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Delegated Powers and Law Reform Committee

Supplementary 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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Committee Membership



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Introduction

1. At its meeting on 21 February 2023, the Delegated Powers and Law Reform Committee considered the delegated powers that are exercisable within devolved competence in the [Procurement Bill](#) (“the Bill”).
2. The Committee considered the [Supplementary Legislative Consent Memorandum](#) (“Supplementary LCM”) for the Procurement 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.
3. The Supplementary 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”.
4. The lead committee is the Economy and Fair Work Committee.

Background to the Bill

5. The Bill is a UK Government Bill introduced in the House of Lords on 11 May 2022.
6. The original LCM lodged in relation to the Bill as introduced did not recommend that consent was given to the Bill. The Bill has passed through the House of Lords and is currently at Committee stage in the House of Commons. As the Bill has progressed through the UK Parliament it has been subject to amendment, and the DPLR Committee is now considering the Supplementary LCM lodged by the Scottish Government on 3 February 2023.
7. Public procurement in Scotland is currently governed by several sets of Regulations that implement EU Directives and they extend to all contracting authorities operating in Scotland, whether or not they are reserved. The UK procurement regulations generally 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.

Previous consideration of the LCM

8. The Committee previously considered the [Legislative Consent Memorandum](#) (“LCM”) on the Procurement Bill (“the Bill”) at its meeting on Tuesday 6 September and on Tuesday 4 October 2022.
9. The Committee also considered the LCM in relation to the Trade (Australia and New Zealand) Bill at the same time as it is connected to this Bill. The Procurement Bill, as enacted, is expected to provide a replacement general power in relation to the implementation of the procurement chapters of the free trade agreements which are contained in the Trade (Australia and New Zealand) Bill. A Supplementary LCM is also expected on the Trade (Australia and New Zealand) Bill to be considered by the Committee.
10. As part of its consideration of the LCM the Committee [wrote](#) to Edward Argar MP, the Minister for Cabinet Office and Paymaster General, following its meeting on 6 September, asking various questions in respect of the relevant powers in the Bill. No response was received in respect of this communication by the Committee. The Committee therefore considered and reported to the lead Committee following its meeting on 4 October, in the absence of additional information from the UK Government.
11. This Committee [reported](#) on the delegated powers in the Procurement Bill on 11 October 2022.

Legislative consent

12. The Legislative consent process is noted to be engaged by the following aspects of the Bill:
- Cross-border procurement
 - Scope and extent
 - Implementation of new trade agreements relating to procurement
 - Implementation of the outcomes of trade disputes relating to procurement

General update

13. The Supplementary LCM explains that the Scottish Government and UK Government have engaged in discussions on the provisions in the Bill, with significant work having been undertaken which will remain ongoing. The Supplementary LCM notes that it is in the interests of both governments to continue these discussions going forward.
14. Since the Committee has reported on the Bill it has progressed through Westminster. It is currently at Committee Stage in the House of Commons with a number of amendments having been tabled for debate on various dates fixed in February 2023. At the time of this Committee's consideration, the amendments relating to Implementation of the outcomes of trade disputes relating to procurement have not yet been debated and voted on, which is addressed below.
15. The Scottish Government has based its recommendations in the Supplementary LCM on the 4 aspects of the Bill highlighted above at paragraph 12, based on the UK Government amendments tabled as at 24 January 2023 being accepted (agreed to by the UK Parliament) and amending the Bill. As noted above, these amendments have been scheduled for debate at various dates during February and where updates are available on them they are provided below. As a result of the amendments tabled, it is now recommended by the Scottish Government that consent be given to some provisions of the Bill, with comment on each of the relevant provisions outlined in the section below.

Committee consideration - review of relevant powers

Cross border

Clause 111(3) (previously 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

Provisions

16. Clause 111 makes various provision for cross-border and joint procurement arrangements to be made through the making of subordinate legislation. Clause 111(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 111(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 111 can only be exercised by a Minister of the Crown.
17. Clause 111(3) is now a power conferred solely on the Scottish Ministers to amend Scottish regulations to allow all bodies covered by the Bill to access procurements under the Scottish regulations and to access joint procurements.
18. All three delegated powers in clause 111 are interconnected and, when exercised together, will set out the process for such procurements to clarify what regime and rules will be applied in each case. Regulations made by a Minister of the Crown or Scottish Ministers would be subject to affirmative procedure.

Committee consideration

19. The power in clause 111(3) has now been subject to amendments so it is no longer concurrently exercisable by both a Minister of the Crown and the Scottish Ministers, but solely exercisable by the latter.
20. The Scottish Government had a number of significant concerns arising from this power in the original LCM, considering the power to be deeper and broader than the intent behind it, noting that some of the drafting appeared to be defective, that the power was conferred unnecessarily on UK Ministers to amend the Scottish procurement legislation, and also that such matters would be better to appear on the face of the Bill.
21. The Supplementary LCM explains that earlier amendments made to the provisions of this clause of the Bill during its passage through Westminster altered the wording

which addressed concerns the Scottish Government had about the power being deeper and broader than the intent and also the defective drafting.

22. The amendments referred to in the supplementary LCM were agreed to on 9 February 2023 (amendments 70-73). These amendments address the remaining concerns raised in the original LCM further, the effect of which is:-
- Scottish Ministers solely have the power to amend the Scottish procurement legislation to regulate the award of contracts by reserved, Welsh and Northern Irish contracting authorities under devolved Scottish procurement arrangements;
 - Scottish Ministers can disapply elements of Scottish procurement legislation when a devolved Scottish authority is awarding contracts under a UK arrangement; and
 - the Procurement Reform (Scotland) Act 2014 is added to the definition of Scottish procurement legislation.
23. The Supplementary LCM recommends that consent be given. It bases this recommendation on these amendments being agreed to, the significant engagement that has taken place between the governments, and that there is detailed work ongoing to agree the precise nature of regulations which would be made under these powers.

24. On the basis that the amendments referred to in the supplementary LCM have been accepted to the Bill, the Committee is content with the powers conferred on Scottish Ministers in clause 111(3) of the Bill.

Additional delegated powers – including Scope and extent

25. The Bill contains a number of 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, which is different to the position with procurement presently where all procurements in Scotland by public bodies, whether they are reserved bodies or not, are managed through Scottish procurement arrangements. This Bill will alter that position.
26. The Bill does extend to Scotland, however, “devolved Scottish authorities” are specifically excluded so the effect is that the only bodies in Scotland whose procurement activities are regulated by the Bill would be cross-border bodies and those whose functions are wholly reserved. The Scottish Government, local authorities, universities, colleges and registered social landlords will all continue to be regulated by Scottish procurement legislation.
27. Consent was not previously recommended by the Scottish Government in relation to the general scope and extent of the Bill due to the broader concerns that existed in relation to the provisions of the Bill.
28. The Supplementary LCM explains that there has been progress made with regards

to the significant concerns held over how cross-border procurements would be managed which has been outlined in detail above at paragraphs 15 – 22. Whilst there are ongoing discussions, the Scottish Government considers that there is now an acceptable solution following amendments being made to how the cross border issue can be addressed and therefore the Scottish Government considers the approach in the Bill to scope and extent to be reasonable and is now recommending consent be given.

29. Whilst the Bill extends to Scotland as a whole, its effect is somewhat limited to Scottish procurement with it not applying to Scottish devolved bodies. Certain aspects of Scottish procurements will be altered by the Bill in that wholly reserved bodies in Scotland and cross-border procurements will be under the new UK procurement regime set up by this Bill.
30. The stated purpose of the Bill is to reform the UK's public procurement regime following its exit from the European Union, 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 and the approach, generally, is one which is considered reasonable, with many of the amendments discussed in this paper alleviating concerns regarding the general operation of the Bill.
31. On the basis that the amendments referred to in the Supplementary LCM have been accepted to the Bill, the Committee is content with the additional delegated powers conferred on a Minister of the Crown.

Implementation of new international trade agreements - non-discrimination

Clause 90 (previously 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

Provisions

32. The Bill confers a power on UK Ministers only to amend the list of international agreements set out in the Schedule which create obligations of non-discrimination that must be implemented in the UK so treaty state suppliers providing goods and services from outwith the UK, subject to those agreements, have the right to benefit from the UK procurement regime.
33. Clause 90 is a power conferred on both a Minister of the Crown and 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 those international agreements. Regulations made by a Minister of the Crown or Scottish Ministers would be subject to affirmative procedure.

Committee consideration

34. The agreement of international trade arrangements is a reserved matter, however, their implementation in devolved areas is not, with current Scottish regulations making explicit provision for non-discrimination.
 35. This power is one which remains concurrently exercisable by both a Minister of the Crown and the Scottish Ministers to ensure that suppliers with which there is a relevant international treaty are treated the same as suppliers from the UK. The effect of this power is that either a Minister of the Crown, or the Scottish Ministers, could implement obligations for the whole of Scotland in relation to procurement in Scotland by bodies not covered by the Bill, including 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 by a Minister of the Crown.
 36. The effect of this power is that either a UK Minister, or the Scottish Ministers, could exercise this power in a devolved area. Regulations made under this clause may be laid in the UK Parliament only where the power is exercised by a UK Minister. Should that happen there will be no opportunity for Parliamentary scrutiny within an area of devolved competence of the Scottish Parliament.
 37. The Supplementary LCM refers to amendments that have been tabled for debate which, the Scottish Government considers, will “link the powers considerably closer to the equivalent powers in relation to the rest of the UK and introduce a test of whether a measure is necessary in order to implement an agreement”. The Scottish Government welcomes these amendments, which it considers substantially address the concerns held in relation to the scope and breadth of the power that was outlined in the original LCM.
 38. There were also further tabled amendments to the Bill since the Supplementary LCM was lodged. One such amendment (amendment 102) sought to address the existing concerns discussed in the Supplementary LCM so that where a Minister of the Crown is exercising the power to make regulations that could amend primary and secondary Scottish procurement legislation, whenever passed, to ensure nondiscrimination of treaty state suppliers, they would be required to obtain the consent of Scottish Ministers before this could be exercised. This amendment was not accepted on 9 February 2023.
 39. The Scottish Government in the Supplementary LCM still does not recommend giving consent to this clause as it remains a concurrent power that can be exercised independently by a Minister of the Crown, despite this being in an area of devolved competence, with no requirement for consent of the Scottish Ministers to be obtained. This is considered to be unacceptable. The Scottish Government’s view is that there should be a statutory requirement to secure such consent, or the power should be conferred solely on the Scottish Ministers in relation to devolved matters.
40. The Committee refers back to its earlier position reported on 11 October 2022.

This position was:

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.

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.

Implementation of the outcomes of trade disputes relating to procurement

41. At the time of this Committee's consideration, this provision is not currently in the Bill as enacted or amended. The introduction of this provision is made by amendments NC11 and 83 which have yet to be debated.
42. The amended provision seeks to introduce a new clause that would allow, where there is a dispute in relation to procurement between the UK and another state, for regulations to be made by the appropriate authority or Scottish Ministers to make provision relating to procurement as considered appropriate in consequence of the dispute. This is drafted as a Henry VIII power so that regulations made under this power can amend primary legislation whenever passed.
43. Where this power is exercised by Scottish Ministers subsection (3) provides that any provision made must relate to procurement carried out by devolved Scottish authorities or under devolved Scottish procurement arrangements only.

Committee consideration

44. The power introduced by this amendment in its suggested format, is concurrently exercisable by both an appropriate authority and the Scottish Ministers, with limitations being placed upon the exercise of the power by Scottish Ministers so that any provision made must relate to procurement carried out by devolved Scottish authorities or under devolved Scottish procurement arrangements only.
45. The effect of this power, if added to the Bill, is that either a UK Minister, or the

Scottish Ministers, could exercise this power in a devolved area. Regulations made under this clause may be laid in the UK Parliament only where the power is exercised by a UK Minister. Should that happen there will be no opportunity for Parliamentary scrutiny within an area of devolved competence of the Scottish Parliament.

46. The Supplementary LCM explains that the Scottish Government agrees such a power would be a sensible to be delegated to Ministers, however, as drafted the power would be exercisable concurrently by either UK or Scottish Ministers, with no obligation on UK Ministers to secure the consent of Scottish Ministers before exercising it in relation to devolved matters, which is considered by the Scottish Government to be unacceptable. The Scottish Government's position is that either there should be a statutory requirement to secure such consent, or the power should be conferred solely on the Scottish Ministers in relation to devolved matters. The Scottish Government therefore does not recommend consent to this clause.

47. On the basis of the amendments discussed in this paper being made to the Bill, the Committee notes that the clause introduced by amendments NC11 and 83 will enable a UK Minister, by regulations, where there is a dispute in relation to procurement between the UK and another state, to make provision relating to procurement as considered appropriate in consequence of the dispute, including the amendment of primary legislation whenever passed; furthermore, the Committee:
- Notes that there is no statutory requirement for a UK Minister to obtain the Scottish Ministers' consent before exercising this power; and
 - reiterates the position that it agreed at its meeting on 22 November 2022 in relation to powers in UK bills conferred on UK Ministers in devolved areas, namely: -
 - (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 a UK Minister 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.

