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Economy and Fair Work Committee

Report on the supplementary Legislative Consent Memorandum for the Procurement 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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Introduction

1. The [Procurement Bill](#) (the Bill) is a UK Government Bill introduced in the House of Lords on 11 May 2022.
2. The Scottish Government lodged an initial [Legislative Consent Memorandum](#) (LCM) on 25 May 2022. The Committee took evidence from Ivan McKee, Minister for Business, Trade, Tourism and Enterprise on [5 October 2022](#) and published its report on [21 November 2022](#).
3. Following amendments to the Bill agreed in the House of Lords and House of Commons, and assurances provided by the UK Government, [a supplementary LCM](#) was lodged by the Scottish Government on 3 February 2023.
4. The Bill is now at committee stage in the House of Commons (second house), following which it will move to report stage, the final amending stage by which the Parliament must express a view.

The Procurement Bill

5. The Bill aims to reform the UK's public procurement regime to create a "simpler and more transparent system not based on transposed EU Directives".¹ The Bill will, for the most part, only apply in Scotland to the procurement activities of reserved bodies.

The Scottish Government's position in the initial LCM

6. The Scottish Government noted in its initial LCM three areas where legislative consent was 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.
7. The Scottish Government did not recommend consent to the Bill as introduced. It said there was 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) was reasonable. However, the Scottish Government had "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 were concurrently exercisable by UK and Scottish Ministers within devolved areas; and that the delegated powers were significantly broader than were required, without any consent mechanism in place.

Committee consideration

8. In its previous report, the Committee noted the Scottish Government's intention to seek amendments. The Committee specifically recommended that, in relation to the issue of concurrent powers, the Scottish Parliament should have the opportunity to scrutinise the exercise of legislative powers within devolved competence, for which the Bill, as introduced, provided no formal means to do so.²
9. The Committee also recommended that—
 - powers are conferred solely on the Scottish Ministers in relation to devolved matters; or
 - UK Ministers, when exercising the power in relation to devolved matters, should obtain the consent of Scottish Ministers.ⁱ

Supplementary LCM and amendments to the Bill

10. The Bill is currently at Committee Stage in the House of Commons.
11. A number of amendments lodged address some of the issues highlighted by the Scottish Government in its initial LCM.
12. It is noted in the supplementary LCM however that some issues are still outstanding. The Scottish Government therefore recommends that partial consent be given to the Bill.

Areas where consent is recommended

Cross-border procurement

13. A concurrent power was originally conferred on both UK and Scottish Ministers to amend Scottish procurement regulations to regulate the award of contracts under the Scottish procurement regime by reserved, Welsh, and Northern Irish contracting authorities. The Scottish Government now indicates that, as amendment 70 now confers this power solely on Scottish Ministers, it is now content to give consent.
14. This amendment was agreed to in committee at the House of Commons on 9 February 2023.

Scope and extent

15. The Scottish Government now indicates that it is content to give consent to the scope and extent provisions in the Bill in light of other agreements made.

ⁱ Jamie Halcro Johnston and Graham Simpson dissented.

Areas where consent is not recommended

16. There are still two areas of the Bill that the Scottish Government does not consent to—

Implementation of new trade agreements relating to procurement

17. Clause 90 confers concurrent powers on both UK and Scottish Ministers to “make a provision for the purpose of ensuring that treaty state suppliers are not discriminated against in the carrying out of devolved procurements”.¹
18. In the original LCM, the Scottish Government expressed concern that there was no requirement on UK Ministers to secure the consent of Scottish Ministers before exercising this power in relation to devolved matters. The LCM also noted that this was drafted as a Henry VIII power, which meant it conferred the power to amend primary legislation, which includes an Act of the Scottish Parliament, whenever made.
19. The supplementary LCM notes that amendments lodged but not yet debated, address some of the concerns around the scope and breadth of these powers, but still do not address the issue of consent where UK Ministers exercise this power in relation to devolved matters. The Scottish Government therefore does not recommend consent to this clause.

Implementation of the outcomes of trade disputes relating to procurement

20. Amendments NC11 and 83 seek to insert a new clause which would allow for the implementation of the outcome of trade disputes relating to procurement. In relation to Scotland, this would provide a concurrent power for UK or Scottish Ministers to make this provision. This clause has been accepted and added to the Bill.
21. The Scottish Government agrees in the supplementary LCM that this power should be delegated to Ministers. It notes again however that this is a concurrent power, with no requirement for UK Ministers to secure the consent of Scottish Ministers before exercising it in relation to devolved matters. The supplementary LCM states 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.³
22. It is for this reason that the Scottish Government does not recommend consent to this clause of the Bill.

Scrutiny by the Delegated Powers and Law Reform Committee

23. The DPLRC considered the supplementary LCM at its [meeting on 21 February](#) and [produced its report on 22 February](#).

Cross-border procurement - Clause 111(3)

24. The DPLRC is content with the powers conferred in this clause.

Scope and extent

25. The DPLRC is content with the additional delegated powers conferred on a Minister of the Crown.

Implementation of new trade agreements relating to procurement - Clause 90 (previously clause 83)

26. Paragraph 37 of the DPLRC's report notes that amendments have been made which address some of the concerns raised the original LCM, noting that—

” 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. ⁴

27. Paragraph 38 notes that further amendments have been tabled to the Bill since the supplementary LCM was lodged. One amendment (102) sought to address some of the concerns raised in the supplementary LCM, this amendment however was not accepted.

28. The DPLRC notes the position in the supplementary LCM that the Scottish Government still does not recommend giving consent to this clause as it remains a concurrent power that can be exercised independently by UK Government Ministers in an area of devolved competence, with no requirement for consent.

29. The DPLRC reiterated the position it took in its earlier report of 11 October, noting that—

” 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.⁴

Implementation of the outcomes of trade disputes relating to procurement

30. The DPLRC notes at paragraph 41 that this provision, made by amendments NC11 and 83, has yet to be debated.ⁱⁱ
31. Again, the Committee notes that this power, should it be accepted, is concurrently exercisable by either UK or Scottish Ministers, with no obligation on UK Ministers to secure the consent of the latter when exercising these powers in devolved areas. The Committee’s report notes, at paragraph 46, that the Scottish Government does not recommend consent to this clause for this reason.
32. The report sets out, at paragraph 47, the DPLRC’s previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas—

ii Since publication of the DPLRC Report, this clause has been accepted and added to the Bill.

- ” • The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
- 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.
- 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.
- 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.⁴

Conclusion

33. **The Committee welcomes the resolution of some of the concerns.**
34. **The Committee notes that the outstanding issues detailed in the supplementary LCM relate to consent requirements in relation to powers conferred on UK Ministers in devolved areas.**
35. **The Committee also notes the DPLRC's position reiterated at paragraphs 40 and 47 of its report.**
36. **The supplementary LCM indicates that the draft motion to be lodged by the Minister for Business, Trade, Tourism and Enterprise will be—**
 - ” **That the Parliament agrees that the relevant provisions in clause 111 and related provisions concerning cross-border procurement, as amended by Government amendments lodged on 24 January 2023, of the Procurement Bill, introduced in the House of Lords on 11 May 2022, and in clauses 2 and 122 of the Procurement Bill, and related provisions concerning scope and extent, so far as these matters fall within the legislative competence of the Scottish Parliament and alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.³**
37. **The Committee recommends that the Parliament agrees the motion, giving partial consent in line with the supplementary LCM.**

Economy and Fair Work Committee

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