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Peter, a chara,

COMMITTEE FOR INFRASTRUCTURE: FOLLOW-UP FROM MEETING ON 19 NOVEMBER 2025 – SUDS BILL – ESR QUERIES

The Committee has requested further clarification on a range of clauses in the Water, Sustainable Drainage and Flood Management Bill following a briefing from the Examiner of Statutory Rules.

Members have requested clarification on the breadth and long-term implications of the Henry VIII powers in clauses 2, 9, and 13, including how they might be used by future administrations.

Clause 2 of the Bill will allow my Department to make regulations about sustainable drainage systems. This is not considered to be a Henry VIII power.

The Henry VIII powers in relation to SuDS are in **Clause 3(4)** which provides for those regulations to amend, repeal, revoke or otherwise modify any statutory provision. This power is required because the policy on the underlying regulatory regime has yet to be fully developed and some amendment may need to be made to other legislation to facilitate this, for example, the SuDS approval body may be a statutory consultee which could necessitate a change to planning legislation.

In the future, if policy alters over time, the power will be capable of being exercised to deliver it (always subject to the overall constraints of the power).

The exercise of the power is subject to the affirmative resolution procedure. Accordingly, the Assembly retains ultimate control over the making of regulations.

Without this power my Department will not be able to make amendments to other legislation which may be needed to facilitate the full implementation of SuDS.

Clauses 7 and 8 of the Bill will allow my Department to make regulations about flood risk assessment and management and environmental impact assessments for drainage works.

The Henry VIII powers in relation to those regulations are in **Clause 9** of the Bill and provide that the powers conferred by clauses 7 and 8 may, subject to certain exceptions, make any provision that could be made by an Act of the Assembly in the areas of flood risk management and the environmental impact assessment of drainage works. The exceptions are that the powers may not be exercised to impose or increase taxation, make any retrospective provision, or create a relevant criminal offence.

Currently, flood risk management and the environmental impact assessment of drainage works are regulated by regulations made by my Department under section 2(2) of the European Communities Act 1972. The repeal of that provision means that my Department's ability to regulate these areas by way of subordinate legislation has been lost. Clause 9 therefore replicates what the 1972 Act allowed. This will allow my Department - within the scope - to amend or revoke existing provision contained in the current regulations or to add new material to those Regulations.

In the future, if policy alters over time, the power will be capable of being exercised to deliver it (always subject to the overall constraints of the power).

The exercise of the power is subject to the affirmative resolution procedure. Accordingly, the Assembly retains ultimate control over the making of regulations.

Without this power my Department would need to make a primary Bill to update the legislation as and when needed, for example, when there are new environmental standards or requirements.

Clause 13 allows my Department to make supplementary, incidental, consequential, transitional, transitory or saving provision. The Clause, as drafted, mirrors Article 306 of the Water and Sewerage Services (Northern Ireland) Order 2006. While a power to make ancillary provision is not always necessary, my Department believes that it is justified in this case. It will help ensure that the Act, which makes a number of alterations of a fairly technical area of law, can be efficiently implemented without the need for further primary legislation.

The exercise of the power is subject to the affirmative resolution procedure. Accordingly, the Assembly retains ultimate control over the making of regulations.

Without this power my Department would not be able to, for instance, make a consequential amendment to other relevant legislation, as is sometimes necessary in a technical area such as water and sewerage, without primary legislation.

Members have requested clarification on the nature and intended role of the 'specified person' referenced in clause 2(4) and (5), including whether this power could result in the creation of a new public body

The nature and intended role of the 'specified person' referenced in clause 2(4) and (5) is to grant or refuse approval for sustainable drainage systems schemes, and to provide advice and guidance to the Department or other public authorities.

Once this Bill has completed its Assembly passage and the power to make regulations in relation to sustainable drainage is operative, regulations will be able to be made which will set out the finer details on any proposed arrangements for the approval of sustainable drainage systems in new housing developments. The power does allow for the creation of a new public body – should it be decided that this is the right approach to take. This would be subject to further consultation in due course.

Members have asked what costs, governance arrangements, or statutory responsibilities might be associated with any public body created under clause 2, and whether these have been assessed.

At this stage, the costs of the required new regulatory regime have not been assessed. However, it should be noted that it is likely that some of the anticipated functions of any new public body created under Clause 2 would replace existing functions and would therefore not all involve additional costs.

Further consultation will be required to finalise the governance arrangements and statutory responsibilities of any public body created.

Members have asked how clause 2 powers will be used, given that the regulations will not be available during scrutiny of the Bill.

Clause 2 will empower my Department to make future regulations on the design, approval, and maintenance of sustainable drainage systems to make SuDS the preferred means of dealing with surface water. The public consultation currently underway and future consultations will inform policy development by gathering essential information and opinions on key policy areas, potential implementation challenges, and opportunities to promote the wider uptake of SuDS. Regulations will then be able to be made which will set out the finer details on how sustainable drainage will be formalised.

Members have asked why the Bill does not specify the maximum penalty for offences created under clause 3.

The maximum penalty for offences cannot be set out in the primary legislation because the policy work, including what will or will not be an offence under the regulations coming out of Clause 3, are yet to be consulted on and finalised. It would not have been appropriate to set a fine for an offence, the nature of which was yet to be determined. Any such penalties and offences will be set out in regulations, which will have to be laid before, and approved by resolution of, the Assembly.

Members have requested clarification on the approach taken in clause 9, where the Bill states what the maximum imprisonment term must not be, rather than clearly stating what it should be.

The Bill cannot specify a maximum penalty for any offences because the offences themselves are not stated – they are a product of any subsequent regulations that may be made. The Bill takes this approach to the specification of penalties because it confers a power to make provision and then limits what provision may be made.

Clause 9, therefore, places limits on regulations enabled by clauses 7 and 8 to ensure that they do not exceed the powers of existent legislation. My Department previously

used a suite of powers conferred by the European Communities Act 1972. Clause 9 therefore replicates what the 1972 Act allowed.

Members requested clarification on why the term 'scope' is used in the subtitle of clause 9.

Clause 9 sets out what the scope of the powers conferred by clauses 7 and 8 is. It was felt that "scope" is an appropriate shorthand description of the content of the clause.

Members have asked why Article 116A, inserted by clause 1(2), and clause 3(5) were not referenced in the Delegated Powers Memorandum.

Article 116 (A), inserted by Clause 1(2) and Clause 3(5), were not referenced in the Delegated Powers Memorandum because Article 116A falls under Clause 1 in the Delegated Powers Memorandum, which provides for regulations to remove a purpose from the list or to make exceptions or expand the meaning of terms used in the regulations. Clause 3 (5) refers to matters supplementary to regulations which may be made under Clause 2; therefore, these fall under the information for Clause 2 in the Delegated Powers Memorandum.


Members have asked why different scrutiny procedures - negative resolution for Article 116A(2) and draft affirmative for Article 116A(3) - have been applied, and what the justification is for that distinction.

Affirmative procedure has been used in Article 116(3) because regulations would amend the list of uses of water which may be prohibited and therefore it was felt that this would require a debate by the Assembly.

However, for regulations under Article 116A(2), which would provide for exceptions or clarification of activities, my Department feels that negative procedure is appropriate given that the effects of these regulations would be quite minor.

I hope this information is helpful.

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A handwritten signature in dark ink, appearing to read 'Liz Kimmins', with a stylized flourish at the end.

LIZ KIMMINS MLA
Minister for Infrastructure