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Dear Bill

UK ENVIRONMENT BILL

Thank you for your letter of 2 June about the Delegated Powers and Law Reform Committee's consideration of the Legislative Consent Memorandum for the UK Environment Bill ("the Bill"). I note that it has focused on the powers in the Bill to make subordinate legislation. I address the questions the Committee's questions in the enclosed annex.

We are considering this Bill against the background of the Covid-19 crisis, and as you know the Scottish Government's priority at this time is to respond to that crisis. However, we understand that the UK Government will continue to progress this Bill through the Westminster Parliament in due course. We therefore have to progress our consideration, and I am grateful for the Committee's attention to this Bill and to the Legislative Consent Memorandum.

Yours

ROSEANNA CUNNINGHAM



Annex

Questions from the Delegated Powers and Law Reform Committee on the Legislative Consent Memorandum for the UK Environment Bill

Firstly, in Schedules 4, 5, 6 and 7 is it the intention in each case that the Part 2 enforcement regulations must be made by the person who made the relevant Part 1 regulations? Or is the intention, for example, that a particular set of Part 1 regulations could be made by the Secretary of State and the related Part 2 enforcement regulations could be made by the Scottish Ministers?

1. Could you clarify what the Scottish Government understands the intention to be?

The Scottish Government's response:

1. *The Scottish Ministers may decide, when it is agreed that the relevant Part 1 regulations should be made under Schedules 4, 5, 6 and 7 on a UK-wide basis by the Secretary of State, that similarly a UK-wide approach for the Part 2 enforcement regulations would make most sense. Alternatively, Scottish Ministers could proceed with Scotland only Part 2 enforcement regulations. Any future approach to Part 1 regulations and the corresponding Part 2 enforcement regulations under Schedules 4, 5, 6 and 7 will be individually judged in each case, and the most appropriate approach taken.*

Clause 49(3)(b) of the Bill specifies that regulations under Schedule 6 made by Scottish Ministers may only contain provision that would be within the legislative competence of the Scottish Parliament. The same specification is made in clause 50 in relation to regulations under Schedule 7, and in relation to regulations made under Schedule 19. However, this is not specified in relation to regulations under Schedules 4 and 5 (on producer responsibility).

2. Could you explain why a legislative competence limitation is specified in relation to regulations under Schedules 6, 7 and 19 but not in relation to regulations under Schedules 4 and 5?

The Scottish Government's response:

2. *We do not believe that there is any significant reason for this difference in approach. A previous version of the Environment Bill had been introduced on 15 October 2019 but it fell as a result of the dissolution of the UK Parliament for the General Election which was held on 12 December. The UK Environment Bill which was introduced in January 2020 adopted a different drafting approach to the provisions on producer responsibility by repealing and re-writing (rather than amending) sections 93 to 95 of the Environment Act 1995 and that may explain the different approach in the drafting of the various Schedules. For resource efficiency and, in particular, for chemicals measures, the Bill covers a significant range of reserved and devolved matters, and this may be another reason why the UK Government chose to make the limit to Scottish Ministers' regulation making powers explicit in these instances. Similar provisions on legislative competence of Scottish*

Ministers are also included in clause 126 of the Bill on consequential provisions and in clause 132 of the Bill on transitional and savings.

Clauses 81(1) and 84(1) of the Bill concern the Solway Tweed River Basin District (“RBD”). Clause 84(1) allows functions in a devolved area to be reallocated between the Scottish and UK Ministers by subordinate legislation which is subject to the negative procedure and laid in the UK Parliament alone. While the Scottish Ministers’ consent is required, the Scottish Parliament’s consent is not. There would therefore be no formal means for the proposals for the new division of functions to be scrutinised by the Scottish Parliament. Similarly, clause 81(1) allows the UK Secretary of State to make regulations amending specified legislation concerning groundwater in the Scottish part of the RBD.

3. Why is it considered appropriate that these powers are conferred on the Secretary of State with Scottish Ministers’ consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence?

4. What is the difficulty with the current position that clause 84(1) is intended to address?

The Scottish Government’s response:

3. *This is appropriate as it reflects that there are existing UK regulations which put in place arrangements in relation to river basin management planning in respect of each cross-border river basin district as a whole.*

In relation to clause 81, this enables the Secretary of State to make amendments to the existing UK regulations which apply to both the Scottish and English parts of the cross-border river basin districts. The Scottish Ministers could not make regulations applying to the cross-border districts as a whole within devolved competence, therefore the power is exercisable by the Secretary of State with the Scottish Ministers’ consent.

In relation to clause 84, the intention of this power is to allow for the joint functions under the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004 (the ST Regulations) to become functions which are exercisable by the Secretary of State alone in relation to the English part and by the Scottish Ministers alone in the Scottish part. Exercising this power will likely involve making amendments which extend beyond Scotland and which change the Secretary of State’s functions, therefore the power is exercisable by the Secretary of State with Scottish Ministers’ consent.

4. *The purpose of the ST Regulations was to enable the extent of the cross-border river basin district to be defined geographically, and to provide that certain, predominantly administrative, functions should be jointly exercised for the district as a whole. In practice this has worked well to date, as both UK and Scottish Ministers have had a similar and shared interest in the protection and improvement of these cross-border rivers.*

Post-EU Exit however, it seems possible that UK Ministers may opt a) not to keep pace with any new EU standards, or b) to diverge from existing EU standards. Therefore these clauses, which we requested, are intended to protect Scottish

Ministers' interests in the associated functions of setting standards and objectives in the Scottish part of the Solway Tweed RBD, so that these may be consistent with Scottish Ministers' approach in the rest of Scotland.

The intention of this power is to allow for the joint functions under the existing ST Regulations to become functions which are exercisable by the Secretary of State alone in relation to the English part and by the Scottish Ministers alone in the Scottish part, so that Scottish Ministers may choose to keep pace with new EU standards in the Scottish part of Solway Tweed RBD, even if UK Ministers choose not to do so in England.

Clause 125 introduces Schedule 19 paragraph 1 which creates a power to amend the UK REACH Regulation. This is a very wide-ranging power to amend the regime by secondary legislation.

5. Why is it considered appropriate for this power to be conferred on the Secretary of State with Scottish Ministers' consent, but with no corresponding power of the Scottish Ministers to make regulations within devolved competence?

The Scottish Government's response:

5. The Scottish Ministers have agreed, with the consent of the Environment, Climate Change and Land Reform Committee, to a number of REACH EU Exit SIs¹ which provide for a replacement UK-wide system that replicates the EU REACH system as far as is possible. It is therefore considered appropriate that the power to amend the UK REACH Regulation is conferred on the Secretary of State as the intention is for UK REACH to operate on a UK-wide basis. Paragraph 3 of Schedule 19 of the Bill requires the consent of Scottish Ministers where amendments are made to the REACH Regulation which are within devolved competence, but given that UK REACH is intended to operate on UK-wide basis it is not considered necessary for the Scottish Ministers to have a corresponding power to make regulations within devolved competence. In relation to the REACH Enforcement Regulation, paragraph 2 of Schedule 19 of the Bill ensures that the Scottish Ministers have a power to amend the enforcement provisions for REACH.

¹ The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/758), the REACH etc. (Amendment etc.) (EU Exit) (No. 2) Regulations 2019 (SI 2019/858) and the REACH etc. (Amendment etc.) (EU Exit) (No.3) Regulations 2019 (SI 2019/1144).