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Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Procurement Bill



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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.



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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 [Procurement Bill](#) ("the Bill").
2. The Bill was introduced by the UK Government in the House of Commons on 11 May 2022. The Bill is currently at Committee stage. The Bill contains 116 clauses and 11 schedules. The stated purpose of the Bill is to reform the United Kingdom's public procurement regime following its exit from the European Union (EU), to create a simpler and more transparent system not based on transposed EU Directives. The Bill will for the most part only apply in Scotland to the procurement activities of reserved bodies, however, there are provisions that are within the legislative competence of the Scottish Parliament.
3. The Scottish Government lodged a [Legislative Consent Memorandum](#) ("LCM") on 25 May 2022. The procurement of goods, services and works by public bodies and some utilities is an area of law previously governed by EU Directives. The current regime in Scotland extends to all contracting authorities operating within Scotland, whether devolved bodies or reserved. The current UK Regulations largely do not extend to Scotland. The Bill will alter that position and will, by contrast, extend to Scotland and regulate the procurement activity of contracting authorities and utilities, but specifically excluding "devolved Scottish authorities". The Bill will legislate for procurements undertaken in Scotland, which is within the legislative competence of the Scottish Parliament.
4. The Scottish Government states in its LCM that it does not intend to lodge a legislative consent motion in respect of the Bill as introduced. This is for the following reasons:
 - the scope and extent of the Bill will legislate for procurements undertaken in Scotland within the competence of the Scottish Parliament, so consent would depend on the acceptability of the rest of the Bill;
 - the delegated powers are concurrently exercisable by UK and Scottish Ministers within devolved areas; and
 - the delegated powers are significantly broader than are required, without any consent mechanism in place.
5. The UK Government has published a [Delegated Powers Memorandum](#) to accompany the Bill (the "UK DPM"). As is normal for UK bills, the Scottish Government has not published a delegated powers memorandum. The Scottish Government's view on the relevant clauses is set out in the LCM.
6. There are two clauses in the Bill which confer delegated powers on the Scottish Ministers, concurrently with UK Ministers. This means that the powers may be exercised by either the Scottish Ministers or by a UK Minister. However, there are other powers conferred solely on UK Ministers which are exercisable within devolved areas. All of the delegated powers provisions in devolved areas relate to areas formerly within EU competence before the UK fully withdrew from the EU.

7. The House of Lords Delegated Powers and Regulatory Reform Committee in the UK Parliament considered the Bill and highlighted a number of concerns with several powers. It considered there were “multiple failures in the DPM to adequately explain and justify very broad delegations of power which enable implementation of significant policy change by delegated legislation”. This is fully outlined in the [Third Report \(parliament.uk\)](#) which was published in June 2022.
8. The lead committee for this 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 provide 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 Edward Argar MP, the Minister for Cabinet Office and Paymaster General](#), asking various questions in respect of the relevant powers in the Bill.
12. The Committee has not yet received a response from the UK Government.
13. The Committee's following recommendations are therefore made in the absence of any further explanation from the UK Government. Should the Committee receive a response from the UK Government following publication of this report, it will forward this to the Economy and Fair Work Committee.

Relevant Powers in the Bill

Clause 83 – Power to make provision for the purpose of ensuring that treaty state suppliers are not discriminated against in the carrying out of devolved procurements

Power conferred on: A Minister of the Crown or Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

14. This power is conferred on a Minister of the Crown or the Scottish Ministers to make provision ensuring that treaty state suppliers are not discriminated against in Scotland by bodies not covered by the Bill in the implementation of international agreements.
15. The power is expressed as a Henry VIII power, meaning it is one which permits the amendment of primary legislation, which includes Acts of the Scottish Parliament, whenever made. It therefore allows amendment to current, and any future primary Scottish legislation, within an area which is devolved to the Scottish Parliament. This power can be exercised by either the UK Ministers or the Scottish Ministers independently.
16. Paragraph 132 of the UK DPM states that this power is required to ensure the full

implementation of the UK's procurement obligations, and that whilst there is limited primary legislation in Scotland on procurement at present, there is a likelihood that at some point in the future the Scottish Parliament will need to pass primary legislation in this area. The power to amend primary legislation, according to the UK DPM, will ensure continued implementation of these obligations in the future.

17. The LCM states that the Scottish Government's view is that the power is significantly broader than is necessary. Additionally, if primary legislation is brought forward in Scotland in this area in the future, then that would be the appropriate time for consideration to be given to whether a Henry VIII power should be delegated to the Scottish Ministers.
18. The Committee notes that there is no legal requirement on a Minister of the Crown to obtain the consent of Scottish Ministers before exercising the power in clause 83 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.
19. 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.
20. 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 said 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.
21. In its letter to Edward Argar MP, the Minister for Cabinet Office and Paymaster General, 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.

22. 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, 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.

23. 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.

Clause 103(3) – Powers relating to procurement arrangements

Power conferred on: A Minister of the Crown or Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

24. Clause 103 makes various provision for cross-border and joint procurement arrangements to be set out by subordinate legislation.
25. Clause 103(1) is a power conferred on a Minister of the Crown to make provision, by regulations, for the regulation and management of the award of contracts by devolved Scottish authorities under the provisions of the Bill or those under Welsh or Northern Irish procurement arrangements. Clause 103(2) is a power to amend the Act, by regulations, to disapply the requirements and provisions of the Bill so far as it relates to devolved Scottish authorities, and to determine how such contracts

are to be managed. Both these parts of clause 103 can only be exercised by a Minister of the Crown.

26. The power in clause 103(3) is conferred on both a Minister of the Crown and the Scottish Ministers to amend Scottish regulations to allow all bodies covered by the Bill to access procurements under the Scottish regulations, to access joint procurements and to specify how they will be managed.
27. The LCM states that cross-border arrangements need to be clarified when there are two different regimes to ensure that contracts can lawfully be awarded where bodies are subject to different regimes. According to the LCM, clarity is also required on how to determine which rules will apply. Although the Scottish Government consider that it is necessary to clarify these matters, it is not set out on the face of the Bill, so how it will operate is currently not clear.
28. The Committee again notes that there is no legal requirement on a Minister of the Crown to obtain the consent of Scottish Ministers before exercising the power in clause 103(3) 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.
29. In its letter to Edward Argar MP, the Minister for Cabinet Office and Paymaster General, the Committee sought an explanation as to:
 1. why it is considered appropriate for the regulation-making power in clause 103(3) to be sought rather than provision to be set out on the face of the Bill;
 2. 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;
 3. 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
 4. 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.
30. Again, the Committee does not consider that it is appropriate to reach a concluded view on these particular issues 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, and notes that:
 - it is unclear why it is considered appropriate for the regulation-making power in clause 103(3) to be sought rather than provision to be set out on the face of the Bill;
 - 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;
- in the absence of any consent requirement, the scrutiny process set out in SI Protocol 2 would not apply.

31. 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.

Additional Delegated Powers (Former EU Competence)

32. The Committee notes that the Bill contains a total of 53 delegated powers which are principally exercisable by a Minister of the Crown to make provision in areas of former EU competence. The Bill will apply to the whole of the UK, but with regards to Scotland it will apply to cross-border and joint procurements and procurements in Scotland by reserved bodies. This is different to the current position where all procurements in Scotland by public bodies, whether they are reserved bodies or not, are managed through Scottish procurement arrangements. This Bill alters that position.
33. The additional delegated powers in the Bill are listed in the **Annex** to this report.
34. The delegated powers in these clauses have no corresponding powers conferred on Scottish Ministers where they are exercisable within an area of devolved competence. UK Ministers are not required to obtain the consent of Scottish Ministers, nor are they required to consult the Scottish Ministers before exercising these powers.
35. All of the delegated powers may be exercised within the legislative competence of the Scottish Parliament and therefore legislative consent is sought for them all.
36. The LCM states that it is accepted that there is an argument to be made for the position adopted by the UK Government to the Bill, in that this will bring clarity for contracting authorities about which regime each authority is subject to, and that it avoids any cost and complexity that would be incurred if contracting authorities were subject to different legislative regimes for different procurements. However,

the Scottish Government consider that the scope and extent of the Bill is so fundamental to the Bill that the decision on whether or not to consent to these clauses should be informed by the acceptability of the rest of the Bill. Currently the Scottish Government considers that there are significant concerns that require to be resolved in order that the Bill would be acceptable.

37. Clauses 103(1) and 103(2) are powers conferred solely on a UK Minister, however, they are connected and inextricably linked to the concurrently exercisable power in clause 103(3) addressed above. The three powers in this clause cannot be considered individually, as together they provide reciprocal arrangements for access to the procurement regimes.
38. In its letter to Edward Argar MP, the Minister for Cabinet Office and Paymaster General, the Committee sought an explanation as to:
 1. why it is considered appropriate for the regulation-making powers in clauses 103(1) and (2) to be sought rather than provision to be set out on the face of the Bill;
 2. why the UK Government considers it appropriate, in the particular policy context of the Bill, that the powers have been conferred so that they are exercisable independently by a Minister of the Crown in relation to devolved matters;
 3. why the UK Government considers it appropriate, in the particular policy context of the Bill, that when the powers are 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
 4. whether the UK Government intends to amend the Bill to either ensure the powers are 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.

39. The Committee does not consider that it is appropriate to reach a concluded view on these particular issues 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, and notes that:
 - there is no explanation for why it is considered appropriate for the regulation-making powers in clauses 103(1) and 103(2) to be sought rather than provision to be set out on the face of the Bill;
 - the powers have been conferred so that they are exercisable independently by a Minister of the Crown in relation to devolved matters;
 - when the powers are 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.

40. In the absence of any explanation from the UK Government for why the powers are 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 powers are conferred solely on the Scottish Ministers in relation to devolved matters, or
- require UK Ministers when exercising the powers in relation to devolved matters to obtain the consent of the Scottish Ministers.

Annex: additional delegated powers in the Bill

Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Procurement Bill, 49th Report, 2022 (Session 6)

Clauses:	Power
Clause 6 Defence and Security Contracts	Confers a power on a Minister of the Crown to make regulations specifying that a contracting authority is a defence authority.
Clause 8 Light Touch Contracts	Confers a power on an appropriate authority (minister of the Crown, Welsh Ministers or a Northern Ireland Department) to make regulations specifying which categories of contract can benefit from "light touch" provisions.
Clause 12 The national procurement policy statement	Confers a power on a Minister of the Crown to publish a National Procurement Policy Statement and creates an obligation for contracting authorities to have regard to that NPPS.
Clause 33 Reserving Contracts to Public Service Mutuals	Confers a power on an appropriate authority to make regulations to specify the services which contracting authorities can reserve certain contracts to be bid for by public service mutuals.
Clause 41 Direct Award to Protect Life etc	Confers a power on a Minister of the Crown to make regulations that certain contracts, or classes of contracts, can be procured without running a competition (direct award) when they are necessary to protect life.
Clause 50 Key Performance Indicators	Confers a power on an appropriate authority to make regulations setting the KPI's in certain public contracts to measure contract performance.
Clause 51 Contract Detail Notices and Publication of Contracts	Confers a power on a Minister of the Crown or a Northern Ireland Department to make regulations to amend the financial threshold for the purposes of contract publication.
Clause 61 Debarment Decisions: Appeals	Confers a power on a Minister of the Crown to make regulations providing for a statutory appeal mechanism for suppliers to appeal debarment decisions.
Clause 62 Electronic Invoicing: Implied Term	Confers a power on an appropriate authority to make regulations to amend the requirements of an electronic invoice.
Clause 63 Implied Payment Terms in Public Contracts	Confers a power on an appropriate authority to make regulations to amend the 30 day payment period.
Clause 64 Payments Compliance Notices	Confers a power on an appropriate authority to make regulations setting out the form and content of a payment's compliance notice.
Clause 65 Information about payments under public contracts	Confers a power on an appropriate authority to make regulations amending the financial threshold or period of time for publication of certain public contracts that meet the financial threshold when payment is made.
Clause 70 Contract Change Notices and Publication of Modifications	Confers a power on a Minister of the Crown to make regulations to amend the financial threshold over which a contracting authority has to publish a contract change notice.
Clause 78 Regulated Below-threshold Contracts	Confers a power on a Minister of the Crown to make regulations to amend the financial threshold to take account both inflation and interaction with the upper thresholds.
Clause 79 Regulated below-threshold contracts: notices	Confers a power on a Minister of the Crown to make regulations to amend the financial thresholds.
Clause 80 Regulated below-threshold contracts: implied payment terms	Confers a power on a Minister of the Crown to make regulations to amend the threshold contracts for the purpose of changing the number of days for the sum due to be paid under the contract (no more than 30 days).
Clause 81 Treaty state suppliers	Confers a power on a Minister of the Crown to make regulations to amend schedule 9 (which sets out a list of the agreements under which such entitlements are created) for the purpose of an international agreement.
Clause 84 Pipeline notices	Confers a power on a Minister of the Crown to make regulations to change the financial thresholds.
Clause 86 notices, documents and information: regulations	Confers a power on a Minister of the Crown to make regulations to amend the number and content of different obligations to publish or produce notices, documents and other information.
Clause 88 Information relating to a procurement	Confers a power on a Minister of the Crown to make regulations to set a minimum requirement for how contracting authorities receive information and for contracting authorities to take information from the register to suppliers.
Clause 97 Recommendations following procurement investigations	Confers a power on a Minister of the Crown to make recommendations as to how to prevent future non-compliance.
Clause 98 Guidance	Confers a power on a Minister of the Crown to provide guidance to ensure that all

following procurement investigations	contracting authorities can learn from the non-compliance identified in the course of the investigation.
Clause 104 Disapplication of duty in section 17 of the Local Government Act 1988	Confers a power on a Minister of the Crown to make regulations to disapply the prohibitions on a case-by-case basis.
Clause 108 Power to disapply this Act in relation to procurement by NHS in England	Confers a power on a Minister of the Crown to make regulations in relation to devolved Scottish authorities (the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016).
Clause 109 Power to amend this Act in relation to private utilities	Confers a power on a Minister of the Crown to make regulations to amend the rules applicable to private utilities in order to remove regulations that are unnecessarily burdensome for private entities.
Clause 112 Power to make consequential, etc, provision	Confers a power on a Minister of the Crown to make regulations to repeal or modify those legislative provisions that will be in effect amended by the Procurement Bill and to make regulations concerning transitional provision.
Schedule 1 threshold amounts, paragraphs 2 and 3	Confers a power on a Minister of the Crown to make regulations to amend the thresholds (GPA-related thresholds, defence and security thresholds, LTR thresholds and the defence and security thresholds).
Schedule 1 threshold amounts, paragraph 5	Confers a power on a Minister of the Crown to make regulations to establish a list of entities that are to be considered central government entities.
Schedule 1 threshold amounts, paragraph 5	Confers a power on a Minister of the Crown to make regulations to establish a list of types of activity that count as “works”.
Schedule 2 exempted contracts, paragraphs 2 and 3	Confers a power on a Minister of the Crown to make regulations to provide for a provision about how a determination as to the percentage of activities carried out by a person is to be made.
Schedule 2 exempted contracts, paragraph 17	Confers a power on a Minister of the Crown to make regulations to enable “public passenger transport services” to be described in regulations.
Schedule 2 exempted Contracts, paragraph 32	Confers a power on a Minister of the Crown to make regulations about how a person’s affiliated turnover amount and total turnover amount.
Schedule 2 exempted contracts, paragraph 34	Confers a power on a Minister of the Crown to make regulations which provide for the description of a “qualifying air carrier”.
Schedule 4 utility activities, paragraph 1	Confers a power on a Minister of the Crown to make regulations as to how to calculate the turnover amount associated with the amount of gas and heat supplied to a network by a person.
Schedule 4 utility activities, paragraph 2	Confers a power on a Minister of the Crown to make regulations as to how to calculate the turnover amount associated with the amount of electricity supplied against all energy supplied by a person.
Schedule 4 utility activities, paragraph 3	Confers a power on a Minister of the Crown to make regulations as to how to calculate the amount of drinking water supplied by a person.
Schedule 4 utility activities, paragraphs 7 and 8	Confers a power on a Minister of the Crown to make regulations which set out the factors to be taken into account when making a decision, specify who is responsible for making determinations and who can apply for an exemption determination.

