

# Legislative Consent Memorandum

## Economic Activity of Public Bodies (Overseas Matters) Bill

### Background

1. This memorandum has been lodged by Shona Robison, Deputy First Minister and Cabinet Secretary for Finance, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by Tom Arthur, Minister for Community Wealth and Public Finance. The Economic Activity of Public Bodies (Overseas Matters) Bill was introduced in the House of Commons on 19 June 2023. The Bill can be found at [Economic Activity of Public Bodies \(Overseas Matters\) Bill - Parliamentary Bills - UK Parliament](#)

### Content of the Economic Activity of Public Bodies (Overseas Matters) Bill

2. The UK Government describes the effect of the Bill as being to ban public bodies from implementing their own boycotts or divestments against foreign countries and territories, where these are inconsistent with formal UK Government legal sanctions, embargoes, and restrictions.

3. The UK Government describes the justification for the Bill as being to ensure a consistent foreign policy across the UK and that the UK speaks with one voice internationally.

4. Clauses 1 and 2 of the Bill would make it unlawful for bodies subject to section 6 of the Human Rights Act 1998 (for short-hand hereafter referred to as "public bodies"), including the Scottish Ministers, to make a regulated decision which "was influenced by political or moral disapproval of foreign state conduct" or by the disapproval of a third party seeking to influence that decision. This restriction applies to "procurement decisions" (defined as decisions about the purchase of goods, services or works) and "investment decisions" (defined as decisions about the acquisition, management, retention or disposal of an asset wholly or principally for the purposes of investment).

5. Clause 3 confers a power on UK Ministers to disapply this restriction in respect of certain countries, territories, considerations, or persons. The UK Government explains, for example, that if this regime had been in place at the time of the invasion of Ukraine, it would have disapplied the restriction in relation to Russia.

6. That power is limited in that it explicitly cannot be used to disapply the restrictions specifically or mainly in relation to Israel, the Occupied Palestinian Territories, or the Occupied Golan Heights. The effect of this limitation is that Israel is placed in a unique position amongst all other countries in the world – no matter what action it may take, the UK Government would be unable to act swiftly by secondary legislation to permit public bodies to take that action into account in relevant decisions.

7. Clause 4 would make it unlawful for public bodies to publish a statement indicating that they intend to act in a way which would contravene the restrictions imposed by the Bill, or would intend to act in such a way were it lawful to do so. This provision would not only prevent public bodies from stating that they intend to breach the restriction in clause 1 of the Bill but, significantly, from stating that they would intend to act in such a way were they not prohibited from doing so. This means that a public body would be in breach merely by stating that their intention would be to take a different approach had it been open to them to do so.

8. Clauses 5 to 11 set out the enforcement regime in relation to these restrictions. The Bill designates UK Ministers as the enforcement authority in relation to these restrictions, and gives them the power to:

- Issue “information notices” requiring public bodies to give them information about their approach to such decisions or statements. These notices would permit the enforcement authority, among other things, to assess whether a decision-maker has breached the prohibitions.
- Issue compliance notices to public bodies requiring them to refrain from taking certain actions; and
- Impose fines on public bodies (the maximum amount is to be prescribed in regulations) for non-compliance with those notices. This would include the ability to fine the Scottish Ministers for non-compliance. It should also be noted that interest will be due on any fine that is not paid timeously or in full.

9. Persons with sufficient interest in the subject-matter of an alleged breach are also given standing by the Bill to make an application for judicial review; with the courts then able to make any order they think appropriate by way of relief and for the purpose of preventing a breach. The Bill enables such challenges to be raised even when the decision or statement, which is the subject of the challenge, would not be amenable to judicial review.

10. Clauses 12 and 13 apply restrictions to local government pension schemes and provides the Pensions Regulator with power to enforce them.

11. Clause 14 makes provisions regarding the relationship between the Bill and procurement legislation. Sub-sections (1) to (3) relate to powers and provisions in the Procurement Bill (which will largely only apply to reserved, Welsh and NI bodies), which, in the case of sub-sections (1) and (3), do not have equivalents in Scottish

legislation. Sub-sections (4) and (5) make an explicit saving for provisions in the Procurement Bill which set out the lawful grounds on which a public body may (or must) exclude a bidder. Such explicit protection is not afforded to exclusions provisions in the suite of legislation regulating devolved Scottish bodies' procurement activity – instead a power is conferred on the Secretary of State by sub-section (6) to make regulations relating to the Public Contracts (Scotland) Regulations 2015, the Utilities Contracts (Scotland) Regulations 2016, the Concession Contracts (Scotland) Regulations 2016, the Procurement Reform (Scotland) Act 2014, and any regulations made under that Act, for purposes “similar” to the preceding subsections or paragraph 2 of the Schedule (relating to defence contracts). It is not clear why the UK Government has taken this approach, instead of simply replicating the provisions of 14(4) in relation to the Scottish procurement legislation. This creates a new, enduring, and wholly unnecessary power for UK Ministers to make regulations in relation to devolved Scottish procurement legislation.

12. Clause 15 amends section 17 of the Local Government Act 1988. That Act prevents local authorities (and some other bodies) from taking specified non-commercial matters into account in contracting decisions. The Bill will omit section 17(5)(e), which prevents local authorities from taking the location of a contractor into account. It also gives UK Ministers the ability to specify in regulations that some matters fall outside of the restriction in 17(5)(f), which relates to consideration of the political, industrial or sectarian affiliations of a contractor.

## Provisions which relate to Scotland

13. The Bill extends to Scotland. It applies to all bodies subject to section 6 of the Human Rights Act 1998 in relation to the procurement or investment decision at hand. That is to say that it extends to courts, tribunals and any body corporate whose functions are of a public nature. The Scottish Ministers would therefore be bound by this Act.

## Why legislative consent is required

14. In accordance with Rule 9B.1 of the standing orders, this is a relevant Bill because it alters the executive competence of the Scottish Ministers, by including them within the scope of the Bill. Currently, the Scottish Ministers have the ability – to the extent permitted by procurement legislation – to consider the country or territory of origin or other territorial considerations in a way that indicates political or moral disapproval of a foreign state, when making decisions about procurement or investment. An example of this is the position taken by the Scottish Ministers in relation to procuring goods from Russian suppliers following the invasion of Ukraine. The Bill will unduly restrict, if not entirely remove, this ability and, therefore alter the executive competence of the Scottish Ministers. The Bill would further limit and caveat the executive competence of Scottish Ministers by making it unlawful, under punishment of fine subject to interest, to even state they would have acted differently or otherwise, were it not for the provisions of the Bill.

## Reasons for not recommending legislative consent

15. The Scottish Government considers this to be a wholly unnecessary and unwelcome alteration of Scottish Ministers' competence, and suggests that there are three principal reasons why the Scottish Parliament should not give its consent to the Bill.

16. The first reason is the disproportionate and unnecessary nature of the Bill. It is not clear what problem the UK Government is seeking to address by including the Scottish Ministers in the scope of this Bill. The Scottish Government has always acted responsibly and in line with the UK's international commitments. In any event, however, an argument that a decision of the Scottish Government in relation to a particular procurement or investment process may be mistaken by overseas governments for an alternative UK foreign policy lacks credibility.

17. There are also already significant protections in Scottish procurement legislation which require equal treatment to be extended to bidders from countries with which a relevant trade agreement applies – and this includes Israel, for example, which like the UK is party to the World Trade Organisation's Agreement on Government Procurement (the GPA). These protections are set out in regulations 19, 26A, 26B, 87A and 87B of the Public Contracts (Scotland) Regulations 2015; regulations 28, 51A and 51B of the Concession Contracts (Scotland) Regulations 2016; and regulations 34, 41A, 41B, 100A and 100B of the Utilities Contracts (Scotland) Regulations 2016.

18. The second reason is the importance of being able to take a values-based approach to international engagement, as set out in the Scottish Government's Global Affairs Framework and Vision for Trade, for example. The Scottish Government's international activity creates opportunities at home, broadens our horizons, attracts high-quality investment and ultimately benefits the people of Scotland. While the Scottish Government will always meet the obligations placed upon it by international law and treaties, people in Scotland rightly expect that decisions should not be made in an ethical or moral vacuum.

19. The third reason relates to democracy. To make it unlawful for Scottish Ministers to even publish a statement to the effect that they would have acted in a certain way were it not outlawed by this Bill – or risk having fines levied by the UK Government – is an assault on democratic expression and will stifle the ability for democratic debate. This betrays a weakness in the UK Government's attempts to present itself as a defender and indeed, promoter of democratic rights internationally, as well as diminishing claims to moral leadership in the face of the present challenges to the rules-based international order.

20. The UK Government's approach to apartheid government in South Africa, refusing to condemn it when others were actively boycotting it, demonstrates the danger inherent in this restriction. We are rightly proud of those in Scotland who took a stand against apartheid. Under the provisions of this Bill, many of them would have been silenced. For a Government to outlaw the expression of ideas different to its own is wholly unjustifiable and entirely incompatible with the notion that we live in a functioning democracy.

## Consultation

21. There has been no specific consultation on this Bill.

## Financial implications

22. Other than the threat of fines, subject to interest, for non-compliance with the new regime, there are no financial implications arising directly from the decision to give or withhold consent to this Bill.

## Conclusion

23. This Bill represents an unnecessary and unwelcome limitation on the executive competence of the Scottish Ministers. It is a wholly disproportionate approach, which would curtail Ministers' ability to take a values-based approach to their activities, and it acts to stifle democracy.

24. The Scottish Government will not be recommending that the Scottish Parliament gives its consent to the Bill.

Scottish Government  
July 2023

This Legislative Consent Memorandum relates to the Economic Activity of Public Bodies (Overseas Matters) Bill (UK legislation) and was lodged with the Scottish Parliament on 19 July 2023

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