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Delegated Powers and Law Reform Committee

Legislative Consent Memorandum: delegated powers relevant to Scotland in the Economic Activity of Public Bodies (Overseas Matters) Bill (UK Parliament legislation)

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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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Committee Membership



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Introduction

1. At its meetings on 26 September and 3 October 2023ⁱ, the Committee considered the delegated powers in the [Economic Activity of Public Bodies \(Overseas Matters\) Bill](#) (“the Bill”) that are exercisable within devolved competence.
2. The LCM is 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.
3. The Economic Activity of Public Bodies (Overseas Matters) Bill is a UK Government Bill introduced in the House of Commons by the Secretary of State for Levelling Up, Housing and Communities, the Rt Hon Michael Gove MP on 19 June 2023. The Bill is presently still progressing through the UK Parliament and is at report stage in the House of Commons.
4. The Bill consists of 17 clauses and one schedule. The provisions of the Bill extend and apply to Scotland. The stated purpose of the Bill is to prevent public bodies from considering a country or territory of origin or other territorial considerations in a way that indicates political or moral disapproval of a foreign state when making procurement and investment decisions.
5. The main provisions of the Bill are contained in clauses 1 - 4 and provide for:
 - a) Prohibition on disapproval of foreign state conduct;
 - b) Application to procurement and investment decisions;
 - c) Exceptions to the ban on disapproval of foreign state conduct; and
 - d) Prohibitions on Statements by public bodies indicating disapproval.
6. The lead committee for the Bill is the Economy and Fair Work Committee.
7. The main provisions of the Bill prohibit public bodies from taking account of the specified matters in the exercise of their procurement and investment functions. The policy is a matter for the lead committee. This committee is considering the delegated powers which the Bill confers on UK Government Ministers.
8. The UK Government has published a [Delegated Powers Memorandum](#) to accompany the Bill (the “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.
9. The Scottish Government lodged a [Legislative Consent Memorandum](#) (the “LCM”) for the Bill on 19 July 2023. The procurement of goods, services and works by public bodies is an area of law previously governed by EU Directives and currently

ⁱ On 3 October 2023, Rona Mackay MSP substituted for Stuart McMillan MSP.

subject to reform in the UK Houses of Parliament.

10. 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. The Scottish Government's reasons are explained at paragraphs 16 to 20 of the LCM, and can be summarised as follows:
 - a) Disproportionate and unnecessary nature of the Bill;
 - b) Limitations on the ability of Scottish Ministers to adopt a values-based approach to international engagement; and
 - c) The limitations the provisions will place on democratic expression and debate.
11. The delegated powers in the Bill in devolved areas are contained in clauses 14 and 15 and relate to procurement and local government. Clause 14 of the Bill includes the power to modify Scottish legislation. Regulations made by the UK Government under that power would not be subject to scrutiny by the Scottish Parliament. In the context of the implementation of the Bill it is unlikely to be used to substantively modify legislation within competence. Clause 15 is minor and technical to allow the provisions of the Bill to operate effectively.

Committee consideration of relevant powers in the Bill

Clause 14 – Relationship with procurement legislation

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Provision

12. Clause 14(6) confers a delegated power on the Secretary of State to make regulations about the relationship between this Bill and the Procurement Reform (Scotland) Act 2014 or any of the regulations under that Act (“Scottish procurement legislation”).
13. Specifically, the power will allow the Secretary of State to make provision in relation to Scottish procurement legislation for “any purposes similar to those of the preceding subsections of this section or paragraph 2 of the Schedule”. Only subsection (4) appears to be relevant, as the other provisions relate to matters which have no equivalent in Scottish procurement legislation.
14. The delegated power should accordingly be read with clause 14(4). That clause provides that the prohibition in clause 1 of the Bill will not prevent giving effect to the provisions of the Procurement Act 2023 about “excluded” and “excludable” suppliers. Those provisions apply in relation to procurements in England, and to reserved procurements.
15. The power in clause 14(6) therefore enables the Secretary of State to make regulations about the relationship of the Bill with Scottish procurement legislation, for a similar purpose. That purpose is to provide that clause 1 will not prevent giving effect to any provisions of Scottish procurement legislation about “excluded” and “excludable” suppliers.
16. This is a narrow power to provide that, in the event of any conflict arising between provisions in Scottish procurement legislation on “excluded” and “excludable” suppliers and clause 1 of the Bill, the provisions in Scottish procurement legislation should be given effect. If exercised in this way, it will make the law passed by the Scottish Parliament governing the grounds for excluding suppliers in procurements consistent with the law (to be passed) by the UK Houses of Parliament on the same topic.
17. Regulations made under this clause are subject to the affirmative resolution procedure.

Committee consideration

18. The DPM states at paragraph 49 that this power is necessary following discussions with the Scottish Government’s procurement team to deconflict the procurement law

regimes applicable in Scotland and the UK.

19. The LCM at paragraph 11 states that this is an unnecessary power for UK Ministers to make regulations in relation to the devolved area of procurement, rather than simply replicating the provisions of clause 14(4) in relation to the Scottish procurement legislation. The legislation which may be amended is the Procurement Reform (Scotland) Act 2014 and regulations made under it, such as the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016 and the Concession Contracts (Scotland) Regulations 2016.
20. The delegated power includes the power to amend Acts of the Scottish Parliament by subordinate legislation. There would be no formal role for the Scottish Parliament in effective scrutiny of regulations made to amend procurement legislation in exercise of this power.
21. The purpose for which the power may be exercised is limited, as it may only be used to make provision for a similar purpose to the provision made in the Bill to save UK procurement legislation in relation to excluded and excludable suppliers. Given that the power enables the amendment of Scottish primary and secondary procurement legislation by regulations laid in the UK Parliament, the Committee restates its general position in relation to powers in UK Bills.

22. The Committee's position in relation to powers in UK Bills is, in general terms, that:

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 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.

c. If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.

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.

23. **The Committee is content with the power conferred on the Secretary of State in relation to the implementation of the Bill, and that the regulations under this clause are subject to the affirmative resolution procedure.**
24. **The Committee draws this power to the attention of the lead committee.**

Clause 15 – Related changes to local government contracting restrictions

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative resolution

Provision

25. Clause 15(3) confers a power on the Secretary of State to avoid conflicts between this Bill and section 17 of the Local Government Act 1988.

Committee consideration

26. The DPM states at paragraph 53 that the power is necessary to ensure that the UK procurement law framework is coherent.
27. Section 17 of the Local Government Act 1988 (the “1988 Act”) generally prohibits local authorities from considering non-commercial matters in procurement decisions. The Explanatory Notes to the Bill at paragraph 71 state that the provision is to ensure that decision-making validated by regulations made under clause 3 of the Bill is not unlawful under these provisions.
28. The ban in the main provisions of this Bill would replace this. The proposed ban in this Bill is different for the following reasons:
- a. It covers investment and procurement decisions;
 - b. It is binding on the wider public sector, including Scottish Ministers; and
 - c. It focussed only on “territorial considerations” rather than the wider scope of non-commercial matters contained in section 17 of the 1988 Act.
29. The power contained in clause 15(3) is a narrow and technical power limited to consequential changes to provisions relating to procurement in the 1988 Act. The power is limited to excluding certain matters from the scope of section 17(5)(f) of the 1988 Act only to avoid conflict with provision made under the Bill.
30. **The Committee is content with the power conferred on the Secretary of State and that the regulations under this clause are subject to the affirmative resolution procedure.**

