



The Scottish Parliament
Pàrlamaid na h-Alba

Published 11 October 2022
SP Paper 239
50th Report, 2022 (Session 6)

Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Trade (Australia and New Zealand) Bill



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish
Parliament website at:
[http://www.parliament.scot/abouttheparliament/
91279.aspx](http://www.parliament.scot/abouttheparliament/91279.aspx)

For information on the Scottish Parliament contact
Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction and background to the Bill	1
Committee consideration	2
Relevant Power in the Bill	2
Annex: correspondence with the UK Government	8

Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(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;

(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;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



dplr.committee@parliament.scot

Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



Paul Sweeney
Scottish Labour



Jeremy Balfour
Scottish Conservative
and Unionist Party



Oliver Mundell
Scottish Conservative
and Unionist Party

Introduction and background to the Bill

1. At its meetings on 6 September and 4 October 2022, the Committee considered the delegated powers that are relevant to Scotland in the UK Government's [Trade \(Australia and New Zealand\) Bill](#) ("the Bill").
2. The Bill was introduced in the House of Commons on 11 May 2022. The Bill is currently at Committee stage in the House of Commons.
3. The Bill is short, with only four sections and two schedules. The purpose of the Bill is to enable the implementation of, and the making of other provision in connection with, the government procurement chapters of the UK's free trade agreements with Australia and New Zealand, which were agreed in December 2021 and February 2022 respectively ("the Free Trade Agreements"). The Free Trade Agreements are yet to enter into force. The Bill confers the power to implement these agreements, including any modifications from time to time to them, concurrently on UK and Scottish Ministers.
4. The Committee notes that the Bill, as enacted, is expected to be repealed by the UK Procurement Act if the [Bill for that Act](#), which is also currently being considered in the UK Parliament, is passed. The delegated powers relevant to Scotland in the Procurement Bill have also been scrutinised by the Committee.
5. The Scottish Government lodged a [Legislative Consent Memorandum](#) ("LCM") on 13 June 2022. The implementation of international agreements relating to procurement falls within the legislative competence of the Scottish Parliament and the powers conferred by the Bill alter the executive competence of the Scottish Ministers.
6. The Scottish Government states in its LCM that it does not intend to lodge a legislative consent motion for the Bill as introduced. This is on the basis of two concerns:
 1. UK Ministers would be able to make secondary legislation in devolved areas without a requirement to seek consent from Scottish Ministers; and
 2. the delegated power allows for implementation of the agreements as amended in the future without the Scottish Parliament knowing what any future amendments might be at the point of giving its consent.
7. No UK Government Delegated Powers Memorandum ("UK DPM") has been published. As is normal for UK bills, the Scottish Government has not published a Delegated Powers Memorandum. The Scottish Government's views on the relevant clause are set out in the LCM.
8. The lead committee for the LCM is the Economy and Fair Work Committee.

Committee consideration

9. The Committee is considering the LCM for the Bill by virtue of Rule 9B.3 of the Parliament's Standing Orders. Paragraph 6 of Rule 9B.3 provides that where the Bill that is the subject of an LCM containing provisions conferring on the Scottish Ministers powers to make subordinate legislation, the Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions.
10. The LCM is also being considered in terms of the Committee's wider remit contained in Rule 6.11.1(b) of Standing Orders which provides that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills "or other proposed legislation". The Committee and its predecessor Committee have considered powers conferred on UK Ministers in devolved areas in various Bills over the course of sessions 5 and 6.
11. Following the meeting on 6 September, the Committee wrote to Kemi Badenoch MP, Secretary of State for International Trade and President of the Board of Trade, asking various questions on the sole power in clause 1 of the Bill. The text of this letter can be read in the **Annex**.
12. The Committee had not received a response from the UK Government when it considered and agreed its report on the LCM at its meeting on Tuesday 4 October. However, on Friday 7 October it received a letter from James Duddridge MP, Minister for International Trade, who is the Ministerial lead for the Bill. The text of this letter is also included in the **Annex**.
13. The Committee's following recommendations were therefore made in the absence of any further explanation from the UK Government. It nevertheless highlights the response from the Minister for international Trade to the Economy and Fair Work Committee.

Relevant Power in the Bill

Clause 1 – Power to implement government procurement Chapters

Power conferred on: Secretary of State and devolved authority (Scottish Ministers in devolved areas)

Power exercisable by: Regulations

Parliamentary procedure: Negative

14. Clause 1 of the Bill confers power on the "appropriate authority" to make such provision as the authority considers appropriate to implement the government procurement chapters of the Free Trade Agreements. This includes the power to make other provision for the purposes of dealing with matters arising out of, or related to, those chapters.
15. The "appropriate authority" is a Minister of the Crown (regulations exercisable by SI), or the Scottish Ministers within devolved competence (by SSI).ⁱ A Minister of

the Crown can exercise the power in devolved areas without the consent of the Scottish Ministers.

16. Regulations made under this power may make different provision for different purposes or areas, provision generally or only in relation to specified cases, and can include ancillary provision (incidental, supplementary, consequential, transitional, transitory or saving provision).
17. Both the “UK-Australia FTA” and the “UK-New Zealand FTA” are defined in clause 1(5) to include those agreements as modified from time to time, which means the power in clause 1 includes the power to implement any amendments to those agreements.
18. Instruments made under the powers are subject to the negative procedure.

Appropriateness of the power

19. Paragraph 15 of the LCM identifies that an alternative approach to conferring a regulation-making power would be that the necessary legislative amendments to implement the Free Trade Agreements are made on the face of the Bill. It states that this would allow for proper scrutiny of the actual legislative amendments proposed. It also indicates that the issue of timing of entry into force could be managed by providing for commencement regulations, so as to ensure it did not precede the entry into force of these international agreements.
20. Paragraph 3 of the LCM indicates that the legislative amendments to domestic procurement legislation in Scotland (as well as in the rest of the UK) required to implement the Free Trade Agreements are relatively minor and technical. According to paragraph 4, the required amendments will provide for the equal treatment of suppliers from Australia and New Zealand in relation to relevant procurement, and for some minor amendments to the procurement rules in relation to electronic methods of communication and unknown contract values. The amendments are also required to make clear that a contracting authority may not terminate a contract for the purposes of avoiding the application of the procurement rules. According to the LCM, these rule changes are expected to have minimal impact on existing practice in Scotland.
21. In the absence of a UK DPM, in the Committee's letter to Kemi Badenoch MP it sought further information as to why is it considered appropriate for the regulation-making power in clause 1 to be sought rather than provision implementing the Free Trade Agreements being set out on the face of the Bill.
22. As the Committee had yet to receive a response when considering its report, it considers that it is unclear why the implementation of the Free Trade Agreements should be done by regulations as opposed to primary legislation. The implementation of international agreements by primary legislation affords a much greater level of scrutiny.
23. There are similarities with the approach taken by the Committee in its [initial report](#) on the Bill that became the [Professional Qualifications Act 2022](#) in respect of the

i Per paragraph 3 of schedule 1, the power is to be exercised jointly where the regulations relate to a matter in respect of which a different power to make subordinate legislation is available, and where that other power requires joint procedure.

power in section 3 to implement recognition of international professional qualifications agreements. The Committee's report on that Bill noted at paragraph 60 that:

” The standard procedure is that international agreements are implemented in domestic law by primary, not secondary, legislation. Legislation during the EU exit process was a departure from this normal procedure in conferring powers to implement certain trade agreements by secondary legislation. Going forward beyond the EU exit process, there appears to be no special reason why future agreements with third countries should be implemented by secondary rather than primary legislation, and no special reason why this should be so particularly in relation to recognition of professional qualifications aspects of such agreements. Before the UK joined the EU in 1972, the UK Government did not have a general power to implement aspects of international agreements by secondary legislation.

24. Likewise, the House of Lords Delegated Powers and Regulatory Reform Committee concluded [in its report dated 27 May 2021](#) in relation to the Professional Qualifications Bill that “clause 3 represents an inappropriate delegation of power and should be removed from the Bill.”

25. The Committee recognises that, subject to the observations on scope of the power below, the power in clause 1 of the Bill relates to implementation of the Free Trade Agreements as agreed and publicly available rather than future unknown agreements with other countries. Nevertheless, it highlights to the lead committee that it would be preferable that the necessary legislative amendments to implement the Free Trade Agreements are made on the face of the Bill rather than via regulations under the power conferred in clause 1 of the Bill. The lead committee may wish to explore with the Scottish Government the possibility of pressing the UK Government to amend the Bill accordingly.

Scope of the power

26. As paragraphs 10 and 11 of the LCM identify, the power provides for the implementation of the agreements as they may be amended in the future. This avoids the need for further primary legislation if the agreements are amended in the future. However, as set out further in the section on “UK Ministers power in devolved areas” below, there is no formal mechanism for the Scottish Parliament to consider the implementation of these future changes in devolved areas.
27. Paragraph 6 of the [UK Government's Explanatory Notes for the Bill](#) states that: “The relevant provisions of the Procurement Bill are anticipated to enter into force after this Bill and after the necessary changes to domestic law have been made for entry into force of the Agreements. To the extent that implementation of the Agreements for their entry into force is complete, the Procurement Bill is expected to repeal the Trade (Australia and New Zealand) Bill (as enacted) and save relevant statutory instruments. Ongoing implementation of the market access aspects of the Agreements would be provided for by a power in the Procurement Bill.”
28. Paragraph 17c of the UK Government's Explanatory Notes for the Bill states that the power in clause 1 of the Bill “is intended to provide for future implementation

only until it is replaced by the power in the Procurement Bill.”

29. Clause 83 of the Procurement Bill confers a concurrent power on UK and Scottish Ministers to make provision for the purpose of ensuring that treaty state suppliers are not discriminated against in the carrying out of devolved procurements. Paragraph 11 of the LCM indicates that this is a general replacement power in relation to the implementation of the procurement chapters of Free Trade Agreements and is limited to ensure that equal treatment obligations are given effect, with rule changes still requiring primary legislation.
30. Paragraph 11 of the LCM states that the ability to use the power to implement the Free Trade Agreements “seems a particularly unnecessary aspect of the power”. This is stated to be in light of how recently the Free Trade Agreements were signed (albeit some time has passed since this statement was made), and in light of the replacement implementation power in the Procurement Bill.
31. Again, in the absence of a UK Delegated Powers Memorandum (“UK DPM”), the Committee’s letter to Kemi Badenoch MP sought further information on this aspect of the scope of the power. In particular, it asked why it is appropriate that the regulation-making power in clause 1 of the Bill applies to the implementation of the Free Trade Agreements as amended, particularly if:
 1. it is expected that the power will be repealed once the Procurement Bill comes into force; and
 2. the Scottish Parliament may not know what any future amendments might be at the point of considering whether to consent to the Bill.
32. As noted above, the Committee had yet to receive a response from the UK Government when considering its report. Among other things, it was not clear whether there is any likelihood that the Free Trade Agreements would be amended and require implementation before the replacement power in the Procurement Bill is enacted.
33. The Committee is concerned about this aspect of the scope of the power, but would have preferred to obtain the UK Government’s position before reaching a concluded view. Notwithstanding the more general recommendation above on the appropriateness of the power, the Committee highlights this issue on the scope of the power to the lead committee as it may wish to seek further information on this issue.

Parliamentary procedure

34. As well as questioning whether making provision on the face of the Bill as opposed to taking regulation-making powers might be appropriate, the Committee considered whether the choice of negative procedure is appropriate for the powers to implement the Free Trade Agreements.
35. In its letter to Kemi Badenoch MP, the Committee asked whether, as a minimum, if a regulation-making power is to be taken rather than provision implementing the agreements being set out on the face of the Bill, regulations made under the power would more appropriately be subject to the affirmative procedure. While the Minister

for International Trade responded to this question in his letter, it was only received after the Committee had agreed its report.

36. In light of the issues identified earlier in this report, the Committee considers that if the power in clause 1 is to be taken, the affirmative procedure would afford the Parliament the appropriate opportunity to conduct enhanced scrutiny of regulations made by Scottish Ministers implementing the Free Trade Agreements. Notably, the power in clause 83 of the Procurement Bill is subject to the affirmative procedure.

UK Ministers' power in devolved areas

37. As identified above, there is no legal requirement on a Minister of the Crown to obtain the consent of Scottish Ministers before exercising the power in clause 1 in devolved areas. There also does not appear to be any political commitment in the accompanying documents that UK Ministers will seek the consent of Scottish Ministers when exercising the delegated power in devolved areas.
38. The Committee's previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas has been as follows:
 1. The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
 2. Where such powers are exercised by the Secretary of State in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.
 3. Powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
 4. As a minimum, powers when exercised by the Secretary of State in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.
39. The Committee [wrote](#) to the UK Government on 12 July 2022 regarding the scrutiny of delegated powers in UK Parliament bills conferred on UK Ministers in devolved areas and the application or otherwise of SI Protocol 2. The then Secretary of State for Levelling Up, Housing and Communities [responded](#) on 14 August indicating that the "UK Government takes into account a variety of factors when seeking delegated powers in devolved areas." The Secretary of State also indicated that "[w]hether or not to include statutory consent requirements is considered on a case-by-case basis as each policy area has a different legislative context."
40. Paragraph 15 of the LCM states: "If the UK Government intends to continue with its approach of creating delegated powers to implement these agreements, the Scottish Government will press it to amend the Bill so that either the power is conferred solely on the Scottish Ministers in relation to Scotland, or that a requirement on UK Ministers to seek the consent of the Scottish Ministers before exercising the power in relation to Scotland is inserted."

41. In its letter to Kemi Badenoch MP, the Committee highlighted the position in this LCM on this point and in the recent correspondence with the Secretary of State for Levelling Up, Housing and Communities. The letter sought an explanation as to:
1. why the UK Government considers it appropriate, in the particular policy context of the Bill, that the power has been conferred so that it is exercisable independently by a Minister of the Crown in relation to devolved matters;
 2. why the UK Government considers it appropriate, in the particular policy context of the Bill, that when the power is exercised independently by a Minister of the Crown in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers; and
 3. whether the UK Government intends to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to Scotland, or to require UK Ministers when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers.
42. Again, the response from the Minister for International Trade was received after the Committee had agreed its report.

43. The Committee does not consider that it is appropriate to reach a concluded view on this particular issue without the benefit of further information from the UK Government. In the absence of such information, the Committee highlights the questions it has asked the UK Government as identified above, and notes that:
- the power has been conferred so that it is exercisable independently by a Minister of the Crown in relation to devolved matters;
 - when the power is exercised independently by a Minister of the Crown in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers; and
 - in the absence of any consent requirement, the scrutiny process set out in SI Protocol 2 would not apply.

44. Subject to the more general recommendations on the appropriateness and scope of the power above, in the absence of any explanation from the UK Government for why the power is exercisable by a Minister of the Crown in this way, the lead committee may wish to explore with the Scottish Government whether it intends to press the UK Government to amend the Bill to either:
- ensure the power is conferred solely on the Scottish Ministers in relation to devolved matters, or
 - require UK Ministers when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers.

Annex: correspondence with the UK Government

Letter to Kemi Badenoch MP, Secretary of State for International Trade and President of the Board of Trade

Firstly, can I congratulate you on your recent appointment. I wish you well in the role.

I am writing in relation to the Scottish Parliament's Delegated Powers and Law Reform Committee consideration at its meeting yesterday of the Legislative Consent Memorandum ("the LCM") for the Trade (Australia and New Zealand) Bill.

The Committee appreciates that the Bill, as enacted, is expected to be repealed by the UK Procurement Act if the bill for that Act, which was also introduced, is passed.

Nevertheless, under the Scottish Parliament's Standing Orders, the Committee is required to consider all Bills which contain relevant delegated powers.

The Committee's scrutiny focused on the concurrent power conferred on Scottish Ministers and a Minister of the Crown insofar as exercisable in relation to devolved matters within clause 1 of the Bill.

Clause 1 – Power to implement government procurement Chapters

Clause 1 of the Bill confers power on the "appropriate authority" to make such provision as the authority considers appropriate to implement the government procurement chapters of the UK-Australia and UK-New Zealand Free Trade Agreements. This includes the power to make other provision for the purposes of dealing with matters arising out of, or related to, those chapters.

Scope of the power

As a Delegated Powers Memorandum has not been published by the UK Government, the Committee has two questions on the scope of the power:

1. Why is it considered appropriate for the regulation-making power in clause 1 to be sought rather than provision implementing the free trade agreements being set out on the face of the Bill?

2. Why is it appropriate that the regulation-making power in clause 1 of the Bill applies to the implementation of the free trade agreements as amended, particularly if:

a. it is expected that the power will be repealed once the Procurement Bill comes into force; and

b. the Scottish Parliament may not know what any future amendments might be at the point of considering whether to consent to the Bill?

Parliamentary procedure

Given the significance of the power, the Committee would also be grateful to know:

3. Whether, as a minimum, if a regulation-making power is to be taken rather than provision implementing the agreements being set out on the face of the Bill, regulations made under the power would more appropriately be subject to the affirmative procedure?

UK Ministers power in devolved areas

There is no legal requirement on a Minister of the Crown to obtain the consent of Scottish Ministers before exercising the power in clause 1 in devolved areas. There is also no commitment in the accompanying documents that a Minister of the Crown will seek the consent of Scottish Ministers when exercising the delegated power in devolved areas.

The Committee's previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas has been as follows:

- (a) The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
- (b) Where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.
- (c) Powers conferred on UK Ministers should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
- (d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the SI Protocol 2 where the power is within the scope of that protocol.

The Committee wrote to the UK Government on 12 July 2022 regarding the scrutiny of delegated powers in UK Parliament bills conferred on UK Ministers in devolved areas and the application or otherwise of SI Protocol 2. The then Secretary of State for Levelling Up, Housing and Communities responded on 14 August indicating that the "*UK Government takes into account a variety of factors when seeking delegated powers in devolved areas.*" He also indicated that "[w]hether or not to include statutory consent requirements is considered on a case-by-case basis as each policy area has a different legislative context."

The Committee noted that paragraph 15 of the LCM states: "*If the UK Government intends to continue with its approach of creating delegated powers to implement these agreements, the Scottish Government will press it to amend the Bill so that either the power is conferred solely on the Scottish Ministers in relation to Scotland, or that a requirement on UK Ministers to seek the consent of the Scottish Ministers before exercising the power in relation to Scotland is inserted.*"

In the particular policy context of the Bill, the Committee would be grateful for an explanation as to:

4. Why does the UK Government consider it appropriate that the power has been conferred so that it is exercisable independently by a Minister of the Crown in relation to devolved matters?

5. Why does the UK Government considers it appropriate that when the power is exercised independently by a Minister of the Crown in relation to devolved matters,

there is no requirement to obtain the consent of the Scottish Ministers?

6. Does the UK Government intend to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to Scotland, or to require a Minister of the Crown when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers?

I would be grateful if you were able to provide a response to these questions by **Wednesday 21 September 2022**. This will allow the Committee to report its findings on the LCM prior to any final consideration by the Scottish Parliament.

I look forward to hearing from you.

I am copying this letter to the Rt Hon Alister Jack MP, Secretary of State for Scotland; Ivan McKee MSP, the Minister for Business, Trade, Tourism and Enterprise and Claire Baker MSP, Convener of the Scottish Parliament's Economy and Fair Work Committee, which is considering the Bill from a policy perspective.

Stuart McMillan MSP

Convener of the Delegated Powers and Law Reform Committee

Response from James Duddridge MP, Minister for International Trade

Thank you for recent letter to the Secretary of State for International Trade (7 September 2022) regarding the Trade (Australia and New Zealand) Bill. As the Ministerial lead for the Bill, I wanted to respond to your questions in turn and share further detail on our approach.

1. Why is it considered appropriate for the regulation-making power in clause 1 to be sought rather than provision implementing the free trade agreements being set out on the face of the Bill?

The nature of the delegated power is that it has two purposes. First, it allows for the timely legislative implementation of the procurement obligations in the government procurement chapters of both the UK-Australia and UK-New Zealand FTAs for their entry into force. Secondly, the delegated nature of the power allows for subsequent legislative implementation of any adjustments to the obligations over the lifetime of the FTAs. Most changes are expected to be minor and will not affect the balance of commitments. For example, updating the names of government departments following machinery of government changes. Given such modifications will be minor and technical, a delegated power will allow changes without placing a burden on parliamentary resource that would come with passing new primary legislation each time legislative amendments are necessary. As it is unlikely the time for passing primary legislation to implement these types of changes will be commensurate with the significance of those changes, a delegated power is appropriate in this context.

2. Why is it appropriate that the regulation-making power in clause 1 of the Bill applies to the implementation of the free trade agreements as amended, particularly if:

a. it is expected that the power will be repealed once the Procurement Bill comes into force;

The Procurement Bill will repeal the power in the Trade (Australia and New Zealand) Bill.

This is a sensible approach to allow for quicker implementation of the UK-Australia and UK-New Zealand FTAs under the Trade (Australia and New Zealand) Bill but avoid duplicate powers existing in perpetuity.

We cannot say with certainty when this repeal will occur, given the Procurement Bill must still complete its passage through the UK Parliament. In the event minor amendments to procurement chapters in either FTA are made prior to the Procurement Bill entering into force, it is right devolved administrations (DAs) and the UK Government have the necessary powers to ensure we can continue to meet international obligations. As it is not clear when exactly these amendments may arise, the delegated power in clause 1 can accommodate that uncertainty in the short-term.

b. the Scottish Parliament may not know what any future amendments might be at the point of considering whether to consent to the Bill?

The UK Government and the Scottish Government have developed a constructive approach to engagement on the UK's international trade policy. This includes discussion at political level through the Interministerial Group for Trade, known previously the Ministerial Forum for Trade, and at official level through a dedicated procurement policy forum. We will continue this constructive approach following entry into force of both FTAs.

Our approach allows for discussions between governments on any amendments being considered or made by Parties to the FTAs. The UK Government is committed to keeping the Scottish Government informed and they should update Scottish Parliament on legislative developments when the power in clause 1 is exercised by a UK Government Minister. When secondary legislation is made by the Scottish Government under clause 1, this will be subject to scrutiny by the Scottish Parliament.

3. Whether, as a minimum, if a regulation-making power is to be taken rather than provision implementing the agreements being set out on the face of the Bill, regulations made under the power would more appropriately be subject to the affirmative procedure?

For implementation of the procurement obligations for the entry into force of the FTAs, the UK Parliament will have had the opportunity already to scrutinise both FTAs before the power is exercised. This will include the government procurement Chapters, and both the UK's and the other Parties' market access schedules.

Accordingly, the provisions of the FTAs will be clear to Parliamentarians and the procurement obligations in the FTAs will not result in any unexpected changes to domestic law for the entry into force of the Agreements.

The negative procedure is appropriate for the scope of the power in clause 1 as the UK Parliament is unlikely to need to debate the content of the regulations given their scrutiny of the FTAs before secondary legislation is made and the length of time the power is likely to be in force.

The changes to the regulations for entry into force will be largely technical to ensure suppliers from Australia and New Zealand are extended the legal rights and remedies that exist in domestic law for procurement covered by the FTAs and ensure alignment with certain rules in the UK-Australia FTA.

These changes are not anticipated to substantially affect how contracting authorities undertake procurement. Accordingly, the changes that would be made are not significant

enough to justify a procedure that involves greater Parliamentary resource.

As noted above, modifications to the FTAs over their lifetime are expected to be minor and technical and would not justify the use of Parliamentary time that would otherwise accompany an affirmative procedure.

4. Why does the UK Government consider it appropriate that the power has been conferred so that it is exercisable independently by a Minister of the Crown in relation to devolved matters?

The concurrent power in clause 1 provides an administratively efficient option for making secondary legislation to implement the procurement Chapters in both the UK-Australia and UK-New Zealand FTAs. It allows for a Scottish Minister to make secondary legislation, or for a UK Minister to do so when practical.

This is the same approach as taken with the Trade Act 2021, which includes a concurrent power to implement international trade obligations. Earlier this year, the concurrent power in the Trade Act 2021 allowed for the Public Procurement (International Trade Agreements) (Amendment) Regulations 2022 to be made.

This single statutory instrument implemented procurement obligations under the UK-Iceland, Liechtenstein and Norway (EEA) Agreement in both UK and Scottish procurement regulations. This avoided the need for separate statutory instruments in both the UK Parliament and Scottish Parliament.

This single statutory instrument was made in consultation with the Scottish Government and with their agreement. The concurrent power in the Trade (Australia and New Zealand) Bill allows us to continue to make use of this convenient arrangement, when practical, for procurement chapters in both the UK-Australia and UK-New Zealand FTAs.

5. Why does the UK Government consider it appropriate that when the power is exercised independently by a Minister of the Crown in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers?

Placing a requirement to obtain consent in statute risks undermining the devolution statutes which enshrine international relations as a reserved matter.

Acceptance of this requirement for this Bill would set the expectation that all UK primary legislation regarding international treaties would include similar clauses. This would establish the principle that the UK Government and the UK Parliament cannot act without agreement of the Scottish Government when taking steps to enable international treaties to enter into force. This would curtail the supremacy of the UK Parliament and restrict the UK Government when acting regarding a reserved matter.

Requiring consent of Scottish Ministers to be obtained would also discourage consensual intergovernmental working and incentivise legal challenge. This is disproportionate and would threaten the timely implementation of the trade agreements thereby delaying the benefits they offer to UK businesses and consumers.

Whilst in practice the UK Government does engage with DAs on the reserved matter of international relations, it is important that the legal position of international relations as a reserved matter is preserved.

6. Does the UK Government intend to amend the Bill to either ensure the power is

conferred solely on the Scottish Ministers in relation to Scotland, or to require a Minister of the Crown when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers?

It is important to reiterate that the power can be exercised concurrently; it is open to both devolved and UK Government ministers to use. It is designed in this way in order to respect the competence of the devolved legislatures and governments, whilst allowing for certainty in respect of the reserved matter of international relations.

We recognise the Scottish Government and Scottish Parliament will seek assurances that the concurrent power in the Trade (Australia and New Zealand) Bill will be used appropriately by the UK Government. Therefore, during Second Reading, the previous Secretary of State, made a commitment at the despatch box to not normally use the concurrent power in this Bill without the consent of the relevant DA and never without consulting them first.

This is the same despatch box commitment made on the use of concurrent powers in the Trade Act 2021. This commitment was sufficient for the Scottish Government to recommend legislative consent for the Trade Act 2021 and for the Scottish Parliament to subsequently vote in favour of a legislative consent motion.

I recognise your Committee session to consider the Trade (Australia and New Zealand) Bill was held shortly before Second Reading of the Bill. Now this commitment has been made, I trust this provides the necessary assurances on the use of concurrent powers as was the case with the Trade Act 2021.

I will shortly be writing to the Minister for Business, Trade, Tourism and Enterprise with a commitment to continue engagement on the Bill and I am grateful for the work of your committee. I would be pleased to continue to support your consideration of the Bill as you believe beneficial.

I am copying this letter to the Rt Hon Alister Jack MP, Secretary of State for Scotland; Ivan McKee MSP, the Minister for Business, Trade, Tourism and Enterprise and Claire Baker MSP, Convener of the Scottish Parliament's Economy and Fair Work Committee.

James Duddridge MP

Minister for International Trade

