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## **Economy and Fair Work Committee**

# **Report on the Legislative Consent Memorandums for the Procurement Bill and the Trade (Australia and New Zealand) Bill**



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# Economy and Fair Work Committee

To consider and report on matters relating to the economy falling within the responsibility of the Cabinet Secretary for Finance and the Economy.



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# The Procurement Bill

## Introduction

1. The [Procurement Bill](#) is a UK Government Bill introduced in the House of Lords on 11 May 2022.
2. The purpose of the Bill is to reform the United Kingdom’s public procurement regime following its exit from the European Union (EU).
3. The Bill had its first reading in the House of Lords on 11 May 2022 and its second reading on 25 May 2022. It has completed committee stage in the first house. The report stage is currently due to commence on 28 November 2022.

## Provisions of the Bill

4. The Bill aims to create a “simpler and more transparent system not based on transposed EU Directives”.<sup>1</sup>
5. The reforms are designed to comply with the current UK obligations stemming from international agreements such as the [World Trade Organisation Agreement on Government Procurement](#). The Bill will also introduce ‘future-proofing’ through delegated powers to allow the procurement regime to be updated as new international agreements are signed.
6. The Bill’s provisions extend to the whole of the UK, with the majority applying to English, Welsh and Northern Irish contracting authorities. In terms of the application in Scotland, the Bill will generally only apply to the procurement activities of cross-border or fully reserved bodies in Scotland. The explanatory notes state that the exceptions to this are in clauses 85 (treaty state suppliers: non-discrimination in Scotland) and 106<sup>i</sup> (powers relating to procurement arrangements) which—  
  
 make provision respectively for making regulations to ensure that suppliers that are “treaty state suppliers” (i.e. those which benefit from an international agreement relating to procurement) are not discriminated against by devolved Scottish authorities and for regulating cross-border procurements involving devolved Scottish authorities which would not otherwise be regulated by the core provisions in the Bill.<sup>1</sup>
7. The Bill covers—
  - public contracts: the award of contracts by most central government departments, their arms-length bodies and the wider public sector including local government, health authorities and schools;
  - utilities contracts: the award of contracts by utilities operating in the water,

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<sup>i</sup> Clauses 85 and 106 were originally clauses 83 and 103 prior to amendment in Grand Committee

- energy and transport sectors;
- concession contracts: contracts for the supply of works or services where at least part of the consideration for that supply is a right for the supplier to exploit the works or services; and
  - defence and security contracts.

## Devolved Competence

8. The UK Government notes in the Bill's explanatory notes that the general application of the Bill will require legislative consent from the Scottish Parliament. In the LCM, the Scottish Government agrees that the legislative consent process is engaged by three aspects of the Bill.
9. Under the terms of the [Sewel Convention](#), the UK Parliament will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament without consent.

## Legislative Consent Memorandum

10. A [Legislative Consent Memorandum](#) (LCM) was lodged by Kate Forbes MSP, Cabinet Secretary for Finance and the Economy, supported by Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise, on 25 May 2022.<sup>2</sup>
11. In its LCM, the Scottish Government notes three areas where legislative consent is engaged—
  - the regulation of procurement activities by reserved bodies in Scotland;
  - conferring a concurrently exercisable power on Scottish and UK Ministers to implement new trade agreements; and
  - cross border procurement.
12. Currently, procurement activities of all contracting authorities in Scotland, whether devolved or reserved, are covered by three sets of regulations collectively termed the "Scottish regulations"—
  - the [Public Contracts \(Scotland\) Regulations 2015](#) (S.S.I. 2015/446);
  - the [Utilities Contracts \(Scotland\) Regulations 2016](#) (S.S.I. 2016/49); and
  - the [Concession Contracts \(Scotland\) Regulations 2016](#) (S.S.I. 2016/65).
13. In the rest of the UK, procurement activities of contracting authorities are governed by separate regulations that, largely, do not apply to Scotland—
  - the [Public Contracts Regulations 2015](#) (S.I. 2015/102);

- the [Utilities Contracts Regulations 2016](#) (S.I. 2016/274); and
  - the [Concession Contracts Regulations 2016](#) (S.I. 2016/273).
14. The UK Government suggests that the Bill will bring clarity for contracting authorities about which regime each authority is subject to, avoiding the cost and complexity for contracting authorities who might have to apply different regimes to different procurement activities.
15. The Scottish Government does not recommend consent to the Bill as introduced. It agrees there is an argument that the Bill's approach to scope and extent (i.e. that reserved bodies should be subject to UK rather than Scottish regulations) is reasonable. However, the Scottish Government has "significant concerns" in relation to the scope and extent of the Bill legislating for procurements undertaken in Scotland within the competence of the Scottish Parliament; that the delegated powers are concurrently exercisable by UK and Scottish Ministers within devolved areas; and that the delegated powers are significantly broader than are required, without any consent mechanism in place.

## Concurrently exercisable powers

16. The Bill confers a concurrently exercisable power on Scottish and UK Ministers, in clause 85, to "make provision for the purpose of ensuring that treaty state suppliers are not discriminated against in the carrying out of devolved procurements".<sup>1</sup> This has been drafted as a [Henry VIII power](#),<sup>ii</sup> which means it confers the power to amend primary legislation, which includes an Act of the Scottish Parliament, whenever made.
17. While the Scottish Government accepts there is a practical need to update the list in the Schedules to the Scottish Regulations, it expresses concern that the power is significantly broader than is necessary, noting that—
- ” This is particularly the case given that it is drafted as a concurrently exercisable power – meaning that the UK Ministers could use this power without further consent being required.
18. The UK Government states in the [Delegated Powers Memorandum](#) that this power has been drafted in anticipation that the Scottish Parliament will, at some point, need to pass primary legislation in this area in the future. The Scottish Government's view however is that—
- ” should the Scottish Parliament elect to amend procurement Regulations by primary legislation in the future, then that would be the appropriate moment for the Scottish Parliament to consider whether a Henry VIII power should be delegated to the Scottish Ministers.<sup>2</sup>

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ii 'Henry VIII clauses' are clauses in a bill that enable ministers to amend or repeal provisions in an Act of Parliament using secondary legislation, which is subject to varying degrees of parliamentary scrutiny.



## Cross-border procurement

19. The LCM states that in relation to cross-border procurement, two issues arise—
- The Bill will create new procurement rules in the rest of the UK. This will mean that framework and similar agreements issued under either the Scottish or UK set of rules will not be compatible with the procurement rules in the other procurement regime. As a result, contracting authorities subject to the Scottish regulations will not be able to award a contract under a framework put in place under the other set of procurement rules, or vice versa.
  - The second area of concern is how a joint procurement exercise, involving contracting authorities based in Scotland and elsewhere in the UK, will decide which procurement rules will apply.
20. The Bill confers powers at clause 106 to deal with these issues through secondary legislation. The Scottish Government however, has raised four concerns relating to the drafting of the powers—
- ” • It confers powers on UK Ministers to amend the Scottish procurement legislation. There is no reason for the UK Ministers to hold this power, which entails real and significant policy choices, over which the Scottish Parliament would have a legitimate expectation of scrutiny;
  - The drafting of the powers conferred on UK Ministers appears to be broader than the explicit intent behind it, and therefore presents a risk of being used for wider regulation;
  - The drafting of the powers appears to be deeper than needed as it refers to the award of “contracts”, rather than to the award of “public contracts” – the latter being a defined term which relates only to contracts worth at least the financial thresholds and not otherwise excluded from regulation; and
  - Some of the drafting appears to be technically deficient, such as the references in associated clause 102 to contracting authorities being designated as the lead authority in a procurement exercise being carried out jointly by authorities from different jurisdictions. This concept is not defined or explained in the Bill. <sup>2</sup>
21. In light of all these concerns, the Scottish Government does not recommend consent to the Bill as introduced. The Scottish Government notes in the LCM its intention to work with the UK Government to address these concerns.

## Committee consideration

### Economy and Fair Work Committee

22. As lead Committee, the Economy and Fair Work Committee considered the LCM at its meeting on 5 October and took evidence from Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise. <sup>3</sup>

23. The Minister said it was a matter of regret that the UK Government had not engaged more fully when drafting the provisions that triggered the LCM and that had it done so, consent could potentially have been recommended. The Minister confirmed that discussions, at official level, are ongoing to try to address the concerns raised in the LCM. It was noted that these discussions have been "constructive" and the Minister was hopeful that improvements may be secured but "we are not there yet".<sup>3</sup>
24. On the issue of concurrent powers in clauses 85 and 106, where UK Ministers can lay regulations which change primary Scottish Legislation without the consent of the Scottish Parliament, the Minister cautioned that—
- ” we do not know whether it could have an impact, but it opens a door and what the UK Government chose to do with it would be a concern. We see issues because of the way in which the bill has been drafted and because it confers those powers. From our perspective, it is not acceptable for UK Government ministers to have the power to make changes to acts of the Scottish Parliament.<sup>3</sup>
25. The Committee notes that in January 2022, the UK and devolved governments published a [Common Framework on Procurement](#)<sup>iii</sup>. During regular official-level meetings, concerns had been expressed that the UK Government's approach to this Bill was "not necessarily compliant with the common framework's principles of respect for devolved competence" and that the ongoing discussions would be test of how the framework operates in practice.<sup>3</sup>

## **Delegated Powers and Law Reform Committee**

26. The Delegated Powers and Law Reform Committee (DPLRC) considered the delegated powers in the Bill relevant to Scotland at its meetings on 6 September and 4 October 2022. In its report on the LCM<sup>4</sup>, it highlighted a number of issues.

### **Clause 85 – Power to make provision for the purpose of ensuring that treaty state suppliers are not discriminated against in the carrying out of devolved procurements**

27. The DPLRC notes that this power is conferred on both UK Government and Scottish Ministers, and 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 UK or Scottish Ministers independently.
28. It also notes that there is no legal requirement on the UK Government to obtain the consent of Scottish Ministers before exercising this power in devolved areas, with no commitment in the accompanying documents that the consent of Scottish Ministers will be sought.

### **Clause 106(3) – Powers relating to procurement arrangements**

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<sup>iii</sup> [The Common Framework on Procurement established a common approach to procurement between the UK and devolved governments following exit from the EU.](#)

29. Clause 106 makes various provision for cross-border and joint procurement arrangements to be set out by subordinate legislation, with clause 106(3) enabling amendments to be made to 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.
30. In its report, the DPLRC again notes that there is no legal requirement on the UK Government to obtain the consent of Scottish Ministers before exercising this power in devolved areas. There is also no commitment in the accompanying documents that the consent of Scottish Ministers will be sought.

### **Additional Delegated Powers (Former EU Competence)**

31. The DPLRC notes that the Bill contains 53 delegated powers principally exercisable by UK Government Ministers in areas of former EU competence. The delegated powers in these clauses have no corresponding powers conferred on Scottish Ministers where they are exercisable within an area of devolved competence.
32. Under the Bill, 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.

### **DPLRC Conclusions**

33. The report sets out, at paragraph 19, the DPLRC's previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas—
  - ” (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.<sup>4</sup>
34. The DPLRC previously [wrote to the UK Government](#) 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. [In response](#), the Secretary of State for Levelling Up, Housing and Communities stated 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.”
35. Following its meeting on 6 September, the Committee [wrote to Edward Argar MP, Minister for Cabinet Office and Paymaster General](#), highlighting the position in the LCM regarding consent requirements, and the recent correspondence with the

Secretary of State for Levelling Up, Housing and Communities. At the time of writing, a response to this letter had not been received.

36. The DPLRC notes in its report that it could not conclude a view on the above issues without further information from the UK Government.

## Conclusions

37. **The Committee notes the issues raised by the DPLRC in its report.**
38. **The Committee considers that, in relation to the powers in clauses 85 and 106(3), the Scottish Parliament should have the opportunity to scrutinise the exercise of legislative powers within devolved competence. The Bill provides no formal means for the Scottish Parliament to do so, where regulations are laid by the UK Government that fall within devolved competence. The Committee is concerned at the potential consequences of this lack of scrutiny by the Scottish Parliament.**
39. **The Committee understands the Scottish Government is in ongoing discussion with the UK Government on this matter. The Committee recommends the Scottish Government seek, as part of these discussions, that—**
- **the powers are conferred solely on the Scottish Ministers in relation to devolved matters; or**
  - **that UK Ministers, when exercising the power in relation to devolved matters, should obtain the consent of Scottish Ministers.<sup>iv</sup>**
40. **The Committee considers that, in relation to the additional delegated powers, it is unable to conclude, without further information, whether the Scottish Parliament should have the opportunity to scrutinise the exercise of legislative powers within devolved competence. The Bill provides no formal means for the Scottish Parliament to do so where regulations are laid by the UK Government that fall within devolved competence. The Committee is concerned at the potential consequences of this lack of scrutiny by the Scottish Parliament.**
41. **The Committee notes the LCM and requests that the Scottish Government keep the Committee updated on discussions.**
42. **More generally, the Committee notes that the Common Framework on Procurement could have provided a mechanism for these issues to have been resolved before reaching this stage. The Committee draws this report to the attention of the Secretary of State for Scotland and asks the UK Government to comment on the suggestion by the Scottish Government that its approach to this Bill has not been compliant with the common framework's principles of respect for devolved competence.**

<sup>iv</sup> Jamie Halcro Johnston and Graham Simpson dissented

43. **The Committee observes that fundamental issues of concern are arising more frequently in LCMs. There is an increased resource implication for the Scottish Government and the Scottish Parliament in identifying these concerns and then seeking to address them. It is regrettable that full engagement by the UK Government, on the areas of concern, does not appear to have taken place at the time this Bill was being drafted.**

# The Trade (Australia and New Zealand) Bill

## Introduction

44. The [Trade \(Australia and New Zealand\) Bill](#) is a UK Government Bill introduced in the House of Commons on 11 May 2022.
45. The purpose of the Bill is to confer the necessary powers to implement the procurement chapters of the UK's free trade agreements with Australia and New Zealand.
46. The Bill had its first reading in the House of Commons on 11 May 2022 and its second reading on 6 September 2022. It has completed committee stage in the first house. A date for the commencement of the report stage has yet to be announced.

## Provisions of the Bill

47. The Trade (Australia and New Zealand) Bill is a relatively short Bill intended to confer the necessary powers to implement the procurement chapters of the UK's free trade agreements (FTAs) with Australia and New Zealand.
48. The Bill confers a power with the following purposes—
  - to ensure that the UK can implement in domestic law the government procurement obligations in the UK-Australia FTA and UK-New Zealand FTA; and
  - to make changes to domestic law that apply generally and not only in relation to the operation of the UK-Australia FTA.
49. The key provision is clause 1 which confers a power to implement the government procurement chapters in the FTAs. According to the Bill's explanatory notes—
  - ” Clause 1 provides a power for appropriate authorities to make regulations for two purposes:
    - a. Subsection (1)(a) allows an appropriate authority to make regulations for the purpose of implementing the government procurement Chapters in the FTAs.
    - b. Subsection (1)(b) allows an appropriate authority to make regulations for the purpose of making other changes for matters arising out of, or related to, the government procurement Chapters in the FTAs.<sup>5</sup>
50. The power in clause 1 is conferred on both UK and Scottish Ministers in respect of Scotland. However, there is no requirement on UK Ministers to seek the consent of the Scottish Ministers before exercising the power in areas of devolved competence.

51. The Bill, as enacted, is expected to be repealed by the UK Procurement Act if that Act is passed.

## Devolved Competence

52. The UK Government notes in the Bill's explanatory notes that the Bill extends and applies to the whole of the UK and that legislative consent is sought from the Scottish Parliament. In the LCM, the Scottish Government agrees that the legislative consent process is engaged as the Bill "makes provision applying to Scotland for purposes within the legislative competence of the Parliament, and alters the executive competence of the Scottish Ministers." <sup>6</sup>
53. Under the terms of the [Sewel Convention](#), the UK Parliament will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament without consent.

## Legislative Consent Memorandum

54. A [Legislative Consent Memorandum](#) (LCM) was lodged by Kate Forbes MSP, Cabinet Secretary for Finance and the Economy, supported by Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise, on 13 June 2022.
55. In its LCM, the Scottish Government states that the legislative amendments required to implement the free trade agreements "are relatively minor and technical amendments to domestic procurement legislation in Scotland (as well as in the rest of the UK)" <sup>6</sup> and that the amendments needed are expected to have minimal impact on existing procurement practice in Scotland.
56. The Scottish Government notes two concerns however arising from the way that clause 1 of the Bill has been drafted. The LCM notes that—
- clause 1 confers power concurrently on Scottish and UK Ministers, allowing UK Ministers to make secondary legislation in devolved areas without being required to seek the consent of Scottish Ministers; and
  - the power provides for the implementation of the FTAs as they may be amended in the future. This avoids the need for further primary legislation if the agreements are refreshed, but is at the cost of the Scottish Parliament not knowing what those future amendments might be at the point of giving its consent.
57. The Scottish Government notes, in relation to their second concern that—
- ” This seems a particularly unnecessary aspect to the power given that the agreements have only been very recently signed, and that this Bill is expected to be repealed by the Procurement Act, the Bill for which was also introduced on 11 May <sup>6</sup>
58. The Scottish Government does not recommend consent to the Bill as introduced.

The LCM states—

” Whilst there is a need for legislation to implement these agreements, and there is an efficiency argument to be made for the possibility of these relatively minor aspects of implementation of these agreements being made by UK Ministers in one pan-UK statutory instrument, there is fundamentally no reason why the UK Ministers need to hold this power in relation to devolved Scottish procurement.

59. It then continues—

” In the absence of a requirement for UK Ministers to seek the consent of the Scottish Ministers before exercising this power in relation to Scotland, the Scottish Government does not recommend that the Scottish Parliament consents to this Bill as it is drafted.<sup>6</sup>

60. The LCM suggests that if the UK Government wishes to create delegated powers to implement trade agreements, then these powers should be conferred solely on 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. Alternatively, the Scottish Government suggests the necessary legislative amendments could be made on the face of the Bill, rather than by secondary legislation.

## **Committee Consideration**

### **Economy and Fair Work Committee**

61. As lead Committee, the Economy and Fair Work Committee considered the LCM at its meeting on 5 October and took evidence from Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise.<sup>3</sup>
62. The Minister reiterated the stance taken in the LCM that powers in the Bill are drafted "too broadly and will be conferred concurrently on UK ministers as well as Scottish ministers with no requirement on UK ministers to secure the consent of Scottish ministers before exercising it in devolved areas".<sup>3</sup>
63. The Minister confirmed that discussions at official level are ongoing with the UK Government to try to address the concerns raised in the LCM but that agreement has not yet been reached.
64. The Minister raised concerns around how the Bill would interact with public sector procurement in Scotland, noting that the Bill gives UK Ministers powers to make changes to decisions taken by the Scottish Government and in Scottish procurement legislation without consent.

### **Delegated Powers and Law Reform Committee**

65. The DPLRC considered the delegated powers in the Bill relevant to Scotland at its



meetings on 6 September and 4 October 2022. In its report on the LCM,<sup>7</sup> it highlighted a number of issues.

66. Following its meeting on 6 September, the DPLRC [wrote to Kemi Badenoch MP, Secretary of State for International Trade and President of the Board of Trade](#), asking various questions about clause 1 of the Bill. The Committee had not received a response to this letter when it considered and agreed its report. However, [a response was subsequently received from James Duddridge MP, Minister for International Trade](#) on 7 October. The text of this letter is included in the Annexe to the [DPLRC report](#).

### Clause 1 – Power to implement government procurement Chapters

67. The DPLRC sought further information as to why the UK Government considered it appropriate for the regulation making power in clause 1 to be sought rather than a provision implementing the Free Trade Agreements being set out on the face of the Bill.
68. In his response of 7 October to the DPLRC's letter, the Minister for International Trade stated that this delegated power is appropriate in this context to allow for timely legislative implementation of procurement obligations under the FTAs, and also to allow for subsequent implementation of any adjustments made to the agreements—
- ” 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.<sup>8</sup>
69. In its report, produced before this response was received, the DPLRC noted that it would have been preferable for the necessary legislative amendments to implement the Free Trade Agreements to be made on the face of the Bill, rather than by regulations under the power conferred in clause 1 of the Bill.

### Scope of the power

70. The DPLRC sought further information on why the UK Government considered it appropriate that the regulation-making power in clause 1 of the Bill also applied to the implementation of future amendments to the Free Trade Agreements, particularly as it is expected that the power will be repealed when the Procurement Bill comes into force. It noted that the Scottish Parliament may not know what any future amendments might be at the point of considering whether to consent to the Bill.
71. The DPLRC reported that it 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.
72. In his subsequent response of 7 October to the DPLRC's letter, the Minister for International Trade stated that, as it was unclear when the Procurement Bill would complete its passage through the UK Parliament, this approach would allow for quicker implementation of the UK-Australia and UK-New Zealand FTAs but avoid duplicate powers existing in perpetuity.

73. With regards to the second part of the question asked by the DPLRC on future amendments, the Minister for International Trade stated that—

” 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.<sup>8</sup>

### **Parliamentary procedure**

74. The DPLRC questioned whether the choice of negative procedure was appropriate for the powers to implement the Free Trade Agreements. In its letter to the UK Government, it asked whether, if a regulation-making power was to be taken, instead of provision being made on the face of the Bill, regulations made under the power should more appropriately be subject to the affirmative procedure.

75. In his response, the Minister for International Trade justified the use of the negative procedure, as the UK Parliament would have already scrutinised the FTAs before secondary legislation was made. He also referred to the length of time the power is likely to be in force. The response also noted that any changes to the FTAs are expected to be minor and technical, and would therefore not justify the parliamentary time required for an affirmative procedure.<sup>8</sup>

76. In its report, which was produced before the response was received, the DPLRC concluded that if the power were to be taken, affirmative procedure would afford the Parliament the appropriate opportunity to conduct enhanced scrutiny of regulations made by the Scottish Ministers implementing the FTAs.

### **UK Ministers' power in devolved areas**

77. Similar to the approach taken on the Procurement Bill LCM (see above), the DPLRC wrote to the UK Government setting out its previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas.

78. The DPLRC's letter also noted that it had previously [written to the UK Government](#) about scrutiny of delegated powers in UK Parliament bills conferred on UK Ministers in devolved areas, and the application or otherwise of SI Protocol 2. [In response](#), the Secretary of State for Levelling Up, Housing and Communities stated 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.”

79. In its letter to the UK Government of 7 October, the DPLRC highlighted this previous correspondence and its position with regards to powers conferred on UK Ministers in devolved areas, and asked the UK Government—

- why it considers 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;
- why it 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; and
- whether it 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.

80. In response, the Minister for International Trade stated that the concurrent power is an efficient way of making secondary legislation to implement the procurement Chapters in both the UK-Australia and UK-New Zealand FTAs. The Minister noted that it allows for either a Scottish or UK minister to make secondary legislation when it is practical to do so, and that the same approach was taken with the Trade Act 2021.<sup>8</sup>
81. On the DPLRC's second question on the consent of Scottish Ministers, the Minister stated that—
- ” Placing a requirement to obtain consent in statute risks undermining the devolution statutes which enshrine international relations as a reserved matter ... Whilst in practice the UK Government does engage with [Devolved Administrations] on the reserved matter of international relations, it is important that the legal position of international relations as a reserved matter is preserved.<sup>8</sup>
82. While international relations are reserved by paragraph 7 in Part 1 of Schedule 5 of the Scotland Act 1998, observing and implementing international obligations is devolved.
83. On the DPLRC's final question on amendments to the Bill, the Minister reiterated that the powers are exercisable concurrently, meaning that they are open to both the UK and Scottish governments to use. He recognised however, concerns about the appropriate use of these concurrent powers and stated that—
- ” 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 [Devolved Administration] 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.<sup>8</sup>
84. In its report, the DPLRC noted that “there is no requirement to obtain the consent of the Scottish Ministers”. Despite this political commitment, in the absence of any consent requirement there is no guarantee the scrutiny process set out in SI Protocol 2 would apply.

## Conclusions

85. The Committee notes the UK Government's role in negotiating free trade deals but agrees it is more appropriate for a provision to implement the Free Trade Agreements to be set out on the face of the Bill rather than relying on secondary legislation. The Committee recommends that the Scottish Government press the UK Government on this point as part of their ongoing discussions.

86. The Committee shares the DPLRC's concerns about the scope of the power in clause 1 also applying to the implementation of future amendments to the Free Trade Agreements, especially given that the powers are expected to be repealed upon the passing of the Procurement Bill. Notwithstanding the more general recommendation above on the appropriateness of the power, the Committee recommends that the Scottish Government press the UK Government on this point as part of their ongoing discussions.

87. The Committee agrees with the DPLRC that, should a delegated power be taken rather than provision being made on the face of the Bill, and should Scottish Ministers make regulations implementing the Free Trade Agreements under that power, the affirmative procedure would be more appropriate to allow the Parliament the opportunity to conduct enhanced scrutiny of regulations. The Committee recommends that the Scottish Government address this as part of their ongoing discussions with the UK Government.

88. The Committee notes that the Scottish Government is currently in discussions with the UK Government on potential amendments to the Bill. Subject to the more general recommendations on the appropriateness and scope of the power above, the Committee recommends the Scottish Government seek, as part of these discussions, amendments to the Bill to ensure either that—

- power is conferred solely on the Scottish Ministers in relation to devolved matters; or
- the UK Ministers when exercising the power in relation to devolved matters obtain the consent of the Scottish Ministers.<sup>v</sup>

89. In relation to this second option, the Committee notes that the UK Government has stated that it does not intend to make regulations in areas of devolved competence without the consent of the relevant devolved administrations. The Committee however shares the concerns raised by the

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<sup>v</sup> Jamie Halcro Johnston and Graham Simpson dissented

**Scottish Government in its LCM, and during the evidence session with the Minister, that there is no requirement on the face of the Bill for the UK Government to obtain consent, were it to make such regulations. With a view to paving the way for the scrutiny process set out in SI Protocol 2 to apply to the exercise by UK Ministers of the power in clause 1 in devolved areas, the Committee agrees that the legislation should require the UK Government to obtain the consent of the devolved administrations, rather than simply relying on the UK Government's assurances that it will do so.**

90. **The Committee recommends the Scottish Government seeks that any provisions affecting the devolved powers of Scottish Ministers be on the face of the Bill and not treated as secondary legislation, and that consent of this Parliament sought for any use of those provisions.**
91. **The Committee requests that the Scottish Government keep the Committee updated on the outcome of its discussions.**

# **Conclusions on both Legislative Consent Memorandums**

- 92. The Committee notes that most of the LCMs lodged by the Scottish Government share a common theme. In almost all recent cases, the Scottish Government has not recommended consent due to provisions that allow UK Ministers to make regulations in areas of devolved competence without the consent of the relevant devolved administrations.**
- 93. The Committee considers that there should be a means for the Scottish Parliament to scrutinise regulations laid by the UK Government that fall within devolved competence.**
- 94. Given the Parliamentary time and resources required to scrutinise LCMs, the Committee strongly recommends that the UK Government include provision for a scrutiny role for devolved administrations where bills include provisions that allow UK Ministers to make regulations in areas of devolved competence. This would not only mitigate disagreements around consent, but would also reduce the cost to the public purse of the LCM procedure.**
- 95. The Committee draws this recommendation to the attention of the Secretary of State for Scotland and the Constitution, Europe, External Affairs and Culture Committee.**

- [1] House of Lords. (2022, May 11). Procurement Bill [HL] (HL Bill 4) Explanatory Notes. Retrieved from <https://bills.parliament.uk/bills/3159/publications#collapse-publication-explanatory-notes>
- [2] The Scottish Government. (2022). Legislative Consent memorandum: Procurement Bill. Retrieved from <https://www.parliament.scot/bills-and-laws/legislative-consent-memorandums/procurement-bill>
- [3] Economy and Fair Work Committee. (2022, October 5). Official Report. Retrieved from <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/EFW-05-10-2022?meeting=13936>
- [4] Delegated Powers and Law Reform Committee. (2022, October 11). 49th Report, 2022 (Session 6). Legislative Consent Memorandum: delegated powers relevant to Scotland in the Procurement Bill (SP Paper 238). Retrieved from <https://digitalpublications.parliament.scot/Committees/Report/DPLR/2022/10/11/0a08d412-990d-401c-97ff-1195c5188faf#/Introduction>
- [5] House of Commons. (2022, May 11). Trade (Australia and New Zealand) Bill - Explanatory Notes. Retrieved from <https://bills.parliament.uk/bills/3152/publications#collapse-publication-explanatory-notes>
- [6] The Scottish Government. (2022, June 13). Legislative Consent Memorandum: Trade (Australia and New Zealand) Bill. Retrieved from <https://www.parliament.scot/bills-and-laws/legislative-consent-memorandums/trade-australia-and-new-zealand-bill>
- [7] Delegated Powers and Law Reform Committee. (2022, October 11). 50th Report, 2022 Legislative Consent Memorandum: delegated powers relevant to Scotland in the Trade (Australia and New Zealand) Bill. Retrieved from <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee/correspondence/2022/delegated-powers-on-legislative-consent-memorandum>
- [8] Department for International Trade. (2022, October 7). Letter from the Minister for International Trade to the Convener of the DPLR Committee. Retrieved from <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee/correspondence/2022/minister-for-international-trade-response-on-the-trade-bill>

**Economy and Fair Work Committee**

Report on the Legislative Consent Memorandums for the Procurement Bill and the Trade (Australia and New Zealand) Bill, 11th Report, 2022 (Session 6)



