

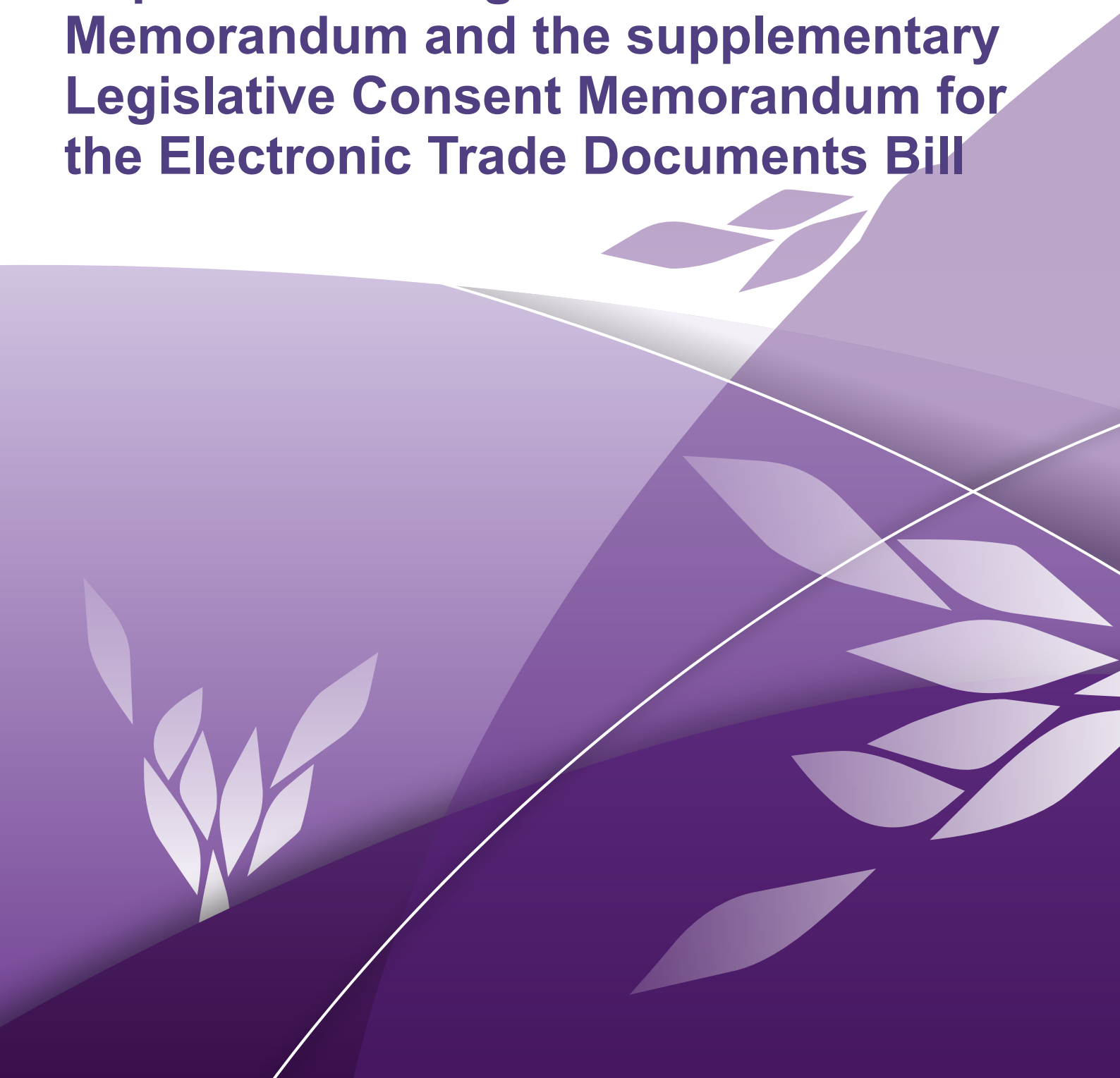


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## **Economy and Fair Work Committee**

# **Report on the Legislative Consent Memorandum and the supplementary Legislative Consent Memorandum for the Electronic Trade Documents Bill**



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# Economy and Fair Work Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Wellbeing Economy, Fair Work and Energy with the exception of matters relating to energy; and on matters relating to just transition within the responsibility of the Cabinet Secretary for Net Zero and Just Transition.



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# Committee Membership



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**Deputy Convener**  
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**Maggie Chapman**  
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**Jamie Halcro Johnston**  
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**Graham Simpson**  
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**Colin Smyth**  
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# Introduction

1. [The Electronic Trade Documents Bill](#) was introduced in the House of Lords on 12 October 2022. In accordance with standing orders (Rule 9B.3.1), a legislative consent memorandum (LCM) would normally have been lodged by 26 October 2022. On 25 October, the Minister for Parliamentary Business wrote to the Presiding Officer advising that an LCM would be required, further analysis of the detail of the delegated powers was taking place and an LCM would be progressed as soon as possible.
2. The Scottish Government lodged [the LCM](#) on 16 May 2023. The Parliamentary Bureau referred the LCM to this Committee on 30 May 2023. Before the Committee had considered the LCM, the Scottish Government lodged a [supplementary memorandum](#).

# The provisions in the Electronic Trade Documents Bill

3. The Bill's primary objective is to modernise trade processes by allowing certain trade documents, in electronic form, to be recognised in law and have the same legal status as paper versions of the same document. Businesses will have the choice whether to use electronic or paper documents.
4. The UK Government states that the Bill will—
  - reduce transaction costs associated with paper trade documents by reducing resourcing and operational costs, and increasing productivity;
  - increase efficiency and encourage business growth by facilitating the development of digital products and services;
  - increase environmental benefits due to a reduction in paper documents; and
  - increase security and transparency in documentation, and greater resilience of systems.

# Legislative Consent Memorandum and supplementary Memorandum

5. The Bill applies to Scotland in its entirety. The Scottish Government is supportive of the overarching purpose of the Bill; to simplify and modernise trade processes. However, as introduced, the Bill granted UK Ministers sole power to make secondary legislation in devolved areas.
6. The Scottish Government's position in the initial memorandum was that it could not recommend that the Scottish Parliament give legislative consent to the Bill. It advised it was continuing discussions with the UK Government.
7. On 7 June, [the Minister for Small Business, Innovation, Tourism and Trade informed the Committee](#) that the United Kingdom Government had [tabled amendments](#) to the Bill. The Minister advised that the Scottish Government was reviewing its position with the intention of submitting a supplementary memorandum.
8. The view of the Scottish Government is that the amendments represent improvement to the Bill as introduced. The amendments tabled would confer powers on the Scottish Ministers in devolved areas and provide a parallel optional joint instrument-making procedure. However, the UK Government is still able to make regulations in devolved areas and there is still no requirement for Scottish Ministers' consent on the face of the Bill. Nevertheless, the Scottish Government now recommends that the Parliament grant legislative consent to this Bill for the following reasons—
  - The policy objective of the Bill is strongly supported by both the Scottish Government and stakeholders;
  - There is no current legislative opportunity at Holyrood to make equivalent provision for Scotland, and any such legislation would not be as comprehensive as the UK Bill;
  - The power involved is extremely limited, and unique to this law reform Bill; and
  - The aim is to ensure consistency in a mutually agreeable and workable way and that, in practice, it is highly unlikely for Scottish Ministers to want different arrangements for trade documents to apply in Scotland. <sup>1</sup>
9. The motion to be lodged by the Cabinet Secretary for Wellbeing, Economy, Fair Work and Energy, is—
  - ” That the Parliament agrees that the relevant provisions of the Electronic Trade Documents Bill, introduced in the House of Lords on 12 October 2022 and subsequently amended, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament. <sup>1</sup>



# Committee Consideration

## Economy and Fair Work Committee

10. At its [meeting on 14 June 2023](#), the Committee took evidence on the initial and supplementary LCM from Richard Lochhead, Minister for Small Business, Innovation, Tourism and Trade.
11. The Minister acknowledged and apologised for the delay in lodging the LCM and said—
  - ” With the benefit of hindsight, had we known it would take this long to conclude discussions with the UK Government, we would have lodged an LCM much earlier.
12. The Committee noted the Scottish Government's revised position on consent and its reasons. It questioned the Minister about LCMs on other Bills where the recommendation had been to withhold consent on the basis of UK Ministers having powers to make regulations in devolved areas, without consent from Scottish Ministers. In the case of this Bill, the Minister advised he had received assurance from the UK Government that it would only use the power in extreme circumstances. The Minister undertook to keep the Committee informed should those circumstances arise.
13. The Minister advised that the Scottish Government considers every Bill on its merits. In the case of this particular Bill, the conclusion of the Scottish Government was that because this is a technical and non-controversial law reform Bill, there were advantages in ensuring common arrangements for trade documents. The Scottish Government's reasons are set out in more detail in the supplementary LCM.

## Delegated Powers and Law Reform Committee

14. The Delegated Powers and Law Reform Committee (DPLRC) considered the LCM at its meeting on 30 May 2023. It wrote to both the [Secretary of State for Science, Innovation and Technology](#) and the [Cabinet Secretary for Wellbeing Economy, Fair Work and Energy](#), seeking clarification on clause 5(2)(b) in the Bill. The DPLRC then considered responses and the [supplementary LCM](#) at its meeting on 20 June.
15. The [report by the DPLRC](#) notes that the clause 5(2)(b) of the Bill creates a power to exclude a type of document or instrument from the scope of clauses 1 to 4 of the Bill. This is a power conferred on the Secretary of State and the Scottish Ministers acting separately or jointly, subject to affirmative procedure.
16. The DPLRC recognises that trade crosses territorial and legal boundaries which may impact on both reserved and devolved matters. The DPLRC considers that it is reasonable that the Secretary of State has a power to make provision which applies across legal jurisdictions. It noted the amendments to clause 5 which now enable the Scottish Ministers to make provision which would be within the legislative competence of the Scottish Parliament if acting alone, or where appropriate, to do so jointly with the UK Government.

17. The DPLRC notes that the UK Government is still able to make regulations within devolved competence action alone but subject to the consultation in mechanism in clause 5(4). It notes there is still no statutory requirement for the Scottish Ministers' consent in these circumstances.
18. The DPLRC also notes that if a consent requirement were included in the Bill, the process for notification to the Scottish Parliament set out in Statutory Instrument Protocol 2 ([SI Protocol 2](#)) would not apply. The Scottish Government stated that SI Protocol 2, as it currently stands, only applies to SIs that include provisions that are within devolved competence and formerly within the competence of the EU. The Scottish Government advised that SI Protocol 2 is currently under review.
19. In conclusion, the DPLRC accepted the delegated power in principle and was content that its exercise would be subject to the affirmative procedure.
20. Nevertheless, the DPLRC restated its position, as agreed in November 2022, in relation to delegated powers in UK Bills exercised in devolved areas which 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 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) 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.
  - 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.
21. The DPLRC noted that in order to have sight of how the power in this Bill is exercised by the UK Government, the Scottish Parliament will be reliant on information provided by governments. The DPLRC also noted the Minister for Small Business, Innovation, Tourism and Trade's undertaking to keep this Parliament informed of developments in this area.

# Conclusion

22. **Standing Order Rule 9B.3 requires that for any UK Government Bill that is a relevant Bill on introduction, a legislative consent memorandum should normally be lodged no later than two weeks after introduction. The Committee notes that this LCM was lodged more than seven months after the Bill's introduction. It was then shortly followed by a supplementary LCM. The Committee acknowledges that this Bill is technical and non-controversial and would simply observe, more generally, that the purpose of the Rule is to enable scrutiny of the Scottish Government's position and to ensure sufficient time is available to reach an informed position on consent.**
23. **The Committee notes the conclusions of the Delegated Powers and Law Reform Committee and shares its general concerns about the lack of opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.**
24. **Recognising that this particular Bill is technical and non-controversial and the undertaking by the Minister for Small Business, Innovation, Tourism and Trade to keep the Parliament involved of developments, the Committee recommends to the Parliament that the Scottish Government's motion be agreed to.**

## **Economy and Fair Work Committee**

Report on the Legislative Consent Memorandum and the supplementary Legislative Consent Memorandum for the Electronic Trade Documents Bill, 5th Report, 2023 (Session 6)

- [1] Scottish Government. (2023, June 13). Supplementary Legislative Consent Memorandum, Electronic Trade Documents Bill. Retrieved from <https://www.parliament.scot/-/media/files/legislation/bills/lcms/electronic-trade-documents-bill/supplementary-legislative-consent-memorandum.pdf>



