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31 January 2023

By email: DPLR.Committee@parliament.scot

Dear Stuart,

ENERGY BILL

Thank you for letter of 24 November to the Secretary of State following the Scottish Parliament's Delegated Powers and Law Reform Committee's (DPLRC) consideration of the Legislative Consent Memorandum for the Energy Bill. As the Minister responsible for the Bill, I am responding on the Secretary of State's behalf. Please accept my apologies for the delay to this response.

In its letter, the DPLRC raised several questions about some of the delegated powers in the Bill, particularly in relation to Parts 1 and 2, the heat network provisions and Clause 238. I have included an annex to this letter which addresses these matters in full. Please note that throughout the annex the clause numbers referred to reflect the Bill as introduced.

I would like to thank the DPLRC for their engagement with the Bill and I welcome their scrutiny of it.

I am copying this letter to the Secretary of State for Scotland and the Minister for Intergovernmental Affairs.

Yours ever,

THE RT HON GRAHAM STUART MP
Minister of State for Energy and Climate

Annex

Clauses 171 and 172

The Committee asked why the UK Government considers it appropriate that Clauses 171 and 172 confer powers on the Secretary of State to amend Scottish primary legislation without a requirement to obtain the consent of the Scottish Ministers.

The Delegated Powers Memorandum¹, at paragraphs 550-557, explains why the UK Government considers the current approach appropriate. In particular, conferring functions on the Gas and Electricity Markets Authority (GEMA) is reserved to the UK Government and the Scottish Government has agreed to this approach.

Clause 171 will deliver the Scottish Government's preference for GEMA being appointed as licensing authority and ensure a consistent approach regarding the appointment of GEMA as heat networks regulator across Great Britain.

Clause 172 meets a request from the Scottish Government to allow for monitoring and enforcement powers for GEMA as licensing authority in Scotland, given the Heat Networks (Scotland) Act 2021 does not provide for these powers. Given these clauses reflect the Scottish Government's policy intent and follow ministerial agreement on the approach, the UK Government does not consider it necessary for the exercise of the power to be subject to the consent of Scottish ministers.

The Committee also asked, in relation to Clause 168(7), 1) why the UK Government is conferring powers exercisable in devolved areas to the Secretary of State, 2) why there has been no inclusion of a 'consent' requirement for such powers and, 3) whether the UK Government intends to amend the bill either to ensure powers in matters of devolved competence are solely exercisable by Scottish Ministers or to include such consent requirements.

The UK Government considers consumer protection rules for domestic heat network consumers to be reserved to the UK Government in accordance with section C7 of Schedule 5 of the Scotland Act 1998. The UK Government considers Parts 7 (Investigation), 8 (Step-in arrangements) and 11 (Consumer protection), insofar as they relate to domestic heat network consumers, to fall under this reservation. Where these Parts will provide for regulations relating to non-domestic heat network consumers, Clause 168(7) requires the Secretary of State to consult with Scottish ministers before making regulations by virtue of any of these Parts of Schedule 15 of the Bill. The UK Government considers this a sensible approach for ensuring consumer protection rules provide Scottish heat network consumers with fair prices and reliability of heating.

The Scottish Government has expressed a preference for aligning with the UK Government's approach to code governance (Part 4 of Schedule 15 if the Bill) and the UK Government will therefore legislate to introduce code governance in Scotland. Part 3 relates to the authorisation regime which Ofgem as heat networks regulator will administer to enforce consumer protection rules and technical standards in Scotland. Scottish heat network consumers will therefore benefit from consumer protection rules and technical standards being enforced under the same regulatory model, thereby ensuring that Ofgem can enforce these rules efficiently and effectively and avoid complexity for consumers. Clause 168(7) also requires the Secretary of State to consult with Scottish ministers before making regulations by virtue of these Parts of Schedule 15 of the Bill. Given the requirement for UK Government to consult with Scottish ministers across all of these policy areas under Clause 168(7) and both Governments' agreement on a coherent UK-wide approach in these areas, the UK Government does not consider it necessary that the exercise of the power should be subject to the consent of Scottish Ministers.

Clause 238 - Power to make consequential provision etc.

The UK Government maintains that Clause 238 does not engage the LCM process. The Committee suggests that Clause 238 of the Bill is "framed in unusually broad terms" but this is not an accurate characterisation of the power. This clause provides for a power to amend primary and secondary legislation *in consequence of* (or *in connection with*) the Bill once enacted. It can therefore only be used in the context of substantive provisions of the Act (and provisions made under the Act) which

¹ Delegated powers memorandum available here <https://bills.parliament.uk/bills/3311/publications>

are either reserved matters or already subject to scrutiny through the LCM process. The power can only be used to amend primary legislation passed before or in the same session as the proposed Energy Act (or in the case of secondary legislation, legislation made under powers in such primary legislation). The power is not therefore an open-ended one to amend any legislation whenever passed or made. Consequential amendment powers are a standard feature within other Bills and Acts of Parliament and simply make sure that new and existing legislation works effectively. Any changes will be minor or technical in nature and any amendment to primary legislation would be subject to a vote in both Houses of Parliament. The UK Government will, of course, engage with the Scottish Government before making any consequential amendments to devolved legislation.

Miscellaneous delegated powers

In addition to Clause 168(7) outlined above, the Committee similarly asked: 1) why the UK Government is conferring powers exercisable in devolved areas to the Secretary of State, 2) why there has been no inclusion of a 'consent' requirement for such powers and, 3) whether the UK Government intends to amend the Bill to either ensure powers in matters of devolved competence are solely exercisable by Scottish Ministers or to include consent requirements, in relation to several clauses in Parts 1 and 2 of the Bill.

Parts 1 and 2 of the Bill establish a financing and economic regulation framework for carbon capture, transport and storage ('CCUS') and low carbon hydrogen production to incentivise and accelerate deployment across the UK. The design of the legislative provisions reflects the inherent interdependency between the different parts of the CCUS chain and has been designed to overcome the market failures that have previously hindered deployment of CCUS in the UK.

A coordinated approach to awarding carbon capture and hydrogen production revenue support contracts and economic regulation of transport and storage networks across the UK will give confidence to potential investors by providing a single regulatory framework, particularly for projects or clusters that cross borders or involve locations in Scotland, England and offshore areas on the continental shelf. Separate regimes would result in a less effective framework, undermine our ability to deliver CCUS and low carbon hydrogen projects across the UK, and result in less efficient outcomes for UK taxpayers and consumers. A coordinated approach will also be administratively efficient, reducing the cost and time to select, fund, deliver and regulate projects in order to meet decarbonisation objectives of both the UK and Scottish governments.

While CCUS is generally a devolved matter onshore in Scotland and in the territorial sea adjacent to Scotland, the regulation of offshore storage activities on the UK Continental Shelf is outside devolved competence and carbon dioxide transport and storage networks are expected to cross territorial boundaries both onshore and offshore. Given the challenges of regulating such large-scale transport and storage networks across and between the nations of the UK and the UK Continental Shelf, the UK Government considers that delegated powers would be most appropriately exercised on a UK-wide basis by the Secretary of State, following consultation with the devolved administrations in relation to devolved matters, to ensure a consistent approach across the UK and to deliver efficient outcomes for UK taxpayers and consumers. Similarly, the UK Government considers that a UK-wide approach to the revenue support contracts covering CCUS and hydrogen production in Part 2 of the Bill will also provide efficiencies, help mitigate risks and drive cost savings over time.

As with Clauses 171 and 172 in relation to heat networks, where clauses in Parts 1 and 2 of the Bill confer functions on GEMA, its status as a reserved body under Part II of Schedule 5 of the Scotland Act 1998 means that those provisions are outside devolved competence. Likewise, once GEMA is appointed as the economic regulator, the Secretary of State's functions under Clauses 7 to 12 will be specifically exercisable in relation to GEMA and so as regards those functions, the provisions are also a reserved matter. Requiring the consent of Scottish Ministers would therefore not be appropriate.

In relation to Clause 32, I would like to draw the Committee's attention to the amendments tabled on 26 August 2022 which set out on the face of the Bill the necessary powers for GEMA to enforce

obligations on carbon dioxide transport and storage licence holders. Clause 32 as amended therefore confers functions exclusively on a reserved body.

In relation to Clause 2(3) and Clause 8, these clauses allow for the potential extension of the economic regulation framework to cover non-pipeline transport and to provide for different licence types. Road, rail and marine transport sectors cover a mix of devolved and reserved areas of competence. The provision allows the UK government to regulate non-pipeline transportation where it considers there is an unacceptable risk of anti-competitive behaviours. Such behaviours could increase the cost of UK taxpayer and consumer funded subsidies needed to transport carbon dioxide, Therefore, in line with the principal objectives, we consider that these delegated powers would be most appropriately exercised on a UK-wide basis by the Secretary of State, following consultation with the devolved administrations.