



## Delegated Powers and Law Reform Committee

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*By email*

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### Procurement Bill

Dear Minister,

Firstly, can I congratulate you on your recent appointment. I wish you well in the role.

I am writing in relation to the Scottish Parliament's Delegated Powers and Law Reform Committee consideration at its meeting yesterday of the [Legislative Consent Memorandum](#) ("the LCM") for the [Procurement Bill](#) as I note that the Cabinet Office is the sponsoring department for the legislation.

The Committee's scrutiny focused firstly on the concurrent powers conferred on Scottish Ministers and a Minister of the Crown within clauses 83 and 103(3) of the Bill. It then considered the various other delegated powers conferred on a Minister of the Crown which are exercisable for Scotland within the Scottish Parliament's legislative competence.

#### Relevant Powers in the Bill

#### **Clause 83 – Power to make provision for the purpose of ensuring that treaty state suppliers are not discriminated against in the carrying out of devolved procurements**

This power is conferred on a Minister of the Crown or the Scottish Ministers to make provision ensuring that treaty state suppliers are not discriminated against in Scotland by bodies not covered by the Bill in the implementation of international agreements.

*UK Ministers power in devolved areas*

The Committee notes that there is no legal requirement on a Minister of the Crown to obtain the consent of Scottish Ministers before exercising the power in clause 83 in devolved areas. There is also no commitment in the accompanying documents that a Minister of the Crown will seek the consent of Scottish Ministers when exercising the delegated power in devolved areas.

The Committee's previous position in relation to powers in UK bills conferred on UK Ministers in devolved areas has been as follows:

- (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.

The [Committee wrote to the UK Government on 12 July 2022](#) 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. The Secretary of State for Levelling Up, Housing and Communities [responded](#) on 14 August indicating that the *"UK Government takes into account a variety of factors when seeking delegated powers in devolved areas."* He also indicated 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."*

In the particular policy context of the Bill, the Committee would be grateful for an explanation as to:

- 1. Why does the UK Government consider 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?**
- 2. Why does the UK Government consider 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?**
- 3. Does the UK Government intend to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to Scotland, or to require a Minister of the Crown when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers?**

## **Clause 103(3) – Powers relating to procurement arrangements**

Clause 103 makes various provision for cross-border and joint procurement arrangements to be set out by subordinate legislation. The power in clause 103(3) is also one which is also conferred on both a Minister of the Crown and the Scottish Ministers to amend 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. As this is not specified on the face of the Bill, it is not clear how this will operate and what rules will apply in what circumstances.

The Committee again notes that there is no legal requirement on a Minister of the Crown to obtain the consent of Scottish Ministers before exercising the power in clause 103(3) in devolved areas. There is also no commitment in the accompanying documents that a Minister of the Crown will seek the consent of Scottish Ministers when exercising the delegated power in devolved areas.

In the particular policy context of the Bill, the Committee would again be grateful for an explanation as to:

- 4. Why does the UK Government consider it appropriate for the regulation-making power in clause 103(3) to be sought rather than provision to be set out on the face of the Bill?**
- 5. Why does the UK Government consider 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?**
- 6. Why does the UK Government consider 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?**
- 7. Also, does the UK Government intend to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to Scotland, or to require a Minister of the Crown when exercising the power in devolved matters to obtain the consent of the Scottish Ministers.**

### Additional Delegated Powers (Former EU Competence)

The Committee notes that the Bill contains a total of 53 delegated powers which are principally exercisable by a Minister of the Crown to make provision in areas of former EU competence. The Bill will apply to the whole of the UK, but with regards to Scotland it will apply to cross-border and joint procurements and procurements in Scotland by reserved bodies. This is different to the current position where all procurements in Scotland by public bodies, whether they are reserved bodies or not, are managed through Scottish procurement arrangements. This Bill alters that position.

The Committee would also be grateful for an explanation as to:

8. Why does the UK Government consider it appropriate for the regulation-making powers in clause 103(1) and 103(2) to be sought rather than provision being set out on the face of the Bill?
9. Why does the UK Government consider it appropriate, in the particular policy context of the Bill, that the additional relevant powers have been conferred so that they are exercisable independently by a Minister of the Crown in relation to devolved matters?
10. Why does the UK Government consider it appropriate, in the particular policy context of the Bill, that when the powers are 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?
11. Finally, does the UK Government intend to amend the Bill to either ensure the powers are conferred solely on the Scottish Ministers in relation to Scotland, or to require a Minister of the Crown when exercising the powers in devolved matters to obtain the consent of the Scottish Ministers.

I would be grateful if you were able to provide a response to these questions by **Wednesday 21 September 2022**. This will allow the Committee to report its findings on the LCM prior to any final consideration by the Scottish Parliament.

I look forward to hearing from you.

I am copying this letter to the Rt Hon Alister Jack MP, Secretary of State for Scotland; Ivan McKee MSP, the Minister for Business, Trade, Tourism and Enterprise and Claire Baker MSP, Convener of the Economy and Fair Work Committee, which is considering the Bill from a policy perspective.

Yours sincerely

Stuart McMillan MSP  
Convener of the Delegated Powers and Law Reform Committee