



Delegated Powers and Law Reform Committee

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By email

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Trade (Australia and New Zealand) Bill

Dear Secretary of State,

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 [Trade \(Australia and New Zealand\) Bill](#).

The Committee appreciates that the Bill, as enacted, is expected to be repealed by the UK Procurement Act if the [bill for that Act](#), which was also introduced, is passed. Nevertheless, under the Scottish Parliament's Standing Orders, the Committee is required to consider all Bills which contain relevant delegated powers.

The Committee's scrutiny focused on the concurrent power conferred on Scottish Ministers and a Minister of the Crown insofar as exercisable in relation to devolved matters within clause 1 of the Bill.

Clause 1 – Power to implement government procurement Chapters

Clause 1 of the Bill confers power on the "appropriate authority" to make such provision as the authority considers appropriate to implement the government procurement chapters of the UK-Australia and UK-New Zealand Free Trade Agreements. This includes the power to make other provision for the purposes of dealing with matters arising out of, or related to, those chapters.

Scope of the power

As a Delegated Powers Memorandum has not been published by the UK Government, the Committee has two questions on the scope of the power:

- 1. Why is it considered appropriate for the regulation-making power in clause 1 to be sought rather than provision implementing the free trade agreements being set out on the face of the Bill?**
- 2. Why is it appropriate that the regulation-making power in clause 1 of the Bill applies to the implementation of the free trade agreements as amended, particularly if:**
 - a. it is expected that the power will be repealed once the Procurement Bill comes into force; and**
 - b. the Scottish Parliament may not know what any future amendments might be at the point of considering whether to consent to the Bill?**

Parliamentary procedure

Given the significance of the power, the Committee would also be grateful to know:

- 3. Whether, as a minimum, if a regulation-making power is to be taken rather than provision implementing the agreements being set out on the face of the Bill, regulations made under the power would more appropriately be subject to the affirmative procedure?**

UK Ministers power in devolved areas

There is no legal requirement on a Minister of the Crown to obtain the consent of Scottish Ministers before exercising the power in clause 1 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 then 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.”

The Committee noted that paragraph 15 of the LCM states: “*If the UK Government intends to continue with its approach of creating delegated powers to implement these agreements, the Scottish Government will press it to amend the Bill so that either the power is conferred solely on the 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.*”

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

- 4. 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?**
- 5. Why does the UK Government 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?**
- 6. 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?**

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 Scottish Parliament’s 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