bill which is subject to a legislative consent memorandum which confers power on the Scottish Ministers to make subordinate legislation. As with bills passed by the Scottish Parliament, the Committee’s role is to consider whether it is appropriate in principle for the power to be delegated to the Scottish Ministers, whether the terms of the power are appropriately drawn and whether the level of scrutiny applied to the exercise of the power is appropriate.

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\(^1\) High Speed Rail (London-West Midlands) Bill available here: [http://services.parliament.uk/bills/2013-14/highspeedraillondonwestmidlands.html](http://services.parliament.uk/bills/2013-14/highspeedraillondonwestmidlands.html)

\(^2\) High Speed Rail (London-West Midlands) Bill Legislative Consent Memorandum available here: [http://www.scottish.parliament.uk/LegislativeConsentMemoranda/HighSpeedRailLCM.pdf](http://www.scottish.parliament.uk/LegislativeConsentMemoranda/HighSpeedRailLCM.pdf)
5. At its meeting of 21 January, the Committee agreed to ask for an explanation in relation to the Parliamentary procedure aspects of clause 49 of the Bill. The correspondence with the Scottish Government is reproduced at the Annex.

Powers to make subordinate legislation

6. There is one clause in the Bill which confers delegated powers upon the Scottish Ministers and it is discussed below.

Clause 49– Works in Scotland for Phase One purposes

| Power conferred on: | The Scottish Ministers |
| Exercised by:       | Order |
| Scottish Parliament Procedure: | Laid only; but where the order would authorise work which would constitute a national development designated by the National Planning Framework, or it would textually amend a private Act, or if the Scottish Ministers direct, the affirmative procedure applies (sections 12(13) and 13 of the Transport and Works (Scotland) Act 2007 as amended, as applied by clause 49(2)) |

7. Clause 49(1) enables the Scottish Ministers by order to approve works required in Scotland for High Speed 2 (HS2) Phase One purposes.

8. “Phase One purposes” are defined by clause 62. This means things done or required either:

- for the purposes of or in connection with the works authorised by the Bill,

- for the purposes of or in connection with trains all or part of whose journey is on Phase One of HS2, or

- otherwise for the purposes of or in connection with Phase One of HS2 or any high speed railway transport system of which Phase One of HS2 forms or is to form part.

9. Clause 49(2) applies several, mainly procedural, provisions of the Transport and Works (Scotland) Act 2007 (“the 2007 Act”) to an order under this clause. Orders under section 1 of the 2007 Act can be made in relation to the construction or operation of railways in Scotland, tramways, other systems using a mode of guided transport, trolley vehicle systems, or the construction or operation of an inland waterway.

10. Various provisions of the 2007 Act are applied to an order for Scottish works for “Phase One purposes”.

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11. Clause 49(4) provides that an order may modify, amend or exclude enactments relating to the purpose of the order (the approval of “Phase One” works). This power is also applied from the 2007 Act. This power can be exercised in relation to enactments relating to matters which are reserved to Westminster, without the restrictions that are imposed by the Scotland Act 1998 on such matters.

**Delegated Powers and Law Reform Committee consideration**

12. The general principle underlying this power seems to be to apply to the authorisation of works in Scotland for HS2 Phase One purposes, the relevant order-making powers and procedures that already apply to the authorisation of works for other transport systems, as detailed already in the 2007 Act. The Committee therefore accepts the power, in principle.

13. On the Parliamentary procedure which applies to an order, the Committee sought clarification of the intentions, as these were not initially clear.

14. The response to the Committee explains that it is generally to be expected that any future orders for development under clause 49 are likely to be subject to the affirmative procedure. The construction of “high speed rail lines linking Edinburgh and Glasgow city centres with London and offering good connections to the rest of the rail network” has been designated as a national development in the National Planning Framework (NPF) 2009.

15. However, it is possible that the “laid only” procedure could apply to an order, because it would depend on what proposals for development come forward. It would also depend on the exact contents of the NPF which is in force at the time when the order is proposed. The Scottish Ministers would also have power to direct that the affirmative procedure should be applied (through the application of section 13(1)(c) of the 2007 Act).

16. The Scottish Government’s response also clarifies that it is intended –(and as clause 49(2) makes provision for) –that an order which would not be subject to the affirmative procedure would be subject to the “laid only” procedure. (That procedure is set out in section 30 of the Interpretation and Legislative Reform (S) Act 2010 (“ILRA”)). There would be no further Parliament procedure, but the order would be considered by the Committee, and so could be reported on.

17. The Scottish Government has no present intention to equate the procedure applying to a non-affirmative order under clause 49, with that applying to such orders under section 1 of the Transport and Works (Scotland) Act 2007. The Committee is content with that approach. Those orders under section 1 are not laid in Parliament, nor considered by the Committee. For a non-affirmative order under clause 49 to be made subject to the “not laid” procedure under ILRA would require a proposal for an order under section 30(5) of ILRA.

18. **The Committee reports that it finds the powers in clause 49 acceptable in principle.**
19. The Committee also reports that it is content that an order would be subject to the “laid only” procedure under section 30(1) of the Interpretation and Legislative Reform (Scotland) Act 2010; but where the order would authorise work which would constitute a national development designated by the National Planning Framework, or it would textually amend a private Act, or if the Scottish Ministers direct, the affirmative procedure would apply.
ANNEX

Correspondence with the Scottish Government

On 21 January 2014, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

1. An effect of clause 49(2)(b) of the Bill is that the “laid only” procedure will apply to an order made under clause 49(1), unless the conditions provided for in section 13(1) of the Transport and Works (Scotland) Act 2007 (“the 2007 Act”) apply to the order. In that event, the order would be subject to the affirmative procedure.

2. An order which authorises the carrying out of work constituting national development within the National Planning Framework would, by virtue of the application of section 13 of that 2007 Act, be subject to the affirmative procedure. The National Planning Framework includes as the third listed national development- “High-speed rail lines linking Edinburgh and Glasgow city centres with London and offering good connections to the rest of the rail network…”

3. The Committee asks the Scottish Government for clarification as to the circumstances in which an order under clause 49 to authorise works in Scotland for High Speed 2 “Phase One purposes” would be subject to the “laid only” procedure, when it would be subject instead to the affirmative procedure, and why that position is appropriate?

4. Section 30(4) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) has the effect that orders under the 2007 Act are not subject to the “laid only” procedures set out in sections 30 and 31 of ILRA (where they are not subject to the affirmative or negative procedures in terms of the 2007 Act).

5. Clause 49 of the Bill does not apply or modify section 30(4) of ILRA. It appears therefore that an order under clause 49(1) (where not subject to the affirmative procedure) would be subject to the “laid only” procedure. This would appear to be the position unless an order is brought forward under section 30(5) of ILRA, to exempt an order under clause 49 from the procedure, as is presently the case for orders under the 2007 Act.

The Committee asks why this approach has been taken, and whether there is any intention to either amend the Bill or to bring forward an order under section 30(5) of ILRA?

On 28 January 2014, the Scottish Government responded as follows:

1. The construction of “high-speed rail lines linking Edinburgh and Glasgow city centres with London and offering good connections to the rest of the rail network” has been designated as a national development in the National Planning Framework 2009. It is therefore generally to be expected that any future orders for development under what is currently clause 49 of this Westminster Bill are likely to be subject to the affirmative procedure. The application of section 13(1)(a) of the
2007 Act to any given development would, however, depend on what precisely is authorised by the relevant order and the exact contents of the National Planning Framework which is in force at the appropriate time. It should also be noted that section 13(1)(c) of the 2007 Act (applied by clause 49(2)) would give Ministers the power to direct that the affirmative procedure should be applied to an order despite the fact that it does not fall within section 13(1)(a). Under current drafting, any clause 49 order which is not subject to the affirmative procedure will be subject to the “laid only” procedure. The appropriateness of this is dealt with in the response to the next question.

2. There is no intention to request the UK Government to amend the Bill in this connection. The Scottish Ministers have the power under section 30(5) of ILRA to modify the list of enactments in section 30(4). If it transpired in future that there were going to be clause 49 orders made which were not going to be subject to the affirmative procedure, a decision would be taken at that time on whether Ministers considered it appropriate to leave such orders subject to the “laid only” procedure or to exempt them from laying by way of an order under section 30(5) of ILRA.
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