

# Procurement Reform (Scotland) Bill

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## 2nd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Section 1	Schedule
Sections 2 to 40	Long Title

Amendments marked \* are new (including manuscript amendments) or have been altered.

### Section 9

#### Jim Eadie

- 6 In section 9, page 4, line 11, after <process,> insert—  
<( ) promote ethical and fair trade practices,>

#### Patrick Harvie

- 66 In section 9, page 4, line 11, after <process,> insert—  
<( ) act in the manner likely to best contribute to compliance with its duties under the Climate Change (Scotland) Act 2009 (asp 12),>

#### Patrick Harvie

- 67 In section 9, page 4, line 11, after <process,> insert—  
<( ) pay due regard to the United Nations Guiding Principles for Business and Human Rights as endorsed by the Human Rights Council of the United Nations in resolution 17/4 of 16 June 2011,>

#### Jackie Baillie

- 68 In section 9, page 4, line 11, after <process,> insert—  
<( ) promote compliance by economic operators with the matters that comprise the public sector equality duty under section 149 of the Equality Act 2010 (c.15),>

#### Ken Macintosh

- 69 In section 9, page 4, line 11, after <process,> insert—  
<( ) promote sustainable employment policies,>

#### Ken Macintosh

- 70 In section 9, page 4, line 11, after <process,> insert—  
<( ) promote the recognition by economic operators of trade unions for the purposes of representing employees,>

**Sarah Boyack**

- 7 In section 9, page 4, line 12, after <innovation,> insert—
- <( ) before carrying out a regulated procurement involving the provision of food, to consider how in conducting the procurement process it can—
- (i) improve the health, wellbeing and education of communities in the authority’s area,
  - (ii) promote the highest standards of animal welfare, and
  - (iii) promote fair trade practices,>

**Jim Eadie**

- 38 In section 9, page 4, line 12, after <innovation,> insert—
- <( ) before carrying out a regulated procurement relating to a health or social care service, to consider how in conducting the procurement process it can improve—
- (i) the quality of the service to, and
  - (ii) the wellbeing of,
- persons who use or will use the service and the families and carers of such persons,>

**Patrick Harvie**

- 71 In section 9, page 4, line 13, leave out from <with> to end of line 14 and insert <in the way best calculated to secure the outcomes mentioned in paragraph (a).>

**James Kelly**

- 3 In section 9, page 4, line 23, at end insert—
- <( ) In this section, references to co-operative societies are references to societies of a type specified in the definition of “co-operative society” in section 36(1) of the Public Bodies Act 2011 (c.24).>

**Jackie Baillie**

- 72 In section 9, page 4, line 23, at end insert—
- <( ) In this section, references to the wellbeing of the authority’s area include, in particular, reducing inequality in the area.>

**After section 9**

**Nicola Sturgeon**

- 8 After section 9, insert—
- <Guidance on sustainable procurement duty**
- (1) The Scottish Ministers may publish guidance on the sustainable procurement duty.
  - (2) Contracting authorities must have regard to any guidance published under this section.
  - (3) The Scottish Ministers must lay a copy of any guidance published under this section before the Scottish Parliament.>

**James Kelly**

39 After section 9, insert—

**<Scottish living wage duty**

- (1) For the purposes of this Act, the Scottish living wage duty is the duty of a contracting authority to specify in the contract notice relating to a regulated procurement that it intends to impose a condition relating to the performance of the contract that the economic operator who is the successful tenderer must pay the Scottish living wage.
- (2) An economic operator pays the Scottish living wage if the remuneration of each of its employees who undertakes any activities related to the performance of the contract is at least the Scottish living wage.
- (3) The Scottish Ministers must by regulations define the Scottish living wage for the purposes of this Act, and may from time to time as they see fit revise such definition.>

**Claudia Beamish**

40 After section 9, insert—

**<Greenhouse gas emissions duty**

- (1) For the purposes of this Act, the greenhouse gas emissions duty is the duty of a contracting authority—
  - (a) before carrying out a regulated procurement, to consider how in conducting the procurement process it can—
    - (i) exercise its functions in a way best calculated to reduce greenhouse gas emissions, and
    - (ii) promote among economic operators involved in the process activities designed to reduce greenhouse gas emissions, and
  - (b) in carrying out the procurement, to act with a view to securing reductions in greenhouse gas emissions.
- (2) The contracting authority must consider under subsection (1) only matters that are relevant to what is proposed to be procured and, in doing so, consider the extent to which it is proportionate in all the circumstances to take those matters into account.>

**Section 10**

**Nicola Sturgeon**

9 In section 10, page 4, line 32, leave out subsection (4)

**After section 10**

**Nicola Sturgeon**

10 After section 10, insert—

**<Contracts for health or social care services**

- (1) Despite section 8, a contracting authority may award a contract for a health or social care service without seeking offers in relation to the proposed contract.
- 5 (2) In relation to a regulated procurement where, by virtue of subsection (1), a contracting authority does not seek offers, section 18(1) does not apply.

- (3) The Scottish Ministers may by regulations make provision specifying what is a health or social care service for the purposes of subsection (1) and section (*Guidance on procurements for health or social care services*)(1).>

**Mary Fee**

- 10A** As an amendment to amendment 10, line 7, leave out <may> and insert <must>

**Nicola Sturgeon**

- 11** After section 10, insert—

**<Guidance on procurements for health or social care services**

- (1) The Scottish Ministers may publish guidance on the carrying out of regulated procurements relating to contracts for health or social care services.
- 5 (2) Contracting authorities must have regard to any guidance published under this section.
- (3) The Scottish Ministers must lay a copy of any guidance published under this section before the Scottish Parliament.

**Mary Fee**

- 11A** As an amendment to amendment 11, line 3, leave out <may> and insert <must>

**Nicola Sturgeon**

- 12** After section 10, insert—

**<Other circumstances in which contract can be awarded without competition**

- (1) The Scottish Ministers may by regulations specify circumstances in which a contracting authority may, despite section 8, award a regulated contract without seeking offers in relation to the proposed contract.
- 5 (2) In relation to a regulated procurement where, by virtue of regulations made under subsection (1), a contracting authority does not seek offers, section 18(1) does not apply.>

**Mary Fee**

- 12A** As an amendment to amendment 12, line 3, leave out <may> and insert <must>

**Mary Fee**

- 41** After section 10, insert—

**<Third sector bodies**

- (1) Despite section 8, a contracting authority may restrict participation in a regulated procurement to third sector bodies only.
- (2) Where a contracting authority restricts participation under subsection (1), it must state that fact in the contract notice.
- (3) For the purposes of this Act, “third sector bodies” means organisations (other than bodies established under an enactment) that exist wholly or mainly to provide benefits for society or the environment.
- (4) The Scottish Ministers may by order amend this section so as to modify the meaning of “third sector bodies” for the purposes of this Act.>

**Mary Fee**

42 After section 10, insert—

**<Guidance on facilitating the involvement of certain businesses**

- (1) The Scottish Ministers must publish guidance on matters that contracting authorities must take into account when considering how the procurement process can facilitate involvement as specified in section 9(1)(a)(ii).
- (2) Contracting authorities must have regard to any guidance published under this section.
- (3) The Scottish Ministers must lay a copy of any guidance published under this section before the Scottish Parliament.>

**Section 11**

**Patrick Harvie**

73 In section 11, page 5, line 22, leave out <section 8> and insert <sections 8 and 9>

**Mark Griffin**

13 In section 11, page 5, line 22, at end insert—

<( ) include a statement setting out—

- (i) whether the authority intends to restrict participation in regulated procurements under section 10(1), and
- (ii) how the authority intends to ensure that it awards at least one contract to a supported business,>

**Nicola Sturgeon**

14 In section 11, page 5, line 25, at end insert <, and

( ) the procurement of fairly and ethically traded goods and services,>

**Sarah Boyack**

15 In section 11, page 5, line 25, at end insert—

<( ) include a statement of the authority's general policy on how it intends its approach to regulated procurements involving the provision of food to—

- (i) improve the health, wellbeing and education of communities in the authority's area,
- (ii) promote the highest standards of animal welfare, and
- (iii) promote fair trade practices,>

**Jackie Baillie**

74 In section 11, page 5, line 25, at end insert—

<( ) set out how, in carrying out its regulated procurements, the authority intends to promote compliance by economic operators with the matters that comprise the public sector equality duty under section 149 of the Equality Act 2010 (c.15),>

**Adam Ingram**

43 In section 11, page 5, line 31, at end insert—

<(ca) set out how the authority intends to ensure that its regulated procurements support the achievement of any objectives or outcomes it has set out in any plan that the authority has a legal requirement to prepare.>

**Adam Ingram**

44 In section 11, page 5, line 31, at end insert—

<( ) where the authority is a provider of children’s services, set out how the authority intends to use its regulated procurement activities to contribute to the aims of children’s services plans as set out in section 9(2) of the Children and Young People (Scotland) Act 2014.>

**Adam Ingram**

45 In section 11, page 5, line 34, at end insert—

<( ) In this section, “children’s services” has the meaning given in section 7(1) of the Children and Young People (Scotland) Act 2014.>

**Adam Ingram**

46 In section 11, page 5, line 34, at end insert—

<( ) The Scottish Ministers may by order specify the types of plans in respect of which the duty under subsection (5)(ca) is to apply.>

**Section 14**

**Nicola Sturgeon**

16 In section 14, page 6, line 16, at end insert—

<( ) a summary of any community benefit requirements imposed as part of a regulated procurement that were fulfilled during the year covered by the report,>

**Mark Griffin**

17 In section 14, page 6, line 18, at end insert—

<( ) a statement of the action the contracting authority has taken during the year covered by the report to ensure that it awards at least one contract to a supported business, and the details of any such contract awarded,>

**Adam Ingram**

47 In section 14, page 6, line 18, at end insert—

<( ) the number of times that the authority has used a Public Social Partnership during the year covered by the report,>

**Adam Ingram**

48 In section 14, page 6, line 18, at end insert—

<(da) a summary of how the authority has used its regulated procurement activities during the year covered by the report to deliver any objectives or outcomes as set in any plan that the authority has a legal requirement to prepare,>

**Adam Ingram**

49 In section 14, page 6, line 18, at end insert—

<( ) where the authority is a provider of children’s services, a review of how each regulated procurement has contributed to the aims of children’s services plans as set out in section 9(2) of the Children and Young People (Scotland) Act 2014,>

**Adam Ingram**

50 In section 14, page 6, line 21, at end insert—

<( ) In this section, “children’s services” has the meaning given in section 7(1) of the Children and Young People (Scotland) Act 2014.>

**Adam Ingram**

51 In section 14, page 6, line 21, at end insert—

<( ) The Scottish Ministers may by order specify the types of plans in respect of which the duty under subsection (2)(da) is to apply.>

**Section 16**

**Nicola Sturgeon**

18 In section 16, page 6, line 32, leave out <issue guidance to contracting authorities> and insert <publish guidance>

**Nicola Sturgeon**

19 In section 16, page 7, line 1, leave out <issued> and insert <published>

**Nicola Sturgeon**

20 In section 16, page 7, line 1, at end insert—

<( ) The Scottish Ministers must lay a copy of any guidance published under this section before the Scottish Parliament.>

**After section 16**

**Jackie Baillie**

75 After section 16, insert—

**<Annual report by Scottish Ministers**

- (1) As soon as reasonably practicable after the end of each financial year, the Scottish Ministers must prepare and publish an annual procurement report.
- (2) A report prepared under this section must include—

- (a) an overview of procurement activity undertaken by contracting authorities during the year covered by the report,
  - (b) a summary of the extent to which the Scottish Ministers consider procurement activity is being carried out in compliance with the duties of contracting authorities under this Act,
  - (c) a summary of the community benefits that are considered to have been achieved as a result of requirements imposed by contracting authorities under section 20,
  - (d) a summary of the extent to which procurement activity relating to health or social care services and other services has differed from other procurement activity,
  - (e) such other information as the Scottish Ministers consider appropriate.
- (3) The Scottish Ministers must lay a copy of each report prepared under this section before the Scottish Parliament.>

### **Section 18**

**Sarah Boyack**

52 In section 18, page 7, line 16, at end insert—

<( ) In publicising the award of a contract, a contracting authority must include a statement setting out how it considers the contract will contribute to the achievement of the matters mentioned in section 9(1).>

### **Section 19**

**Patrick Harvie**

76 In section 19, page 8, line 8, leave out <the> and insert <global>

**Patrick Harvie**

77 In section 19, page 8, line 9, leave out <of the authority's area>

**Mary Fee**

53 In section 19, page 8, line 10, at end insert—

<( ) A requirement under subsection (1)(a) relating to training may, in particular, include a requirement that 5 per cent of the employees of an economic operator who will undertake any activities related to the performance of the contract must be apprentices.>

### **Section 20**

**Mary Fee**

54 In section 20, page 8, line 14, leave out <£4,000,000> and insert <£2,000,000>

**Jackie Baillie**

78 In section 20, page 8, line 25, at end insert <, and

- (b) a requirement that the economic operator must collect data required to demonstrate the benefits that are being achieved as a result of the contract including community benefit requirements.

(4A) The Scottish Ministers may by regulations make further provision about—



- (a) the data that must be collected under subsection (3)(b),
- (b) the manner in which data collected is to be published.>

## **Section 21**

### **Nicola Sturgeon**

- 21** In section 21, page 8, line 29, leave out <issue> and insert <publish>

### **Nicola Sturgeon**

- 22** In section 21, page 8, line 39, leave out <issued> and insert <published>

### **Nicola Sturgeon**

- 23** In section 21, page 8, line 39, at end insert—

<( ) The Scottish Ministers must lay a copy of any guidance published under this section before the Scottish Parliament.>

## **After section 21**

### **Claudia Beamish**

- 55** After section 21, insert—

#### *<Climate change duties requirements*

##### **Climate change duties requirements**

- (1) This section applies where a contracting authority proposes to carry out a regulated procurement in relation to which the estimated value of the contract is equal to or greater than £2,000,000.
- (2) The contracting authority must include a climate change duties requirement in the contract notice relating to the procurement.
- (3) For the purposes of this section, a climate change duties requirement is a requirement that an economic operator, in submitting a tender, must include a statement setting out the effect that it considers its performance of the contract would have on the climate change duties of the contracting authority.
- (4) The contracting authority must include in the award notice a statement of the effect it considers the procurement will have on its climate change duties.
- (5) In this section, “climate change duties” has the same meaning as in section 44(4) of the Climate Change (Scotland) Act 2009 (asp 12).
- (6) The Scottish Ministers may by order modify subsection (1) so as to substitute for the figure specified there for the time being such other figure as they consider appropriate.>

**Jackie Baillie**

79 After section 21, insert—

*<Equal pay audits*

**Power to require equal pay audit**

A contracting authority may, in the contract notice relating to a regulated procurement, include a statement that it intends to award the contract to an economic operator that can demonstrate that it has conducted an equal pay audit in relation to its employees.>

**Neil Bibby**

80 After section 21, insert—

*<Childcare requirement*

**Childcare requirement**

- (1) This section applies where a contracting authority proposes to carry out a regulated procurement in relation to which the estimated value of the contract is equal to or greater than £2,000,000.
- (2) The contracting authority may specify in the contract notice relating to the procurement that it intends to impose a condition relating to the performance of the contract that the successful tenderer must—
  - (a) make adequate childcare provision available to its employees who undertake any activities related to the performance of the contract, or
  - (b) otherwise demonstrate that flexible options are available to accommodate the childcare needs of such employees.>

**Ken Macintosh**

81 After section 21, insert—

*<Wage ratio conditions*

**Wage ratio conditions**

- (1) The Scottish Ministers may by regulations make provision requiring a contracting authority to specify in the contract notice relating to a regulated procurement that it intends to impose a wage ratio condition relating to the performance of the contract.
- (2) For the purposes of this section, a wage ratio condition is a condition about the ratio between the remuneration of the highest and lowest paid of those employees of the successful tenderer who undertake any activities related to the performance of the contract.
- (3) Regulations under this section may—
  - (a) specify an appropriate wage ratio for the purposes of this section,
  - (b) specify contracts, or classes or types of contract, in relation to which a wage ratio condition can be specified,
  - (c) make such other provision relating to specifying wage ratio conditions as the Scottish Ministers think fit.>

## Before section 22

### Neil Findlay

56 Before section 22, insert—

#### <Exclusion of economic operators: tax avoidance

- (1) A contracting authority must exclude an economic operator from the process relating to a regulated procurement if the economic operator has entered into an artificial tax avoidance arrangement or series of arrangements.
- (2) For the purposes of this section, an “artificial tax avoidance arrangement” is to be interpreted in accordance with sections 58 to 60 of the Revenue Scotland and Tax Powers Act 2014.
- (3) The Scottish Ministers must by regulations make provision specifying—
  - (a) the process to be followed, and
  - (b) the evidence that is to be conclusive,in determining whether or not an economic operator has at any time entered into an artificial tax avoidance arrangement or series of arrangements.>

### Neil Findlay

57 Before section 22, insert—

#### <Exclusion of economic operators: blacklisting

- (1) A contracting authority must exclude an economic operator from the process relating to a regulated procurement if subsection (2) applies.
- (2) This subsection applies if the contracting authority is satisfied that the economic operator—
  - (a) has at any time compiled, used, sold or supplied a list (a “prohibited list”) which—
    - (i) contains details of persons who are or have been members of trade unions, or who are taking part or have taken part in the activities of trade unions, and
    - (ii) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to the recruitment or treatment of workers, and
  - (b) has not taken action which, in the opinion of the contracting authority, is sufficient to remedy the effects of such compilation, use, sale or supply.
- (3) Subsection (2) does not apply where it appears to the contracting authority that the economic operator has compiled, used, sold or supplied a prohibited list in circumstances which fall within a case set out in regulation 4 (exceptions to general prohibition) of the Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493) (“the 2010 Regulations”).
- (4) Without prejudice to the generality of subsection (2)(b), matters that the contracting authority must take into account in determining whether remedial action is sufficient include whether the economic operator has—
  - (a) publicly acknowledged that it has undertaken activities falling within subsection (2)(a),

- (b) apologised to those affected by such activities,
  - (c) subsequently employed persons affected by such activities, and
  - (d) paid to persons affected by such activities adequate compensation, negotiated with representatives of such persons.
- (5) In this section—
- “employment agency” has the same meaning as in regulation 2(1) of the 2010 Regulations,
  - “discrimination” has the same meaning as in regulation 3(3) of the 2010 Regulations,
  - “use”, in relation to a list, includes use of information contained in the list.
- (6) References in this section to membership of a trade union include references to—
- (a) membership of a particular branch or section of a trade union, and
  - (b) membership of one of a number of particular branches or sections of a trade union,
- and references to taking part in the activities of a trade union have a corresponding meaning.>

**Jayne Baxter**

**58** Before section 22, insert—

**<Exclusion of economic operators: zero hours contracts**

- (1) A contracting authority must exclude an economic operator from the process relating to a regulated procurement if subsection (2) applies.
- (2) This subsection applies if the contracting authority is satisfied that the economic operator has in place arrangements for any of its employees to be employed on the basis of a zero hours contract.
- (3) In this section, a “zero hours contract” means a contract or arrangement for the provision of labour which—
  - (a) except where subsection (6) applies, fails to specify guaranteed working hours, and
  - (b) has either of the features mentioned in subsection (4).
- (4) The features referred to in subsection (3)(b) are that the contract or arrangement—
  - (a) requires the employee to be available for work when there is no guarantee that the employee will be required to work,
  - (b) subject to subsection (5), requires the employee to work exclusively for that economic operator.
- (5) Subsection (4)(b) does not apply if the contracting authority is satisfied that the economic operator has demonstrated a compelling business reason to justify a contract or arrangement requiring the employee to work exclusively for that economic operator.
- (6) A contract is not, for the purposes of this section, a zero hours contract if, after being given the opportunity to seek—
  - (a) legal advice, or

- (b) the advice of a trade union or other elected representative of employees, an employee agrees to accept a contract that fails to specify guaranteed working hours.
- (7) Without prejudice to the generality of subsection (5), a compelling business reason may, in particular, include requirements of commercial confidentiality.>

## Section 22

### Nicola Sturgeon

- 24 In section 22, page 9, line 4, leave out <the process relating to>

## Section 23

### Nicola Sturgeon

- 25 In section 23, page 9, line 19, leave out <to participate in the process relating> and insert <in relation>

## Section 24

### Nicola Sturgeon

- 26 In section 24, page 10, line 21, leave out <issue> and insert <publish>

### Nicola Sturgeon

- 27 In section 24, page 10, line 21, leave out <to take part in the process relating> and insert <in relation>

### Jim Eadie

- 28 In section 24, page 10, line 29, at end insert—  
<( ) Without prejudice to the generality of subsection (2), any guidance issued under subsection (1) must cover the manner in which contracting authorities are to take ethical and fair trade practices into account in assessing the suitability of an economic operator.>

### Nicola Sturgeon

- 29 In section 24, page 10, line 30, leave out <issued under subsection (1)> and insert <published under this section>

### Nicola Sturgeon

- 30 In section 24, page 10, line 30, at end insert—  
<( ) The Scottish Ministers must lay a copy of any guidance published under this section before the Scottish Parliament.>

## After section 34

### Nicola Sturgeon

31 After section 34, insert—

#### <Transfer of forum for proceedings to First-tier Tribunal

The Scottish Ministers may by regulations modify sections 33 and 34 so that proceedings under section 32 may be brought before the First-tier Tribunal for Scotland instead of the sheriff court or Court of Session.>

## Section 36

### Claudia Beamish

59 In section 36, page 16, line 31, at end insert—

<“emissions” has the same meaning as in section 17(1) of the Climate Change (Scotland) Act 2009 (asp 12),>

### Claudia Beamish

60 In section 36, page 16, line 33, at end insert—

<“greenhouse gas” has the same meaning as in section 10(1) of the Climate Change (Scotland) Act 2009 (asp 12),>

### Patrick Harvie

82 In section 36, page 17, line 1, leave out subsection (2)

## Section 38

### Nicola Sturgeon

32 In section 38, page 17, line 22, at end insert—

<( ) section 7(1),>

### Nicola Sturgeon

33 In section 38, page 17, line 22, at end insert—

<( ) section (*Other circumstances in which contract can be awarded without competition*)(1),>

### Nicola Sturgeon

34 In section 38, page 17, line 24, at end insert—

<( ) section (*Transfer of forum for proceedings to First-tier Tribunal*),>

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